THE ARAB HUMAN RIGHTS POSITION IN THE LIGHT OF INTERNATIONAL LAW

A Thesis submitted

By

SAMI S. EL-ATRASH

For

LL.M. in PUBLIC INTERNATIONAL LAW

GLASGOW UNIVERSITY

FACULTY OF LAW

DEPARTMENT OF PUBLIC INTERNATIONAL LAW

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ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

I dedicate this humble research to all freedom loving people who suffered or continue to suffer violations of human rights and all who are active in the struggle for this cause against injustice and suppression anywhere in this world.

SAMI S. EL-ATRASH

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Introduction

> *"Freedom is a supreme value for all Arabs because they are deprived of it. The Arab people are deprived of the freedom of thought and expression, of the right to participate in decision-making; they are exposed to imprisonment, torture and murder - including collective murder; their honour is trampled upon, their highest values violated; and silence and submission are imposed upon them everywhere. The Arab people are today desperate and without hope, without faith in themselves or in their regimes."*[1]

This is the depressing picture of the Arab people, described by a group of Arab intellectuals, academics and professional people, at a meeting held in Hammamat, Tunis, in 1983. They describe a people lacking political rights and freedoms and, more seriously, the violation of the basic human rights of life, liberty and physical integrity by their regimes.

The depressing circumstances of contemporary political life in the Arab world has led me to make this study, aiming to examine the position of Arab countries in the light of their obligations under international law, by analysis of the instruments of international human rights law which recognise and aim to protect certain rights and freedoms. I intend to examine the status of those instruments whether at the national, regional or international level. I will examine the Arab governments' legal position according to international institutions and the instruments, in particular, to what extent they recognize them and subject to what restrictions.

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1. The Hammamat Declaration, Merip Reports, January 1984, p23

I will review whether those rules and instruments are acceptable to all the Arabs and if Arab states have made relevant reservations or derogations.

The purpose of this analysis is to assess the extent to which the Arab individual's rights and freedoms are protected, and the legal remedy available to him, in the light of international human rights law, as well as in the regional and national provisions which aim to achieve protection of human rights.

I examine different concepts of human rights and other international issues related to them, including the Islamic concept of international law and human rights, as in the contemporary Arab world religion continues to be a significant factor.

Whether Islamic teaching is in contradiction with the principles of modern international law or internationally agreed human rights must be examined in the light of certain statements from Muslims, expressing extreme views which I quote :

"What they call human rights is nothing but a collection of corrupt rules worked out by Zionists to destroy all true religions"

Ayatollah Ruhollah Khomeini

and :

"When we want to find out what is right and what is wrong we do not go to the United Nations; we got to the Holy Koran ... For us the Universal Declaration of Human Rights is nothing but a collection of mumbo-jumbo by disciples of Satan ..."

Ayatollah Mir-Ali Moussave-Khameneh'i[2]

2, "Islam and human rights" Edward Mortimer Index on Censorship 5/83, p5

Human rights issues became more and more of concern to the international community as reflected by the increasing number of non-governmental organisations which devoted themselves to the movement of human rights, as a natural reaction to a series of factors. The human rights movements represented by several international organisations, UN organs and agencies, Amnesty International and the International Commission of Jurists, etc., responded to the human rights issues, including the practices of governments, in a very effective way despite the nature of the governments.

As human rights and their protection gained important status in modern history especially after the Second World War, becoming an important subject of international law, therefore, this research will concentrate on the international instruments now in force which declare the law of human rights, concentrating on certain rights and freedoms of concern to the political life of the Arab individual. This means the basic undisputed rights and freedoms which leave no room for question as to whether they are compatible with any culture, ideology or religion - the rights of life, liberty and security of person.

Two questions which dominate the issue of the role and effectiveness of international human rights law as far as this research is concerned are : can the present system of international law effectively prevent violations of human rights?
Can international law provide an effective remedy for violations of human rights in Arab countries?

In the first Chapter, I examine the origins, background and development of international human rights law. Of particular interest to the research is the role of revealed religion as a source of human rights. I examine the Islamic teaching with regard to individual's rights and freedoms, and in particular its role in defining the inalienable rights of the individual in his relation with the state. In a sense rights granted by religious teaching are substantially the same as the rights derived from the state of nature, the so-called "natural rights" of man, elaborated by John Locke and codified in the first historical human rights declarations of the eighteenth century.

After a brief survey of the legal developments during the eighteenth and nineteenth centuries, where I examine important principles of the developing law of nations, such as the doctrines of national sovereignty and humanitarian intervention, I analyse some of the important modern human rights instruments. Beginning with the UN Charter, I assess the contents, and the legal status and implications of the principal instruments of concern to the research, particularly the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to it, and other instruments such as the recently adopted Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Since many of the Arab countries examined in the research have acceded to some of these international instruments it is worthwhile to analyse their legal standing and the obligations undertaken by signature and ratification so as to

establish the legal position of Arab states in the light of international law and human rights issues.

By surveying the development of the modern international law I am able to examine a number of issues which affect the human rights position in the Arab countries today, including the principle of national sovereignty which continues to pose difficulties for the international community in investigating and attempting to deal with human rights violations. By examining the content and legal status of modern instruments, I hope to clarify the legal undertakings of signatories of these instruments and hence their obligations, both to the international community and their own citizens.

As well as the discussion of the contents of modern international human rights instruments, I briefly examine the problems involved in their implementation. The debate over the evaluation of international law and human rights could not answer the questions which arise in regard to the effectiveness of those instruments. The point has been made, principally by Professor Watson, that in view of the limited effectiveness of international human rights law, its role in the protection of human rights is at best limited,[3] if such a role could be said to exist at all.[4]

After a survey of regulating and implementation procedures incorporated in the Covenant, the quasi-judicial process established under the Optional Protocol, and other UN reporting and

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3, "Legal theory, efficacy and validity in the development of human rights norms in international law" J,S, Watson University of Illinois Law Forum 3 1979
4, "The limited utility of international law in the protection of human rights" J,S, Watson American Society of International Law, 1980

investigative procedures dealing with human rights issues, I pass from global international human rights law to regional developments in the field of human rights protection. In this section, I examine briefly the achievements of the European states in developing the most effective standard of human rights protection now existing , focussing on the effect of the European Court and Commission, before passing to other regional developments.

I examine the human rights activities of two regional organisations : the Organisation of African Unity and the League of Arab States. I examine the content of the African Charter in some detail since the instrument contains a number of unique provisions and in some aspects differs from other international developments, particularly in the role and competence of the Committee established to regulate the observance of the African Charter of Human and Peoples' Rights. Finally, I examine the activities of the regional organisation particularly concerned with the Arab world, surveying the establishment of the Permanent Arab Commission on Human Rights by the League of Arab States.

By examining the issues of implementation, such as reporting, investigations, inter-state and individual applications, I hope to demonstrate a small part of the present range of legal remedies for human rights violation. By examining regional developments which already offer an impressive safeguard of human rights and promise more effective safeguards to the individual in the future, I hope to show both the present achievements of human rights law, and its potential for developing human rights protection in all regions of the world.

In the second Chapter, I examine certain human rights issues which form the subject of the research : the practices of arbitrary arrest and detention, torture and cruel, inhuman or degrading treatment or punishment, and extra-judicial killing. I examine each of the three issues according to a similar procedure, beginning with an analysis of the international legal understanding of the practices. My analysis of each issue is based on the provisions of international human rights instruments dealing with the rights violated by the practices, including definitions, where appropriate, as well as the findings of international and regional organs, like the UN Human Rights Committee, where their interpretation illustrates legal understanding, and the European Court and Commission of Human Rights, whose findings and consideration of alleged violations of the European Convention on Human Rights and Fundamental Freedoms, contribute valuable jurisprudence on the interpretation and understanding of human rights law.

The next stage of my analysis is to examine the effect of the state of emergency on international and national legal protection of human rights, since there is frequently a link between the state of emergency and grave violations of human rights, with particular reference to Article 4 of the International Covenant on Civil and Political Rights concerning derogation in time of public emergency. The most detailed discussion of this issue occurs in my examination of the practice of arbitrary arrest and detention since derogation from the protection of individual's liberty is provided in Article 4, while the rights of physical integrity and life are held to be non-derogable under any circumstances.

After examining the legal provisions to be found at the international level concerning each of the issues, I pass to the national legislation of Arab countries, analysing the constitution and other laws in terms of the standard minimum legal protection identified at the international level. This examination of national legislation establishes the extent to which these rights are legally safeguarded in the Arab countries. Finally, I examine the practice of Arab governments with regard to the three issues using, in particular, the findings of Amnesty International, to establish the occurrence and extent of human rights violations in the Arab world.

My analysis of the human rights issues contains, in the case of torture, examination of the travaux preparatoires for the Convention against Torture, since this record of the points of dispute and areas where agreement on international action was difficult to reach is valuable for the light it sheds on international law in general, and the attitude of the international community to this human rights violation in particular. The sections in which I analyse the issues of arbitrary arrest and detention and extra-judicial killing make use of reports produced at the request of the UN Commission on Human Rights, in order to examine the international legal understanding of these practices in the absence of definitions in the instruments themselves.

The Arab governments' recognition and indeed acceptance of international legal provisions protecting human rights is again under examination in Chapter Three where I survey the response of Arab governments to international organisations on human rights issues. In Chapter Three I examine the response of Arabs at a number of levels to their human rights position.

I review the governmental progress in the establishment of a regional commission in the field of human rights as a response to the call of the UN for the establishment of regional human rights organs. Again at governmental level, I examine the response of Arab governments to international organisations. I begin with certain Arab governments' response in the international forum of the United Nations, concentrating particularly on the official response to reporting obligations undertaken by signature of the International Covenant on Civil and Political Rights. I examine the reports submitted to the Human Rights Committee under Article 40, reviewing particularly those sections of country reports dealing with the three issues of interest to the research and also examining discussions between Arab governments' representatives and the Human Rights Committee during consideration of reports.

In the next section of Chapter Three, I survey communications and discussions between Arab governments and the non-governmental organisation, Amnesty International, again concentrating on the three issues of the alleged practice of arbitrary arrest and detention, torture and extra-judicial killing.

Finally, I examine the efforts of Arab non-governmental organisations concerned with human rights at regional and national levels. I concentrate on the achievements of the Union of Arab Lawyers and the efforts of the authors of the Hammamat Declaration of Tunis, but also demonstrate the efforts of human rights groups at a national level, particularly in Libya and Syria.

By examining the response of Arabs at all levels to their human rights position, the extent of real acceptance and understanding of international human rights norms can be demonstrated. In addition, the extent of governmental implementation of their human rights undertakings can be seen in their response to international organisations.

In the final Chapter, I examine the Islamic concept of human rights and other related issues in Islamic law. As I mention at the beginning of the introduction, the Islamic religion is an important factor in contemporary Arab politics, and I find it very important to examine Islamic theory in order to reconfirm that Islam does not reject modern developments in human rights protection, as some Muslims claim. I try to demonstrate similarities and common conclusions in Islamic understanding and modern international law in order to show that there is no fundamental contradiction between Islamic concepts and those of modern international law.

My analysis begins with an examination of the law of nations from the Islamic point of view, aiming to show that Islamic international law recognises many rules to be found in modern international law. As background to my examination of the Islamic concept of international relations in time of peace and war,

I examine the issues of Dar al-Islam, Dar al-Harb, Dar al-Ahd and the concept of Jihad, as examples of the rules of Islamic understanding of international relations. As examples of Islam's understanding of international law, I examine Islamic humanitarian law, the Islamic law of treaties, and the protection of diplomats under Islamic law (Shari'a).

In the next section I examine the understanding of Islam to human rights concepts, concentrating again on the rights of concern to the research : life, liberty and physical integrity. I concentrate on the primary sources of Shari'a - the Qur'an and Sunnah, but also using secondary sources, such as the consistent practice of the four Kalifas, in order to demonstrate Islamic teaching. I examine the protection of human rights in Islam in the light of the modern international legal provisions protecting human rights, in order to demonstrate that on basic issues, the two concepts are compatible, and reflect common moral and social values.

In the final section of Chapter Four, I survey the position of Islamic law in some Arab countries, choosing my examples to demonstrate the varying extents to which Islamic law has been retained or re-instated in modern Arab countries, and very briefly shed light upon its effects on human rights and law in those countries.

CHAPTER ONE

PHILOSOPHICAL, HISTORICAL AND LEGAL DISCUSSION OF HUMAN RIGHTS

SECTION ONE

SURVEY OF HUMAN RIGHTS THEORIES

(a) Natural law

(b) Positivist theory

(c) Marxist theory

A basic problem of the discussion of human rights theory in any time is the difficulty in identifying and defining human rights.

Some have identified human rights as those which are "universal" and "moral". Such terms add little to our understanding of the nature of human rights, as we still have to say what makes certain rights "moral" or "universal", and by which criteria such values may be assigned.[1]

The difficulty in definition is not confined to the broader term "human rights", but, as we shall see, definitions of the more specific civil and political rights are complicated, not only by their nature, but in addition, by the fact that they are often discussed and drafted in general terms so as to avoid disagreements between governments, whether in creating instruments or in regard to implementing them, as a result of different ideologies.[2] *This difficulty may not be considered a major problem, as most nations agree, on paper at any rate, that those rights and freedoms in general, whether political or civil, economic, social or cultural, are considered to be:*

> *"...the fundamental moral and social values which should be, or should continue to be realised in any society fit for intelligent and responsible citizens"*
> *"those minimal things without which it is impossible to develop one's capabilities and to live a life as a human being..."*[3]

1, "The jurisprudence of human rights" by Jerome Shestack in Human Rights in International Law Vol I (ed) Theodor Meron, 1984 pp 74-75
2, Human rights in the world A.H. Robertson 1972 p71
3, "Natural Rights" by Margaret Macdonald in Proceedings of the Aristotelian Society 47 (1946-1947), p240 and "Rights, Human Rights and Racial Discrimination" by Richard A. Wasserstrom Journal of Philosophy, 61 ; 20 (October 29 1964), p636, quoted by Hugo Adam Bedau in "Human rights and foreign assistance programs" in Human Rights and US Foreign Policy (Eds) Peter G. Brown and Douglas MacLean, 1979 p42

Most writers on this subject comment upon the difficulty of fixed definitions in the formulation of human rights theory.[4] This is directly attributable to the differences in perspective based on needs, conflicts, practical circumstances and above all, interests. As a result there have been differences of opinion, and disagreements over the interpretation of issues, whether in political or philosophical contexts. In international politics, differences of culture, national traditions, and political interests must be counted for their impact on the concept of human rights. The United Nations voting patterns on human rights issues indicate that many nations have different standards in their definition of human rights.[5]

This in turn will raise another point, concerning the mechanism for their protection. One could raise the question of whether human rights legislation and enforcement should be considered matters of national jurisdiction, or international matters. I will examine this question later in the chapter.

In order to understand and appreciate the concept of human rights, I shall examine its philosophical and legal perspectives, then pass to its historical development, ending in the twentieth century with the birth of international human rights instruments after the Second World War,

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4, Human rights and world public order ; the basic policies of an international law of human dignity Myres S, McDougal, Harold D, Lasswell, and Lung-chu Chen, 1980 pp64-65

5, An example of how voting patterns on human rights issues reflect different cultures and national traditions can be seen in the voting on Resolution 39/137 of 1984 which dealt with the question of a second draft optional protocol to ICCPR, aiming to abolish capital punishment. The voting pattern is instructive because it clearly reflects the attitude of the majority of Arab and Islamic countries towards this issue.

Resolutions and Decisions adopted by the General Assembly during the first part of its thirty-ninth session 18th September -18th December 1984, p442-3,

reflecting the increased concern of large numbers of people all over the world towards their fellow human beings.

I intend to begin by looking at some major issues in human rights theory : natural law and the autonomy of the individual; positivism and the authority of the state; Marxism.

Natural Law :

Natural law theory, first elaborated by the Stoics of the Hellenistic and Roman period, embodies elementary principles of justice as irrevocable, unalterable and eternal rights.[6] One can say that the western tradition of human rights is very much associated with what may be called the "natural law" tradition.[7]

Grotius was important in developing secular natural law. He defined natural law as "a dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity." In fact, modern human rights law rests mainly on natural law and natural rights theory. difficulties may arise in deciding which rights are to be derived from "nature". While basic human rights such as life and liberty seem to derive from the "natural state" of man, other more sophisticated claims have a less firm basis in natural theory. He also developed the "Law of Nations" based on laws derived from the will of man and the principles of the law of nature.

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6. "The Jurisprudence of Human Rights" by Jerome Shestack in Human Rights in International Law Vol I Ed Theodor Meron, 1984 p77

7. "The Roots and Origins of Human Rights" by Elaine Pagels in Human Dignity : The Internationalization of Human Rights Ed. Alice Henkin p6

These ideas of natural rights have been developed in international law in the twentieth century by H. Lauterpacht.

John Locke formulated a doctrine in which men, rational by nature, and free because they are rational, are capable of knowing for themselves the fundamental principles by which their conduct ought to be governed. All that is needed is the additional force and authority of civil government to ensure that these principles will be respected by all. Thus, under the law of nature, men enjoy natural rights, inherently theirs as men, which constitute a standard prior to all government and indeed all society. The rights are those of life, liberty and estate.[8]

Locke's "Two Treatises of Government" and the "Letters of Toleration" are important for understanding his political theory, but they also remind us that the theory of natural rights, in his point of view, is concerned not only with rights of political liberty and of property, but also with rights of conscience, rights manifested in freedom of belief, freedom of religious practice, freedom of worship, all in ways that do not encroach upon the rights of others so as to require the intervention of the civil power.

Locke's "Two Treatises of Government" formed the classic doctrine of natural rights, not only for England and continental Europe, but the doctrine also became classic for North America. We encounter the doctrine in a document like the American Declaration of

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8, "The rights of man since the reformation ; an historical survey" by J.H. Burns in An Introduction to the Study of Human Rights, p24

Independence, with its assertion of the existence of "inalienable rights", among which are "life, liberty and the pursuit of happiness".[9]

We find it again, more elaborately, in the French Declaration of the Rights of Man and the Citizen in 1789. While this indicates that the idea of natural rights was at this time in the arena of actual political conflict and action, it must be pointed out that, philosophically, the doctrine has been much criticised, from the eighteenth century onwards.

Two schools of thought which criticised natural rights theory were the Utilitarians and the Sceptics. The Utilitarians argued that the appeal to natural rights was useless and indeed dangerous - useless because it substituted an abstraction for the measureable criterion of the greatest happiness of the greatest number, and dangerous because of its implication that any institution might be open to challenge by those who claimed it infringed their inalienable natural rights.

In similar vein, the Sceptics, including Bentham, argued that a scientific technique for achieving human happiness should be substituted for the irrelevant rhetoric of natural law and the rights of man.[10] *Whatever may be said about natural rights theory, it cannot be denied that this theory makes possible an appeal against unjust power to a higher authority which protects individual*

9, Human rights in the world A.H. Robertson, 1982 p6
10, "The rights of man since the reformation ; an historical survey" by J.H. Burns in An Introduction to the Study of Human Rights, pp24-26

human rights.'' It identifies human freedom from which other human rights naturally flow. It provides properties of dependability and support, domestically and internationally, for a human rights system. The critical problem facing natural rights doctrine, now as in the past, is how to determine the norms that are to be considered as part of the law of nature, and therefore inalienable, and how to determine the scope of natural rights.

Positivist Theory :

Ideological controversy did not substantially advance the doctrine of individual human rights, but from the controversy, there emerged positivist thinkers, like Bentham and Austin, who sought to bring about reform in the law to meet the natural changing needs of human beings.

Positivist theory and its philosophy came to dominate legal theory during most of the nineteenth century, and it still commands considerable allegiance in the twentieth. In accordance with positivist theory, the source of human rights is to be found only in the enactments of a system of law with sanctions attached to it.'[12] However clearly the evaluation of this theory in the protection of human rights relies very much on the bearing of states. Although one could easily focus on specific implementation that is necessary to protect particular rights, this legal conception is useful in developing a system of human rights in international law through

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11, Human rights and world public order ; the basic policies of an international law of human dignity Myres S, McDougal, Harold D, Lasswell, and Lung-chu Chen, 1980 pp64-65
12, "The Jurisprudence of Human Rights" by Jerome Shestack in Human Rights in International Law Vol I Ed Theodor Meron, 1984 p79

treaties and laws agreed by nations.[13]

In criticism, one may say that the positivist approach left no room for the status of the individual in international law, and, in addition, that it encourages that immoral laws be obeyed because they are legitimate, as is happening in the territories occupied by Israel, and in South Africa, where violations of human rights are sanctioned by law.

On this last point, the positivist theory has been widely criticised, though some moral philosophers, like Professor Hart, tried to refine and free this theory from its mistakes, and he himself continues to argue for a concept of law which allows the validity of law to be distinguished from its morality.

Marxist Theory

As we come to Marxist theory, we will notice that it approaches the nature of human beings not as individuals with rights from inherent nature or divine attribution, but as "specie beings". Marx saw nothing natural or inalienable about human rights in a society in which capitalists monopolise the means of production. He regarded the notion of individual rights as a bourgeois illusion.[14] *He rejected the idea that man's rights reflect his relationship to society, in favour of society organised in a State, where the State is the source of citizens' rights.*[15]

13, Human rights and world public order ; the basic policies of an international law of human dignity Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen, 1980, p74
14, "The Jurisprudence of Human Rights" by Jerome Shestack in Human Rights in International Law Vol 1 Ed Theodor Meron, 1984 pp81-83
15, Human rights in the world A.H. Robertson, 1982, p10

Modern communist doctrine says that, no matter what the actual wishes of men and women may be, their true choice is to choose the goals the State has set. No doubt

with such a premise, coercing people into accepting these goals becomes a matter of fulfilling their real selves in furtherance of true freedom.'[16]

As modern communist doctrine has developed Marxist theory, the current system in Eastern Europe and the Soviet Union represents the transitional state of socialism under which the State and ruling party play a key role in transforming society.

As Professor Pollis says:

> *"Such a conceptualization of the nature of society precludes the existence of individual rights rooted in the state of nature which are prior to the state, Only legal rights exist, rights which are granted by the state and whose exercise is contingent on the fulfilment of obligations to society and to the Soviet state,*
>
> *Furthermore, since capitalism is exploitive, and individual rights, inclusive of the right to private property, are bourgeois rights, socialist rights, which satisfy the basic needs of survival and security, constitute the substance of human rights,,,"*[17]

One can say that international human rights were affected by this ideology, as many of the economic and social provisions mentioned by the United Nations Declaration, and the International Covenant of Economic, Social and Cultural Rights owes much to this theory of the communist states. No doubt the contribution of the communist states added another dimension to the definition of human rights by including basic economic and social rights.

16, "The Jurisprudence of Human Rights" by Jerome Shestack in Human Rights in International Law Vol I Ed Theodor Meron, 1984
17, Culture, ideology, economics and human rights, A. Pollis, 1981

I have examined natural law as a source of human rights, the positivist approach and the Marxist view of human rights since these theories have been most important in the development of modern human rights law.

Another important source of human rights is revealed religion. I have chosen to examine the Islamic religion as an example, because as well as showing revealed doctrine as a source of human rights, it demonstrates how this source develops a system of law protecting individual rights within a community.

SECTION TWO

RELIGION AS A SOURCE OF HUMAN RIGHTS

Although one cannot say that any of the major religions uses the term or concept of human rights in an obvious way,[18] nevertheless it can be shown that what we might recognise as fundamental human rights and freedoms are contained in, and recommended by the three principal faiths - Judaism, Christianity and Islam.

I will examine religion as a source, briefly and without profound discussion. In general terms, theology presents the basis of a human rights theory as stemming from laws higher than states. Of course, theories of human rights based on religious teaching presuppose the acceptance of the revealed doctrine as the source of such rights.

In each of the faiths, it is taught that man is created in the image of God, which immediately endows the human being with a certain value. Another aspect of religious teaching - that of a common creator of mankind, produces the notion of common humanity, and equality and indeed universality of rights. In addition, because rights are endowed by a divine Creator, they are not subject to mortal authority or abrogation. This introduces the important idea that human rights are inalienable, and are to be recognised and not conferred by any authority. Therefore I disagree with Elaine Pagels when she describes this idea as a "specifically Western view of the relation of the individual and society".[19]

18, "The jurisprudence of human rights" by Jerome Shestack in Human rights in International Law ; legal and policy issues, 1984 Vol 1 (ed) Theodor Meron p75
19, "The roots and origins of human rights" by Elaine Pagelsin Human dignity ; the internationalization of human rights, (ed) A, Henkin, 1979 p7

Choosing Islam as an example, I will examine in general the contribution of this religion to the development of human rights, as it has participated in and supports the principles of equality, liberty and justice which underlie international human rights today.

As a starting point, it is my duty to stress to international public opinion that it should not confuse what is happening in some Islamic countries in the field of human rights with the teachings of Islam. Neither Islam nor any other religion could tolerate such violations as a part of its teaching.[20]

Islam is a religion based on humanity, justice, liberty and equality. Adverse criticism is no doubt the result of practices which have very little to do with Islamic teaching, as well as an ostensible lack of knowledge and familiarity with the historical, cultural and religious fundamentals of Islam. I will examine this in more detail in Chapter 4.

Examining the Islamic religion as a source of human rights I will begin by saying that human rights, whether political and civil, or economic, social or cultural were mentioned fourteen centuries ago in the content of the Shari'a.[21]

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20. There is no place for the UN to plead unwillingness to be involved in a controversy with religious undertones, when it is clear enough that their actions are connected with no religion, Islamic or otherwise.

21. Shari'a is an Arabic word meaning the path to be followed. It means the conduct of Muslims and the rules which govern all aspects of life.
Shari'ah; the Islamic law Abdur Rahman I Doi, 1984 page 2

Islam is able to go beyond revealed doctrine, as the Islamic Shari'a contains the following sources[22] :

(a) the Qur'an, containing the revelations to the Prophet Muhammad, as the first primary source of Shari'a;

(b) the Sunnah, which contains the conduct and behaviour of the Prophet, as a second primary source;

Secondary sources include the "consensus of opinions" (al-Ijma); "analogical deductions" (al-Quiyas); "public interest" (Istihsan); "legal presumption" (Istishab); "blocking the ways" (Sadd al-Daharai); the four schools of Fiqh and their leaders.

Basic human rights are safeguarded in Islamic teaching. The fundamental right is the "right to life" and the verses of the Qur'an[23] declare :

"If anyone slew a person unless it be for murder or for preventing mischief in the land, it would be as if he slew the whole people; and if anyone saved a life, it would be as if he saved the life of the whole people" (5;3)"

Moreover the Qur'an declares :

"And slay not the life which Allah hath forbidden save with right" (Qur'an 6 ; 151)

Islam recognises the basic right of life, whether in time of war or peace-time. It prohibits the taking of life except as a measure to punish crimes through competent legal channels. Islam considers murder as the greatest sin. The injunction applies without distinction as to race or colour or sex.[24]

22, Shar'ia the Islamic law Abdur Rahman I Doi 1984 Part I
23, For references to the Qur'an throughout the research I have used The Koran ; a translation by A,J, Dawood, 1978
24, Human rights in Islam, Abul A'la Mawdudi 1980 pp17-18

On the question of equality, the Qur'an says :

"And people are but a single nation" (10;19)

"Surely the noblest of you with Allah is the most pious of you" (49;13)

Islam promotes the equality of mankind, and forbids discrimination related to race, colour or nationality. This is confirmed in the Sunnah as the Prophet declared at Arafat :

1, A coloured person has no preference over a white man, nor a white person over a coloured one, nor an Arab over a non-Arab, nor a non-Arab over an Arab, except through righteousness

2, Every believer is a brother of another believer and all Muslims are brothers unto one another,

Here I feel that I should examine briefly what is meant by the Islamic concept of the limitation of equality as a human right. The Islamic notion of equality distinguishes legal equality from the abstract notion. It is true, therefore, that Islam does not sanction absolute equality among its votaries. [25]

The Qur'an says :

"Verily we have given preference to some over others"

So one can say that the concept of equality in the Islamic faith means objective equality before the law, in broad terms,equality in opportunity, and equality in civil rights, irrespective of colour, race or sex as well as social equality. The only restrictions on this equality are where there is conflict with other principles of the religion.[26]

25, The concept of state and law in Islam, Farooq Hassan 1981 p41
26, See also my discussion in Chapter Four, both in the general discussion of Islam and human rights, and my examination of Islamic law in the Arab countries,

According to the Islamic notion of liberty, a Muslim is free in that he is not required to obey any authority but that of God. This means that he is free within the limits prescribed by Shar'ia. No one can encroach on the rights and freedoms of others, but at the same time he can feel free within his own rights.

Freedom of expression and liberty of conscience are two cornerstones of Islamic teaching. Early Islamic history is full of instances of such freedom. An ordinary citizen can feel free to criticise the highest in the state and call him to account, confirming that individual freedom is sacred only as long as it does not conflict with the rights and interests of other individuals.[27]

The Qur'an provides for the protection of religious sentiments[28] :

"And if the Lord had willed, surely all those who are in the earth would have believed all of them; wilt thou therefore compel men till they become believers?" (10;99)

"There is no compulsion in religion" (2;256, 6;108)

"And do not abuse them whom they call upon besides Allah, lest exceeding the limits they abuse Allah out of ignorance. Thus we have made fair-seeming to every people their deeds; then to their Lord shall be their return, then he will inform them of what they did" (6;109)

With regard to some of the other rights I will concentrate on in this research,the Sunnah says ;

Prophet Mohammed says "Allah will punish those who persecute others on the earth"

and with regard to torture, the Sunnah prohibits torture and cruelty. The Prophet said :

"No one should be subjected to chastisement by fire",

and also admonished against hitting any person on the face.

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27. The concept of state and law in Islam, Farooq Hassan, 1981 pp41-42
28. Islam and human rights Zafrulla Khan, 1967 pp112f, 72

Another right protected by Islam is protection from arbitrary imprisonment, the right of the individual not to be arrested or imprisoned for the offences of others. The Qur'an says :

No bearer of burdens shall be made to bear the burden of another," (6;164)

One may say that Islam reached the stage of giving legal recognition to fundamental rights and freedoms in early times, long before the development of modern international law of human rights. As far as the Islamic faith is concerned, one can say that these rights were laid down by the Qur'anic revelations, Prophetic Sunnah, and the practice and traditions of Islam in the seventh century AD. It provides automatic and double protection of human rights, as it is considered not only as an offence, but a sin to damage the rights of other individuals.

The Qur'an provides for the right to life, protection of the wounded, freedom of religion, speech, movement, expression, education, justice and privacy. One can say that the only limitation on these rights is, logically, that they should not affect the rights of other individuals.

Neveretheless, Islam, through its sources makes provision for rising against authority when there is a violation of its sacred principles. The Qur'an states :

"These are the limits ordained by God; so do not transgress them,"

"If any do transgress the limits ordained by God such persons are the unjust,"

Another principle laid down by the Qur'an states:

" O you who believe, obey Allah and obey His Messenger and those from among yourselves who hold authority; then if there is any dispute between you concerning any matter, refer it to Allah and His Messenger, if you (really) believe in Allah and the Last Day. This is the best course (in itself) and better as regards the result," (2;229; 4;59)

According to Shar'ia, if leaders disobey God, they lose the right to claim obedience from the people. This is explained by the Prophet as follows:

"There is no obedience to any creature if it involves disobedience to the Creator,"

"There is no obedience for him who disobeys God," (Sharh al-Sunnah Mishkat No 3515)

I have briefly examined the Islamic religion as an example for religion as a source of human rights. I intend to shed more light upon the Islamic concept of human rights in Chapter Four.

SECTION THREE

HUMAN RIGHTS IN INTERNATIONAL LAW : MODERN DEVELOPMENTS

Now we come to the modern human rights situation, the outcome of global effort to safeguard human rights, and to confirm and protect them through international treaties and declarations as well as international organisations, for the achievement of that goal.

What can be regarded as among the first declarations of principles of human rights were produced as a result of the almost simultaneous rebellion of Britain's American colonies, and the French Revolution. In each case principles embodying what may be recognised now as fundamental human rights and freedoms were codified, in the Declaration of Independence and the Bill of Rights in America, and the Declaration des droits de l'homme et du citoyen in France.

Principles common to the two texts include statements of the fundamental rights of life and liberty. The American Declaration asserts that all men are created equal and that the rights to life , liberty and the pursuit of happiness are inalienable. The French Declaration mentions the rights to liberty, security and property. It declares that these rights are "natural and inalienable".

These developments put an important principle into effect, as the United States and the French Republic codified human rights in written constitutions, and this principle was adopted by other nations.[29]

29, Human Rights in the World, A.H. Robertson, p6

A major factor in the history of human rights protection was the development of international law. The "Law of Nations" with its old traditions, which came collectively to be described as a set of laws or "international law", rested and still today rests essentially on consent, and can be enforced only by self-help, and individual or collective sanctions imposed on "outlaws".[30]

One can say that international law is initially created by obligations voluntarily assumed by its subjects. However, it can be said that the law imposes obligations on those subjects when it is embodied in treaties or agreements "intended to create legal rights and obligations" for the subjects..[31]

Though some, like Watson, doubt the effectiveness of treaties and covenants in affecting the practice of states with regard to human rights, others, like D'Amato, argue that treaties are legally binding instruments regardless of whether the parties to them observe them or not.[32] *I will look at this argument in more detail when I come to discussion of modern legal protection of human rights.*

Such laws cannot be totally ignored, because of the fact that the states of the modern community depend and rely on one another's "goodwill". As a result it would be contrary to the interests of any of them to outlaw itself entirely.

30, The International Law of Human Rights, Paul Sieghart, 1983 p10

31, Report by the International Law Commission on the Law of Treaties in 1953 in International Law D.W. Greig, 2nd ed, 1976 p460 and Principles of Public International Law Ian Brownlie, 3rd ed, 1979, p600

32, "The Questions of Validity and Efficacy in Human Rights Law" Dr A, Carty, Lecture in Glasgow University

There is also the consideration of international public opinion which leads some regimes to avoid putting their legitimacy to serious question on the international level or risking serious legitimate sanctions from other states.[33]

Since the beginning of the law of nations, one of its fundamental principles was that of national sovereignty, which reserves to each sovereign state the exclusive right to take any action it wishes, provided only that the action does not interfere with the rights of other states, and is not prevented by international law on that or any other ground.[34]

A major factor in the development of human rights instruments was to seek to minimize the harmful exercise of this principle by states, the principle still being in practice in the world today, since human rights became the legitimate concern of the whole of mankind, no longer a purely domestic matter.[35]

In the nineteenth century, international law was developing the doctrine of the legitimacy of "humanitarian intervention" which provided a limited exception to the doctrine of national sovereignty. The practice of the doctrine, however, needs careful evaluation, as in the nineteenth century, humanitarian considerations were almost always combined with colonial ambition.[36]

33, & 34, The International Law of Human Rights, Paul Sieghart, 1983, p11
35, This idea gained legal status in the Charter of the United Nations, article 2, para.7 , Buergenthal, Thomas "Codification and Implementation of International Human Rights" in Human Dignity ; the internationalization of human rights, Ed. A. Henkin, 1979, p16
36, For example, France in Syria in 1860
International Protection of Human Rights Louis B. Sohn and Thomas Buergenthal, 1973 pp143-177

However, it seems that the gap between the interests of mankind on the one hand and the principle of national sovereignty on the other is getting narrower, at least in theory, as a result of the development of international human rights standards, and modern efforts to put an end to the suffering recorded in the history of mankind.

The nineteenth century witnessed international collaboration in important humanitarian aspects, such as the abolition of national slavery and the international slave trade. An important and truly international instrument was born in this period, when the general act of the Berlin Conference on Central Africa was able to affirm that

"Trading in slaves is forbidden in conformity with the principles of international law"[37]

The process continued after the first world war with the birth of the first international organisation, with the new League of Nations acting as guarantor to protect the rights of linguistic and ethnic minorities in the new state territories created by the Treaties of Versailles and St Germain after the First World War.[38] *As a result, the peace settlement at the end of the war brought important developments in the human rights field.*

37, Human Rights in the World, A.H. Robertson, p15
38, Networks of interdependence ; international organisations and the global political system Harold Jacobson, 1979, p43f

Those developments took place in the Covenant of the League[39], as two articles dealing with human rights aspects found their way into the Covenant, as Articles 22 and 23. The first sets up the principle that colonies and territories which as a consequence of the war had ceased to be under the sovereignty of the states which had formerly governed them and which were inhabited by "peoples not yet able to stand by themselves under the strenuous conditions of the modern world" were to be put under the protection of advanced nations who would be responsible for their administration under conditions guaranteeing amongst other things, freedom of conscience and religion, and the prohibition of abuses such as the slave trade.

Another human rights instrument can be found in Article 23 of the Covenant of the League, where it says it would :

"endèavour to secure and maintain fair and humane labour conditions, undertake to secure just treatment for the native inhabitants of territories under their control, and entrust the League with the supervision of agreements relating to the traffic in women and children.."

Even though their suggestion that the Covenant contain a provision protecting minorities was not pursued, the Allied and Associated Powers did require states to grant the enjoyment of certain human rights to all inhabitants of their territories, and to protect the rights of their racial, religious and linguistic minorities.

39, A Short History of International Organisation, Gerard J. Mangone, 1954, App 5,

Undoubtedly the League of Nations also did important work on slavery, as the Slavery Convention of 1926 is widely considered the first true instrument in the international human rights field.

One can say that the Geneva Convention on Upper Silesia between Germany and Poland in 1922 is considered as breaking new ground in guaranteeing the rights of individuals, such as the rights to liberty, life, free exercise of religion and equal treatment before the law. This treaty represents an important development in international law as an instrument establishing personal rights against the state.[40] Before this treaty the individual did not possess any rights capable of being enforced under international law, as the provisions dealing with human rights aspects in earlier international agreements produced inter-state obligations only.[41] Other international treaties such as the Hague Convention and the Geneva Convention were adopted in order to limit the suffering caused by wars, and to regulate the treatment of prisoners of war.[42] Beside the effect of the Red Cross movement in establishing such treaties, the International Labour Organisation was established in 1919, and soon began to promote a series of international conventions to improve workers' conditions. The two earlier multilateral labour conventions[43] were adopted by the organisation after the First World War.

40, The International Law of Human Rights Paul Sieghart, 1983, p13
41, Human Rights as Legal Rights Pieter N. Drost, 1965, p17
42, Human Rights in the World A.H. Robertson, p19
43, The treaties were against night work by women and against the use of white and yellow phosphorus in the manufacture of matches.

SECTION FOUR

HUMAN RIGHTS INSTRUMENTS

(a) International

(b) Regional

By the beginning of the Second World War, and as a result of the establishment of international rules and institutions , the rights of individuals and groups witnessed for the first time a great deal of recognition and protection in international law. This war and the events leading up to it produced real developments in the international law of human rights, and in fact the theory of international law was adapted to the new developments. As far as human rights is concerned, one can say that the individual became an important subject of international law for the first time, so that states could no longer rely on the plea of domestic jurisdiction, and the individual, in some cases, could seek his own remedy.

One must say that the international community, which was shocked by the events of the war, would have accepted even stronger human rights provisions than those which found their way into the Charter of the United Nations, which took up the role of the League of Nations,[44] as there was an attempt to incorporate an international Bill of Rights into the Charter.[45]

In the event, the Charter did provide for the creation of a Commission on Human Rights whose task was to draft an international Bill of Rights. By analysing the human rights provisions of the Charter, we could say that

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44, Networks of interdependence ; international organisations and the global political system, H,K, Jacobson, 1979 p45
45, Human Rights in the World, A,H, Robertson, p25

Article 1 puts the promotion of respect for human rights on the same level as the maintenance of international peace and security as a purpose of the United Nations. This can be demonstrated by Article 1 which states that the purposes of the United Nations are :

1, To maintain international peace and security,,,

2, to develop friendly relations,,,and self-determination of people,,,

3, to achieve international cooperation,,,and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion,,,"

In Article 56, member states pledge themselves :

"to take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55",

for the promotion of

"universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion",[46]

Such obligations undertaken on signature of the Charter are regarded as being legally binding, as the Charter may be regarded as a multilateral treaty.[47] *It is also widely believed that the principles stated in Article 1 have become part of customary international law and as such are binding on all states.*[48]

It should be mentioned that although these undertakings are legally binding, they are of a general nature and may not be regarded as a source of positive international law.[49]

It has been argued that the obligations taken under the Charter are weakened by Article 2, paragraph 7, which states that the UN is

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46, Charter of the United Nations, Article 55
47, The International Law of Human rights, Paul Sieghart, 1983, p51
48, "Responsibility for Violations of Human Rights" Yuri Rechetov Human Rights Journal XII 1-2 1979 p84
49, Human Rights as Legal Rights, Pieter N. Drost, 1965, p29

not authorised to intervene in matters essentially within the domestic jurisdiction of member states.[50] *However it can be said that promotion of respect for, and observance of, human rights does not necessarily require such intervention, so the obligation remains.*

In Lauterpacht's opinion, though neither the Commission on Human Rights nor the Economic and Social Council, nor indeed any other organ of the United Nations have the right of intervention in the legal sense, the Commission is both entitled - and bound - to take any other action short of intervention (including examination, enquiry, investigation, report and recommendation) with a view to remedying violations of human rights.[51]

In early 1947, the Commission on Human Rights decided that the International Bill of Rights would contain a Declaration of Human Rights, Conventions containing legal obligations (now called the Covenants) and measures of implementation as well as a system of international supervision or control.[52]

In 1948, the General Assembly adopted the Universal Declaration of Human Rights, by Resolution 217 (III).[53] *There are differing views of its juridical status. There are those who believe that, as the Declaration was not intended to impose legal obligations on states but only to represent, as described in the preamble, a "common standard of achievement for all peoples", however strong its moral*

50, Human Rights in the World, A.H. Robertson, pp29-30.
51, International Law and Human Rights H. Lauterpacht, 1968 p230
52, Robertson, p26
53, ibid, p27

or political authority, it does not create binding obligations in international law.[54] *Others believe that it is now binding as part of customary law regardless of which states have ratified it. For example, Judge Fouad Ammoun in his Separate Opinion on the Namibian Case*[55] *stated that :*

> *"Although the affirmations of the Declaration are not binding qua international convention,,,they can bind states on the basis of custom,,,whether because they constituted a codification of customary law,,,,or because thay have acquired the force of custom through a general practice accepted as law,,,"*

In any case, the member states of the United Nations may be regarded as being legally bound by the UDHR as a result of the "Proclamation of Tehran" adopted at the International Conference on Human Rights in Tehran in 1968, which states that the UDHR "constitutes an obligation for all the members of the international community".[56]

The UDHR strongly affected national law, as at the Tehran Conference in 1968, the Secretary-General of the United Nations, U Thant, was able to say that there were no fewer than forty-three constitutions adopted in recent years which are clearly inspired by the Universal Declaration, and that examples of legislation expressly quoting or reproducing provisions of the Declaration can be found in all continents.[57]

54, International Law and Human Rights, H, Lauterpacht Ch, 17
55, Reports of Judgements, Advisory Opinions and Orders International Court of Justice 1971, p76
56, The International Law of Human rights, Paul Sieghart, 1983, p54
57, Final Act of the Tehran Conference (A/Conf,32/41, p37)

The Commission on Human Rights completed its work on the draft Covenants by 1954. The process was finally completed in 1966, when they were adopted by the General Assembly[58] - two multilateral Conventions or Covenants on Human Rights, one on Civil and Political Rights, and the other on Economic, Social and Cultural Rights - a division motivated chiefly by ideological and political considerations.[59]

The international covenants were intended as a more elaborate and detailed formulation of the principles contained in the Universal Declaration.

Other aims of the International Covenant on Civil and Political Rights were to give a legal dimension to its contents, and to establish measures of implementation, through an Optional Protocol. There is an immediate obligation on each State Party to the Covenant "to respect and ensure to individuals within its territory...the rights recognised in the present Covenant", according to Article 2, which states :

1, Each State Party to the present Covenant undertakes to respect and to ensure to all individuals in its territory,, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion,,,

2, ,,,each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant,

3, Each State Party to the present Covenant undertakes;
(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

58, UN General Assembly Resolution 2200 A(XXI), Networks of Interdependence, pp 347 and 371
59, This division persisted up until 1977 when the United Nations General Assembly stressed that all human rights, whether political or civil, economic, social or cultural, are equally important, indivisible and interdependent, Resolution 32/130 of 16th December 1977,

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

By these measures the international community sought to make the ICCPR more effective than the UDHR. It should be noted that obligations on States Parties are immediate and absolute. States are required to take constitutional or legislative action to ensure the rights mentioned in the Covenant. The Comment of the Human Rights Committee is also important, when it pointed out that these measures alone may not be enough. The Committee stated that it was important for citizens of States Parties to know their rights, and State authorities to know their duties, and that appropriate action should be taken to publicise the obligations taken by the State under the Covenant.[60]

A further achievement was the establishment of a compulsory system of reporting by States. This was provided by the provision within the instrument, in Article 28, for the establishing of a Human Rights Committee with competence to administer Article 40, according to which States Parties undertake to submit reports to the Committee on measures they have taken to implement the Covenant. The Committee considers these reports, and transmits its own reports and comments to the States Parties, as well as an annual report to the General Assembly. State communications to the Human Rights Committee drawing attention to failures to give effect to

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60. GC3/13; HRC 36,109

the provisions of the Covenant may be made with regard to States who have recognised the competence of the Committee to receive such communications, (article 41). The procedures for such communications and the action to be taken by the Committee in response are laid out in detail in articles 41 and 42, but by 1982, the Committee had received no communications under this procedure.[61] It may be commented that fears of the misuse of such procedures for political motivations plays an important role.[62]

As well as the compulsory measures of implementation contained in the Covenant, the Third Committee established an optional system of fact-finding and individual petition or "communication" to the Human Rights Committee in the Optional Protocol to the ICCPR.

States which become Party to the Optional Protocol thereby recognise the competence of the Human Rights Committee to receive and examine communications by individuals alleging violations by States Parties of their rights as safeguarded by the Covenant.[63] Those communications will be admissible under Rule 90 of the Committee if they fulfil the following conditions :

"(a) that the communication is <u>not anonymous</u> and that it emanates from an individual, or individuals, subject to the jurisdiction of a <u>State Party to the Protocol</u>;
(b) that the individual claims to be a victim of a violation by that State Party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual himself or his representative; the Committee may, however, accept to consider a communication submitted on behalf of an alleged victim when it appears that <u>he is unable to submit the communication himself</u>;

61, The International Law of Human Rights, Paul Sieghart, 1983, p387
62, "International enforcement of human rights ; effectiveness and alternatives" Dinah Shelton American Society of International Law 1980 p11
63, Human Rights ; the International Petition System, M.E, Tardu, 1979 Binder 2, The Communications Procedure under the Optional Protocol to The United Nations Covenant on Civil and Political Rights, Part I A, pp5-19

(c) that the communication is not an abuse of the right to submit a communication under the Protocol;
(d) that the communication is not incompatible with the provisions of the Covenant;
(e) that the same matter is not being examined under another procedure of international investigation or settlement;
(f) that the individual has exhausted all available domestic remedies",

According to article 5, paragraph 2 of the Protocol, prior exhaustion of local rmedies is required, but the application of such remedies should not be "unreasonably prolonged". In the Weinberger Case the Committee concluded that the case was admissible since the application of local remedy was unreasonably prolonged.[64]

The General Assembly preferred that the Optional Protocol should permit the Committee to make "recommendations" and "suggestions" to States Parties concerned.[65] As a result of the lack of any provision to create another body able to take a binding decision, those views of the Committee are not legally binding on States.[66]

According to Article 5, paragraph 4 the Committee shall forward its opinion to the State Party concerned as well as to the plaintiff.[67]

Some important decisions under the Optional Protocol were taken in 1980, on five cases involving the government of Uruguay, four of which alleged the torture of detainees. The Committee found that "the State Party has failed to show that it has ensured to the person concerned the protection required by Article 2 of the Covenant". They also considered that in some of the cases, Articles 7 and 19 had been violated.[68]

64, 1981 Report of the Human Rights Committee, G,A,O,R,, 36th session, Supp, 40, p114
65, Human Rights ; the International Petition System, M,E, Tardu, 1979 loc cit,, p11
66, 1980 Report of the Human Rights Committee, G,A,O,R,, 35th session, Supp, 40, p84
67, (Communication No, R,1/5) International Legal Material 1980 No 19 p133
68, Review of the International Commission of Jurists 1980 No, 24, p37

One can say that until 1945, international law considered that the manner in which a state treated its own nationals was a matter within its own jurisdiction and competence, with which other states had no right to interfere, but since then the legal position has changed.

Matters with regard to which states have accepted obligations in international law have ceased to be questions solely within their domestic jurisdiction. Article 2(7) of the Charter of the United Nations affirms the principle of national sovereignty in respect of matters essentially within the domestic jurisdiction of any state.

At the regional level, the principle was affirmed in all the regional charters, the Charter of the Organisation of American States[69], The Charter of the Organisation of African Unity[70] and the Pact of the League of Arab States[71], and the 1957 European Convention for Peaceful Settlement of Disputes[72].

There is a reservation on this principle when there is a percieved threat to international peace and security, and it seems that gross violation of human rights which threatened international peace would thereby cease to be a purely internal matter, but it is a matter for discussion as to whether human rights ordinarily fall into the category of matters essentially within the domestic jurisdiction of states.

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69. Article 11
70. Article 3(2) and 3(3)
71. Articles 5 and 8
72. Article 27 paragraph 8

Lauterpacht commented that if we decide that "human rights and freedoms are not comprised within the category of matters essentially within the domestic jurisdiction of the State, then it would appear that the competence of the United Nations in respect of them is wholly unrestricted..."[73]

As we saw before, the protection of human rights is on the same level as the protection of international peace and security as a purpose of the United Nations in the Charter.

The issue of who is to judge whether matters are essentially within the domestic jurisdiction of states arose early, with certain countries proposing in 1945 that the matter should be decided in each case by the International Court of Justice.[74] *An Advisory Opinion of the Permanent International Court of Justice on the Nationality Decrees Case concerning Tunisia and Morocco (1923) stated :*

"...The words 'solely within the domestic jurisdiction' seems ..to contemplate certain matters which, though they may very closely concern the interests of more than one state, are not in principle matters regulated by international law. As regards such matters each state is sole judge."[75]

It might be argued, with the development of human rights instruments in the twentieth century, that human rights have become "matters regulated by international law".

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73. The International Protection of Human Rights, H. Lauterpacht, pp29-30
74. UN Doc. 207-III/2/A/3, May 10th 1945, UNCIO, Vol. 12, pp190-192
75. Nationality Decrees in Tunis and Morocco Case, PCIJ (1923) Series B,N.4 pp23-24

Other states which have accepted similar obligations have a legitimate interest in seeing that the common undertakings are respected. [76]

This idea is rejected by Watson, who sees the lack of reciprocity in human rights as a major problem. He argues that the lack of reciprocal interests coupled with the lack of any supra-national enforcement agency for human rights means that states have no motivation either to respect human rights internally, if political interests dictate otherwise, or to seek to change the behaviour of other states. He sees the lack of obvious incentive and benefit in human rights treaties as a major obstacle to their effectiveness.[77]

D'Amato argues that all nations have an "entitlement" or legal right to seek to protect the human rights of nationals of other countries, provided it can be established that human rights are protected by international law.[78] *While he concedes to Watson, who argues that since nations have no "interest" in legally opposing human rights violations in other countries, the effectiveness of international law in protecting human rights is limited*[79]*, he points out that the legal right to do so can be established nevertheless : "the entitlement remains the same even if the interest is not manifested".*[80]*He argues that enforcement of human rights is primarily a political or moral issue, rather than a legal one.*

76, Human Rights in the World, A.H. Robertson, p31
77, "The Limited Utility of International Law in the Protection of Human Rights" J.S. Watson American Society of International Law 1980
78, "The Concept of Human Rights in International Law" Anthony D'Amato Columbia Law Review Vol 82 ; 1110, 1982 pp1112-1159
79, J.S. Watson loc. cit.
80, Anthony D'Amato loc. cit., p1149

It seems that the effectiveness of international human rights instruments will always be a major problem, especially when it comes to the articles on measures of implementation when trouble is raised as a result of different views of the basic question of how far governments could be expected to accept a system of international control.

One feels obliged to point out that different governments take up different positions at different times, depending on the political context, to the extent that some delegates argue that it is outside the competence of the United Nations to discuss human rights situations on their own territories, or on that of their allies, but quite proper to discuss alleged violations by their political opponents.[81]

The Director of the United Nations Division of Human Rights, Theodor van Boven has pointed out that it is:

"most unsatisfactory that, in spite of the universal vocation of the United Nations, many situations which would amount to a consistent pattern of gross violations of human rights remain unnoticed in the proceedings of its organs,,,Many countries which strongly favour United Nations fact-finding in [southern Africa and Israeli-occupied territory] would take a different view if it affected their own,"[82]

It has been pointed out that American policy on human rights is unpredictably linked to security and economics. While its policy is often related to security and strategic questions demonstrated by, for example, its differing approach to human rights violations in Afghanistan and the Philippines, this is not always the case, as its

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81, Human Rights in the World, A,H, Robertson, p30
82, "Fact-Finding in the Field of Human Rights" Theodor van Boven 3 Israel Y,B, on Human Rights 93, 106, quoted in "Procedural Due Process in Human Rights ; Fact-Finding by International Agencies" Thomas M, Franck and H, Scott Fairley American Journal of International Law Vol, 74 1980 p312

failure to criticise Romania when the latter was moving awayfrom the Soviet Union contrasts with its criticism of Israel's human rights policies in the occupied territories during peace negotiations in the American interest.[83]

It is not surprising that there has been fundamental disagreement in the United Nations on establishing international machinery for the enforcement of agreements. While states with disparate social systems might agree on objectives, they have radically different ideas about putting these objectives into reality. The Eastern states and third world countries have not accepted western proposals for implementation[84]*, while in the European Community, there has been substantial agreement, as demonstrated by the regional convention.*

Implementation systems created by treaty have the inherent weakness that they are unlikely to reach those countries where human rights are the least respected and where therefore, they are most needed. There is no way to force such countries to ratify the treaties, and even if they did so, to respect their obligations. Even those governments which are most committed to respecting human rights are reluctant to commit themselves in advance to limitations on their discretionary powers, and in the experience of the United Nations in any event, treaty provisions for implementation have been extremely limited in their scope and operation.

83, "American Foreign Policy and Human Rights ; Rhetoric and Reality" David P. Forsythe Universal Human Rights Vol 2,3 July-September 1980
84, This will be clear in Chapter 2 when I discuss the attitudes of states like the Soviet Union and Iraq to the implementation provisions of the Convention against Torture.

A possible alternative to procedures of implementation which attempt to impose legal sanctions on violators of international agreements on human rights is represented by the practice of fact-finding by international organisations. While it lacks a real punitive element, it has been described as a potentially significant weapon against human rights violation, because amongst other effects, the report of a fact-finding body serves to "clarify misconceptions, absolve or embarrass the investigated party, influence public opinion, and where appropriate, facilitate further expressions of community disapprobation".[85] It has also been noted that countries tend to be more willing to permit investigations by fact-finding groups than they might be to accept, for example, the jurisdiction of an international tribunal.[86]

Ad hoc investigations by committee or special rapporteur have been instituted by the United Nations Commission on Human Rights, with regard to South Africa, Israel and Chile, but as Shelton comments, it is not always clear if improvements in human rights practice result directly from the presence of investigating teams.[87] A major weakness of this procedure is that the choice and treatment of these investigations is clearly controlled by political factors. Another is the lack of mandatory power to enter countries, make investigations and hear witnesses.[88]

85, "Procedural Due Process in Human Rights ; Fact-Finding by International Agencies" Thomas M, Franck and H, Scott Fairley American Journal of International Law Vol, 74 1980 p308
86, ibid
87, "International enforcement of human rights ; effectiveness and alternatives" Dinah Shelton American Society of International Law 1980 pp6 and 15-16
88, Cases and Materials in International Law D,J,Harris, 3rd ed, 1983, p533

Another alternative procedure is that provided by Resolution 1503, the purpose of which is to identify and hopefully eliminate global "situations which appear to reveal a consistent pattern of gross...violation of human rights". Individual communications are received as sources of information to show "consistent patterns of gross violation" rather than cases. Communications are examined by a working group of Subcommission on Prevention of Discrimination and Protection of Minorities, and then the Subcommision itself.

Situations regarded as needing further attention are then referred to the Commission on Human Rights, who may appoint a working group on an ad hoc basis to investigate, with the acceptance of the state concerned. By 1980, a number of countries had been the subject of investigation under this procedure, but with the entry into force of the ICCPR and Optional Protocol, its role and effectiveness seem to be limited.

After this analysis of the most important human rights instruments history has reached, I would like to mention a number of far-reaching proposals which were considered, including an Australian suggestion for an International Court of Human Rights, a proposal by Uruguay for the establishment of an Office of a United Nations High Commissioner for Human Rights[89], and a French proposal for an International Investigation Commission coupled with the appointment of an Attorney-General of the Commission.

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89. "Is due process overdue?" in Human Rights ; the International Petition System, M.E. Tardu, 1979 Binder 2, The Communications Procedure under the Optional Protocol to The United Nations Covenant on Civil and Political Rights, Part I A, pp2-3

India proposed that the Security Council should be advised of alleged violations, investigate them and force redress, meanwhile others suggested the creation of a new specialised agency for the implementation of the Covenants.

The USA and the UK proposed that the Human Rights Committees should be set up on an ad hoc basis, but only for inter-state disputes. The Soviet Union was consistently opposed to all arrangements of this sort on the ground that they would "interfere in the internal affairs of states", contrary to Article 2(7) of the Charter, undermining their sovereignty and independence.[90]

90, Human Rights in International Law A.H. Robertson, p29

Human rights instruments at the regional level

From global protection of human rights, I would now like to examine the regional developments, which represent a more effective and successful standard at the level of implementation.

European reaction to the twin threats of Fascism and Communism in the after math of World War Two, led the Europeans to try to safeguard the rights of individuals threatened by dictatorship. They tried to protect democracy and the rights of individuals in a realistic and effective way, by the creation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

The special achievement of the European states was to go beyond the limited effectiveness of the international instruments and create a practical framework for institutionalised protection of human rights, with organs, institutions and a greater degree of enforcement. The establishment of the European Commission on Human Rights and the European Court of Human Rights represent the European attempt to overcome problems which have for a long time obstructed the international community in implementing international protection for human rights.

Organs like the European Commission on Human Rights and the European Court of Human Rights reflect greater guarantees to the Europeans as individuals, and safeguards for their rights and freedoms.

European states safeguard the rights of their citizens, and in some cases, those of aliens[91] by recognising the right of individual petition to the European Commission of Human Rights[92]

and by accepting the compulsory jurisdiction of the European Court of Human Rights.[93]

Moreover, the decisions of the European Court act to regulate domestic legal systems when there is any violation of human rights[94], and feed domestic legal systems with new instruments and legislation.

As a result, it gives the individual European citizen double protection, nationally and internationally, in the most important aspects of human rights.

91, As, for example, in the "Amekrane Case" where the family of an alien was able to bring a case against Britain before the Commission on Human Rights, 16 Y.B.E.C.H.R. 356 (1973)
92, States make declarations under Article 25 of the Convention accepting the rights of individuals to petition against them. Most European states have made such declarations, some without limit of time, and others for varying periods, from two to five years,
Cases and Materials on International Law D.J. Harris, 3rd ed, 1983, p480
93, Again, declarations are made by states, under Article 46, accepting the Court's compulsory jurisdiction. There is also a procedure for states to accept its jurisdiction on an ad hoc basis. Most European states have made declarations, for varying periods,
Cases and Materials on International Law D.J. Harris, 3rd ed, 1983, p481
94, An example of a judgement which resulted in change in domestic legislation is the case of Mrs Sohair Balkandali and Mrs Cabales, where the British government was found to have violated the European Convention The British government accepted that it would have to change immigration rules, after the Court in Strasbourg found that Britain was guilty of sex discrimination by allowing men legally resident in Britain to bring in wives from abroad, but not giving women the same rights to bring in husbands. The Home Secretary promised action to change the immigration laws,
The Times May 29th 1985

One significant aspect of the European Convention is that it embodies many important organs which could be taken as an example for other regions to follow. This effective protection[95] sets forth a practical example to other regions, leaving no doubt of the urgent need to follow the Europeans in creating such instruments and organs in other parts of the world.

The most important civil and political rights are safeguarded in the European Convention. I do not think it is necessary to list the articles of the European Convention which safeguard the important civil and political rights, but a measure of the importance attached to them by the Europeans may be inferred from the priority given to those rights. The right to life, protection from torture, right to liberty and security of person, protection from illegal arrest or detention are among the very first articles of the Convention.

The significance of this convention lies not only in the European states, which participate in it, but also in the fact that it achieved one of the stated goals of the United Nations in establishing regional instruments for safeguarding human rights in all the regions of the world[96], despite differences in ideologies, culture and historical background.

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95. The European Convention on Human Rights may be considered as the most advanced protection of human rights, but it has not been free from setbacks, as for example, in the case of Greece, absent for five years from 1969, until democracy returned and Greece rejoined the Convention in 1974.

96. Recommendation of the Human Rights Commission in 1967 (Recommendation 6 (XXIII) of 23rd March 1967)

Other regional developments concerning the protection of human rights include the American Convention on Human Rights (1969) and the African Charter on Human and Peoples' Rights (adopted 1981, not yet in force). The first came as a result of the acceptance of Latin American and Caribbean States of the Convention on Human Rights, the Inter-American Court and Commission on Human Rights.[97] *. It contains 25 articles concerned mainly with civil and political rights and freedoms, with State obligation to respect those rights absolute, according to Article 1.*

While the American Convention contains articles which seek to protect human rights and fundamental freedoms, and as such has much in common with both the Universal Declaration and the European Convention, the African Charter, though not yet in force, represents the human rights aspirations of a developing region. Many of the problems faced by the African states emerging from a period of colonial rule and generally undeveloped politically, are common to the situation of some states in the Arab world.

The African Charter on Human and Peoples' Rights was adopted at a meeting of the O.A.U. on 26th June 1981.[98] *As well as twelve articles listing civil and political rights, and four articles listing economic, social and cultural rights, it contains six articles which deal with what have come to be known as "third*

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97. It entered into force on the 19th of July 1978.
98. This Charter will come into force three months after a majority of O.A.U. States has ratified it.

generation" rights, that is, rights of groups of individuals or "Peoples".

Articles 4, 5 and 6 deal with the rights I intend to examine in this research.

> *Article 5 ; All forms of exploitation and degradation of man, particularly,,,torture, cruel, inhuman or degrading punishment and treatment shall be prohibited,*
>
> *Article 4 ; Human beings are inviolable, Every human being shall be entitled to respect for his life and the integrity of his person, No one may be arbitrarily deprived of this right,*
>
> *Article 6 ; Every individual shall have the right to liberty and to the security of his person, No one may be deprived of his freedom except for reasons and conditions previously laid down by law, In particular, no one may be arbitrarily arrested or detained,*

The Charter also provides, in article 30, for the establishment of an African Commission on Human and Peoples' Rights which, like the Human Rights Committee of the United Nations, will require periodic reports of measures taken to give effect to the rights and freedoms recognised and guaranteed by the charter,(article 62). Among important aspects of the Commission's functions are its stated aims of formulating :

> *principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations,*

and its intention :

> *(c) to cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights,*

African states' recognition and acceptance of the international standards for the protection of human rights is clearly shown throughout the Charter, particularly in article 60 which states :

> *The commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations,,,*

Like the ICCPR, the Charter establishes a Commission which is competent to receive communications from states and other communications (articles 46-59), on which it will report to states and the Assembly of the Heads of States and Government (article 52). However, unlike other regional organs, the Commission requires no prior declarations of competence to consider State communications.[99]

A document closely related to the African Charter on Human and Peoples' Rights is the Charter of the Organization of African Unity[100], *the organization to which states party to the African Charter must belong, particularly an article confirming the purposes of the organization, as follows:*

> *Article 2 ; (c) To promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.*

99, The International Law of Human Rights Paul Sieghart, 1983, pp420-421
100, The United Nations maintains cooperative relations with the O.A.U. (eg., Resolution 38/5 of 1983), Striking matters for the O.A.U. were always independence, development and the economic situation of African states, for example, the summit meeting at Addis Ababa in 1985 concentrated on measures to alleviate the problems of drought and famine in Africa, For example, The Times July 20th 1985

Some observations can be made on this regional progress in the field of human rights. The African states responded to the stated aim of the United Nations to create regional instruments and institutions to safeguard and protect human rights. As I noted above, the African Charter is distinct in some aspects from other regional instruments, for example, in its interest in the so-called third generation rights, like the rights to development (articles 22 and 24) and the right of "colonized or oppressed peoples" to free themselves from domination (article 20, paragraph 2).

These rights go beyond the general provisions for the self-determination of peoples in the international Covenants, directly reflecting the colonial past and contemporary situation of many African states.

As well as safeguarding rights and freedoms, the Charter presents duties for States and individuals. Duties of the individual include duties to the state, society and the international community (article 27, paragraph 1), while duties of the state include the promotion and assurance of respect of rights and freedoms in the Charter (article 25) In addition, the Charter places restrictions on certain of the rights, for example, Article 11, where the right of assembly is restricted by considerations of national security or freedom of others. Article 12, part 2 also restricts the right of freedom of movement, for the protection of national security, or public health or morality. Also, in paragraph 3 of the same article, the Charter appoints itself to judge the right for asylum. All those rights are potentially restricted by states.

In general, the Charter could be considered as a good start to the promotion of human rights in the African continent. It will be understood by reading the history of the human rights instruments that vagueness and restrictions come as a result of different policies and ideologies of parties, but development on this level can be reached by real political will of African states.

Article 60 of the Charter expresses the real will and the loyal effort from African governments to consider the international standards as their inspiration for developing their instruments and organs in this very important field, particularly as they are members of the international institutions. Each "independent, sovereign African state" is entitled to join the O.A.U., and become party to the African Charter. While this excludes the South African regime, it presents no obstacle to the Arab states of North Africa.

Another development at the regional level is the establishment of the Permanent Arab Commission on Human Rights by the League of Arab States. In August 1966 the Economic and Social Council of the United Nations invited the four regional organisations (the Council of Europe, the Organisation of American States, the Organisation of African Unity and the League of Arab States) to attend sessions of the Commission on Human Rights, and to exchange information with the Commission on their respective human rights activities. The four organisations were also asked to take part in the International Conference on Human Rights in Teheran in 1968, and this gave great impetus to the Arab League to establish their own Commission on Human Rights.

They were encouraged again in this aim by the hopes of the United Nations to establish regional commissions for human rights in areas where they did not already exist.'[101] In 1967, the Arab League, when asked for their comments on the setting up of such a Commission, made a reply which included the following :

> *1, The field of human rights is a vital one for strengthening links among countries which belong to a regional area,*
> *2, As for the procedure of establishing regional commissions on human rights and specifying their functions, the League of the Arab States believes that the proper foundations for setting up such regional commissions are the foundations on which a regional inter-governmental organisation is based, Thus the regional commissions should be established within the framework of international or regional inter-governmental organisations,,,"[102]*

101, Recommendation 6(XXIII) of 23rd March 1967
102, Human Rights in the World, A,H, Robertson, pp162-163

The establishment of the Commission came about when the Council of the Arab League decided to hold a Conference on Human Rights in Beirut in 1968, which set up a Permanent Arab Commission on Human Rights. Each member of the Arab League is represented on the Commission.

In 1969, the Commission prepared a programme based on the principle that all matters relating to human rights in the Arab world are within the competence of the Commission. Its aim is to promote joint action by the Arab countries and the protection of the rights of "the individual Arab and promoting respect for human rights in Arab countries in general".[103]

The programme is in two parts, based on action at the national and international levels. At the national level, it seeks the establishment of national Commissions on human rights in member countries linked to the permanent Commission. It also envisages receiving reports from member countries on their domestic human rights activities, on which it will make recommendations. Finally, at the request of the Commission the Council of the League decided to establish a Committee of Experts to prepare a draft of a Convention on Human Rights, by Decision No. 2668.[104]

103, Human Rights in the World, A.H. Robertson, p164
104, "In favour of the establishment of an Arab Court for Arab Human Rights" Jamil Husayn Al-Mustaqbal al-Arabi April 1983, pp16-40

At the international level, the Arab League participates in international conferences, and sends an annual communication to the United Nations Commission about its activities. The United Nations maintains formal relations with the League of Arab States.[105]

In general, one can say that the above Commission interests itself most in violations of human rights in the occupied territories. One can say that the most important achievement of that commission was its participation in the ad hoc working group of the UN Human Rights Commission appointed by resolution 6(XXV) to investigate Israel's alleged violations of human rights in the occupied territories.[106]

A final remark could be made about the Commission, that it was meant to be very limited in competence and effectiveness at the domestic level, as it does not express the hope which individuals thought about when it was established.

As a result, other non-governmental organisations and committees concerned with human rights tried to establish an Arab Convention and Court on Human Rights, with a more effective commission, similar to other regional developments.

I intend to examine their efforts and achievements in Chapter Three when I survey the Arab response to human rights.

105, For example, Resolution 38/6 adopted by the General Assembly in Plenary "by which the Assembly requested the Secretary-General to strengthen cooperation and coordination between the United Nations and the organisations of the United Nations system and the Arab League to enhance their capacity to serve the mutual interests of the two organisations in the political, economic, social and cultural fields", Annual Review of UN Affairs, 1983
106, "Procedural due process in human rights fact-finding by international agencies" by Thomas M, Franck and H, Scott Fairley American Journal of International Law Vol, 74 1980 p315

CHAPTER TWO

LEGAL ANALYSIS OF THE RIGHTS OF LIFE, LIBERTY AND PHYSICAL INTEGRITY

Introduction

In Chapter One, I discussed the principal sources of human rights theory, and the historical development of the international protection of human rights, passing through the creation of the most important instruments in the field.

In discussing these instruments, I began with the global protection of human rights, then passed to regional developments, taking the European Convention as the effective standard at this level, because it laid down effective machinery for the protection of human rights for the first time in the history of human rights, but also examining regional developments most closely related to this research, the efforts of the Organisation of African Unity and the Arab League in the human rights field.

In Chapter Two, I will examine the international instruments. As this research is concerned with political and civil rights, I will concentrate on the Covenant on Civil and Political Rights and other instruments concerned with these rights, as well as the organs associated with them. As the global instruments had a major effect, through legal obligations, on national laws, then I will consider the protection of these rights within the internal legal systems of some Arab states, beginning with the constitutions as the highest domestic instrument, then the variety of Codes and laws, as for example, the Penal Code.

I intend to discuss the practices of Arab countries in regard to certain rights. It is not intended to cover all related issues as the scope of this research is limited. The issues I will cover are, in my opinion, fundamental to any discussion of political life in Arab countries. While the rights I will discuss are technically regarded as civil, nevertheless they are closely tied to political rights in general, and in particular the political life of Arab countries. These issues are closely connected to political rights, like freedom of opinion and expression, as well as the civil rights of liberty and security of person, since, for example, persons cannot enjoy certain political rights, such as freedom of speech or political participation unless they are sure that their other rights are relatively secure and the political climate encourages individuals to take seriously the opportunity to participate in political life.

The main issues are :

(1) Arbitrary arrest and detention;

(2) Torture and cruel, inhuman or degrading treatment or punishment;

(3) Extrajudicial killing.

I will examine the rights associated with each of these issues in the light of international instruments and their practice, and at the regional level, taking the European Convention on Human Rights and the European Court and Commission as guidance. I will use these instruments to define the rights.

At the national level, I will examine domestic protection of these rights through the Constitutions and other legislation, and when possible using the cases available.

I also find myself obliged to discuss the issue of the state of emergency and its effect on these rights, in the light of the contemporary situation of some Arab countries.

Finally, I will come to the practices, examining the findings of international and regional organisations and bodies, in the light of the Arab states' response to the international instruments.

PART ONE

LEGAL ANALYSIS OF ARBITRARY ARREST AND DETENTION :

SECTION A

IN THE LIGHT OF THE INTERNATIONAL INSTRUMENTS

(1) liberty and security of person

(2) freedom from arbitrary arrest and detention

(3) deprivation of liberty [only on grounds or procedures established by law]

(4) compensation

Personal liberty and security are among the first rights mentioned in the international instruments for their importance and their fundamental value. Article 3 of the UDHR states :

"Everyone has the right to,,,liberty and security of person,"

and Article 9 of the UDHR states :

"No one shall be subjected to arbitrary arrest, detention or exile,"

and Article 9, paragraph 1 of the ICCPR states :

"Everyone has the right to liberty and security of person, No one shall be subjected to arbitrary arrest or detention,"

The prohibition of arbitrary arrest and detention is considered as a vital safeguard of the individual's right of liberty. Its importance was considered such as to merit, in both the UDHR and the ICCPR, an article of its own, rather than being considered merely an aspect of the right to liberty.[1]

Likewise, the European Convention in Article 5 guarantees liberty of persons and provides guarantees against arbitrary arrest and detention.[2]

The provisions of the ICCPR elaborate the prohibition of arbitrary arrest and detention in 5 paragraphs. I will examine the categories of rights protected, as follows :

1, "Civil Rights" Richard B, Lillich in Human Rights in International Law ; Legal and Policy Issues Vol, 1 (ed,) Theodor Meron, 1984 p136
2, European Convention on Human Rights Francis G, Jacobs, 1957 p45

1. the right to liberty and security of person;

2. freedom from arbitrary arrest and detention;

3. deprivation of liberty only on grounds or by procedures prescribed by law;

4. compensation for unlawful arrest or detention;

1. the right to liberty and security of person

As we saw, this right is protected in Article 9 of the UDHR and Article 9, paragraph 1 of the ICCPR. It is also mentioned in the regional instruments : the American Declaration on the Rights and Duties of Man[3]; the European Convention on the Protection of Human Rights and Fundamental Freedoms[4]; American Convention on Human Rights,[5]; African Charter on Human Rights and Peoples' Rights[6].

All these instruments stress the fact that liberty and security of person is a fundamental human right.

3, American Declaration of the Rights and Duties of Man Article 1 states ; "Every human being has the right to,,,liberty and the security of his person,"
4, European Convention for the Protection of Human Rights and Fundamental Freedoms , Article 5, paragraph 1 states ; "Everyone has the right to liberty and security of person"
5, American Convention on Human Rights, article 7, paragraph 1 states ; "Every person has the right to personal liberty and security,"
6, African Charter on Human Rights and Peoples' Rights, Article 6 states ; "Every individual shall have the right to liberty and to security of his person,"

By examining the findings of the United Nations Human Rights Committee and United Nations Human Rights Commission[7] European Commission and Court on Human Rights, we can try to see the international legal understanding of this provision. As for the meaning of "liberty and security of person", the European Court[8] has found that "liberty of person" in Article 5 of the European Convention refers to the physical liberty of a person though not freedom of movement, while the European Commission observed that "personal liberty" refers to freedom from arrest and detention.[9]

Courts in America and India have extended the meaning of liberty and security to include many rights, and constitutional safeguard of liberty and security may be regarded as protecting other rights than purely physical liberty.

Deprivation of liberty may be determined in regard to a number of factors, including type, duration and manner of implementation. In the Guzzardi v Italy case, the European Commission and Court of Human Rights examined the question of whether compelling Guzzardi to stay on an island constituted deprivation of liberty. They concentrated on the small size of the island, the constant supervision, the impossibility for him to make social contacts and the length of his stay.[10] In addition, they found that the difference between restriction on liberty and the deprivation of liberty is one of degree.

7, In their "Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile", 1964
8, Guzzardi Case Eur. Court H,R,, Series A, Vol 39, judgement of November 6th 1980
9, Arrowsmith v UK (7050/75) Report ; DR 19, 5
10, Guzzardi v Italy (7367/76) Report ; 7 December 1978; Judgement ; 3 EHRR 333

2. freedom from arbitrary arrest and detention

Freedom from arbitrary arrest and detention is mentioned in the UDHR, Article 9, which states :

"No one shall be subjected to arbitrary arrest or detention,,,"

and the ICCPR, Article 9, paragraph 1, which also states :

"No one shall be subjected to arbitrary arrest or detention,"

It is also explicitly mentioned in the American Declaration on the Rights and Duties of Man (Article 7, paragraph 3) and the African Charter on Human Rights and Peoples' Rights (Article 6), though not in the European Convention on the Protection of Human Rights and Fundamental Freedoms, though it has been held to be implied in Article 5, paragraph 1, as the provisions of this paragraph spell out the conditions under which alone a person may be lawfully deprived of his liberty. Thus, according to the European provisions, arbitrary arrest and detention may be understood as being deprivation of liberty in circumstances other than those specified in Article 5, paragraph 1.

Before looking in detail at the provisions of the article in the ICCPR, we should analyse the international understanding of the term "arbitrary arrest".

The term "arbitrary" in this phrase means :

(a) "on grounds or in accordance with procedures other than those established by law, or
(b) "under the provisions of a law the basic purpose of which is incompatible with respect for the right to liberty and security of person"[12]

12, These definitions are those adopted for the purpose of the Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile conducted for the Human Rights Commission in 1963.

According to the travaux preparatoires of Article 9 of the UDHR, two views dominated discussion on the meaning of "arbitrary".

One was that "arbitrary" should be replaced by "except in the cases and according to the procedure prescribed by prior legislation", while the other, which is more comprehensive and represents a better safeguard, pointed out that an arrest or detention might be perfectly legal but nevertheless be arbitrary.[13]

During drafting of Article 9 of the ICCPR, views were expressed that "arbitrary" meant "illegal" or "unjust" or "both illegal and unjust".[14]

When the Third Committee of the General Assembly discussed this paragraph the views were expressed that "arbitrary" arrest or detention was that which was carried out "without any legal grounds" or "contrary to law" or according to a law which was in itself "unjust" or "incompatible with the dignity of the human person" or "incompatible with the respect for the right to liberty and security of person"[15].

In the light of these varying definitions of the term "arbitrary", it seems that "arbitrary" is not the same in meaning as "illegal" but that it has a wider meaning, being more comprehensive. While an arrest which is illegal is arbitrary, it is not the case that an arbitrary arrest must be illegal. It may be perfectly legal but unjust, and therefore arbitrary.

13, Study of the right of everyone to be free from arbitrary arrest, detention and exile,p6
14, E/CN,4/SR,47, paragraph 43
15, A/4045, paragraphs 43-49

This was, substantially, the conclusion of the Committee in the Study on the Right of Everyone to Be Free from Arbitrary Arrest, Detention and Exile.[16]. *The Committee commented further that they considered this definition to be corroborated by Article 29, paragraph 2 of the UDHR, which states :*

"In the exercise of his rights and freedoms, every one shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Clearly any code of law which is incompatible with this purpose must be considered as not only likely to lead to arbitrary arrest or detention but in contrast to the international understanding of justice and democracy.

The term "arrest" may be generally understood as meaning the period from the moment the suspect (or accused, since many legal systems maintain the principle that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law) is physically restrained and placed under custody until the time that he is brought before a judicial authority which may order his continued detention or release.

16, Study of the right of everyone to be free from arbitrary arrest, detention and exile, 1964 p7

3. Deprivation of liberty only on grounds or by procedures prescribed by law

As we saw, one interpretation of the term "arbitrary" during drafting of Article 9 of the ICCPR was that it means arrest or detention "on grounds or in accordance with procedures other than those established by law", and it was this interpretation which was adopted in the ICCPR, Article 9, paragraph 1 which states :

"No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established in law"

It could be said that any person should enjoy his liberty and freedom as a principle, (unless there is violation of law leading to deprivation of liberty). As a result of the principle that every accused is innocent until he is proved guilty, one could say that no one should be deprived of that privilege except on the grounds or with the procedure established by law and according to the penal policy of most civilised nations. Those grounds and procedures could be categorised in varying degrees between countries, as we will see when I examine the national legislation, both constitutional and otherwise, of Arab countries but internationally, there is a minimum procedure mentioned in Article 9 of the ICCPR.

Grounds established by law for arrest or detention, as demonstrated by the provisions of Article 5, paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms, can be categorised as follows :

(a) the lawful detention of a person after conviction by a competent court;
(b) lawful arrest or detention for non-compliance with the lawful order of a court or to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention for the purpose of bringing a suspect before a competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him committing an offence;

(d) the detention of minors for educational supervision or appearance before a competent legal authority;

(e) detention in the public interest, for example, to prevent the spread of infectious disease;

(f) lawful arrest to prevent unauthorised entry or exit from a country, for example, in cases of deportation or extradition.

Reasonable grounds to suspect that a crime has been or may be committed are required for the legal process of arrest or detention in all legal systems. Reasonable suspicion may be combined with other requirements, such as the seriousness of the offence and the existence of circumstances justifying arrest.

A potential problem with "reasonable grounds" is that subjective assessment of what are reasonable grounds generally lies with the official authority which makes the arrest, but in most cases objective assessment of grounds, based on facts and circumstances, is made by the authority competent to issue a warrant or order for arrest.

The minimum procedures contained in the ICCPR, Article 9, paragraphs 2-4 are the right to be informed of the reason for arrest, the right to judicial control of arrest and detention and the right to test the legality of arrest and detention, but procedures protecting the rights of suspects or accused may be more or less comprehensive in different legal systems of the world. I intend to examine both the principles which are specified in the ICCPR and other striking aspects of protection of the rights of suspects contained in law.

(a) Right to be informed of the reasons for arrest, and of any charges

Article 9, paragraph 3 of the ICCPR states :

"Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

This requirement is an important one because it safeguards the right of the detainee to know the charges against him in order to allow him to take the steps necessary to defend himself. There are differences in the details of the procedure of informing the detained between legal systems. Most laws require that in any arrest or detention (other than the case of flagrante delicto), the contents of a warrant authorising arrest should be made known to the accused, at the time of arrest.

The European Commission on Human Rights has found that reasons for arrest are not required to be conveyed in writing[17], or indeed in any special form, since in Neumeister v Austria, they considered that because the accused had been interrogated by a judge several days before his arrest, and so could not fail to have known the reasons for his arrest and the charges against him.[18]

The suspect or accused should be informed promptly of any charges against him. Failure to do so will make the arrest and detention arbitrary. The Human Rights Committee found that Article 9, paragraph 2 of the ICCPR had been violated in the case of de Massera v Uruguay, when the accused was not charged until 9 months after his arrest[19].

17, X v Netherlands (1211/61) CD 9, 46
18, Neumeister v Austria Eur Court H.R, Series A Judgement of June 27th 1968
19, de Massera v Uruguay HRC 34, 124, International Legal Material No 19 1980

(b) right to judicial control of arrest and detention

Article 10 of the UDHR states:

"Everyone is entitled in full equality to a fair and public hearing by a fair and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Article 11 paragraph 1 states:

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

Article 9, paragraph 3 of the ICCPR states:

"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise for execution of the judgement."

The European Convention contains a similar provision.[20] Three aspects of judicial control of arrest and detention can be distinguished in the provisions. These are the right to be brought promptly before a judge or judicial officer, the right to be tried or released within a reasonable time, and the consideration of release pending trial.

In most countries the law requires that an arrested person should be brought promptly before a judge or judicial authority.

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20. Article 5, paragraph 3 states ; "Everyone arrested or detained,,,shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial".

The time limits vary between countries from a few hours to several days.[21]

This constitutes a test of the legality of arrest and detention, but it is meaningless unless carried out promptly because otherwise arbitrary detention may take place, due to lack of judicial review of the detention. The Human Rights Commmittee, in the case of Ismael Weinberger Weisz v Uruguay found that Article 9, paragraph 3 of the ICCPR was violated when he was held incommunicado for more than 100 days, and not brought before a judge for more than ten months after his arrest.[22]

The expression in ICCPR "before judge or officer authorised by law to exercise judicial power" should not cause any misinterpretation because the officer should be judicially authorised to carry out the examination.

The European Court of Human Rights[23] *considered that while an "officer..." is not identical to a judge, he should fulfil minimum conditions guaranteeing the rights of the person arrested. These were independence of the Executive and the parties, the obligation of hearing the individual in person and conducting a review of the circumstances of detention, taking the legal circumstances into account.*

21, Study of the right of everyone to be free from arbitrary arrest, detention and exile pp40-41
22, Human Rights Committee Report 1981 G,A,O,R, 36th session, Supp,40, p114
23, Schiesser v Switzerland (7710/76) Judgement ; 2 EHRR 417

As for the right to be tried or released within a reasonable time, the European Commission has said that the term "reasonable time" should be determined in the light of the facts of each case. It has identified elements relevant to the determination of reasonable time, for example, in Wemhoff v Federal Republic of Germany, it commented that courts need to determine whether detention before judgement is passed, for whatever reason, could "impose a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed to be innocent". The representative of Germany argued, and this was accepted by the Commission, that it is the time of appearance before the trial court that marks the end of the period that must be judged reasonable, but the Court found that the period continues until the person is judged and the trial terminated.[24] In the case of Neumeister v Austria, Article 5, paragraph 3 of the European Convention was found to be violated since the plaintiff was held in pre-trial detention for two years and two months.[25]

The laws of some countries specify the period during which the accused should be brought to trial.[26]

24, Wemhoff v Federal Republic of Germany Eur, Court H,R, Series A, Vol,7, Judgement of June 27, 1968
25, Neumeister v Austria Cases and Materials pp500-502
26, Study of the right of everyone to be free from arbitrary arrest, detention and exile,pp43-44

The Human Rights Committee found, in the case of Ismael Weinberger v Uruguay, that Article 9, paragraph 3 of the ICCPR was violated because he was not tried within a reasonable time, not being sentenced until three and a half years after his initial arrest.[27]There were several other decisions against Uruguay under this provision.[28]

The third element of the provision for judicial control of arrest and detention in the ICCPR concerns release pending trial. The provision states that the release may be subject to guarantees. These may be personal or financial. Their purpose is to ensure the subsequent appearance of the accused rather than as aform of punishment. In order to secure this, then, the amount or nature of the guarantees should be fixed with regard to the separate circumstances of each case.[29]

27, Weinberger v Uruguay 1981 Report of the Human Rights Committee G.A.O.R. 36th session, Supp. 40, p114
28, International Legal Materials No, 19 1980 Communication R.1/5
29, Wemhoff v Federal Republic of Germany See n.24 above

(c) right to test lawfulness of arrest or detention before a court

This right is protected in the ICCPR by Article 9, paragraph 4 which states :

"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

This provision is intended to safeguard the liberty of the individual and to prevent violation of this right, by making sure that detention falls within the grounds of the law.

It seems that the "court" mentioned in the provision should share the attributes of judicial power discussed above. These were that it should be independent of the Executive and of the parties, that the plaintiff should appear in person before the court, and that the judgement should be made with regard to the circumstances of each separate case.

The Draft Principles on Freedom from Arbitrary Arrest and Detention prepared for the Human Rights Commission[30] in 1963, in Article 38 and the note on it, stress the importance for anyone detained of having immediate access to such a remedy to challenge the lawfulness of his arrest or detention. They stress the importance of immediate access, both to end the illegal detention of someone already detained (and possibly denied such guarantees as

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30, Study of the right of everyone to be free from arbitrary arrest, detention and exile Part VI

access to a lawyer or other communication) and to prevent the detention of someone under threat of arbitrary arrest and detention. This is provided in the article in ICCPR by the phrase "without delay".

In the case of Weinberger v Uruguay, the Human Rights Committee found that there had been a violation of Article 9, paragraph 4 of the ICCPR, because recourse to habeas corpus was not available to Ismael Weinberger.[32]

The Human Rights Committee also found, in connection with the communication of Valentini de Bazzano on her own behalf as well as three others, that there had been violations of Article 9, paragraph 4 of the ICCPR with respect to Luis María Bazzano Ambrosini and José Luis Massera, as they were denied the right to habeas corpus.[33]

32, Human Rights Committee Report 1981 G,A,O,R, 36th session, Supp,40 p114
33, International Legal Material No, 19 1980 Communication No, R,1/5

4. compensation for unlawful arrest or detention

Article 9, paragraph 5 of the ICCPR states :

"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

It seems that the laws of many countries provide the right to such compensation.[34] Compensation for wrongful arrest or detention raises the question of responsibility of the State authority in the exercise of their function.

Breach of conditions for detention laid down in law establishes a right to compensation. In various countries, the law provides that wrongful deprivation of liberty covers not only cases where charges are dismissed as groundless, but also arrests made under reasonable suspicion which are otherwise unlawful through violation of procedure.[35]

Compensation may cover material or moral damage. Usually, compensation takes the form of monetary payment, sometimes in an out-of-court settlement to enable States to avoid a judicial decision against them.

34, Study of the right of everyone to be free from arbitrary arrest, detention and exile p157
35, ibid,, p158

Conditions of detention

As I have discussed the principal safeguards for the arrested or detained person in international law, it seems worthwhile briefly to examine other conditions which should be observed during the period of detention. As far as the conditions of detention are concerned, treatment and places could be an important factor affecting the individual's rights.

Distinguishing the accused person from the person convicted of a crime, with the priniciple that any one arrested or detained should be considered innocent until proved guilty, he should not be treated in the same manner as a convicted person.

The international instrument provides, in ICCPR, article 10, that :

"1, All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,
2, (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons,"

A person under arrest may be kept in police custody, or the custody of the arresting authority. Laws of some countries provide that a person under arrest may not be kept in a public prison for criminals, for example, the Jordanian Prison Act, Article 20[36] *provides :*

"In so far as space within the prison permits,,,
1, Prisoners awaiting trial shall be segregated from convicted prisoners;"

but should be kept in a place prepared for that purpose.[37]

36, CCPR/C/1/Add,56 25th January 1982, p11
37, Code of Court Procedure Act No, 9 of 1961, Article 105 states ; "No person shall be detained except in prisons established for that purpose,"
CCPR/C/1/Add,56 25th January 1982, p4

With regard to the provision of the international instrument which states that persons deprived of their liberty should be treated with humanity and respect for their dignity, it is worthwhile to mention that the laws of many countries provide that places of custody should be healthy and should provide for proper medical care and treatment.

Another point to be taken in consideration is that various national laws provide for the segregation of prisoners on a number of different grounds, for example, nature of the offence, educational standard and so on.

I have examined the international protection for the individual from arbitrary arrest and detention, starting from the principle contained in the UDHR of protection for the liberty and security of the individual, to which arrest and detention are exceptions. I examined the provisions of the ICCPR with regard to this protection in some detail as they represent some of the principles of safeguard which will be found in more or less elaborate form in national legislation. However, it should be pointed out that Article 4, paragraph 2 of the ICCPR permits derogation from the article protecting this right in time of public emergency which threatens the life of the nation. Therefore I intend to make a short examination of derogation from the ICCPR in time of public emergency, after my discussion of the national instruments which protect this right.

SECTION B

IN THE LIGHT OF THE NATIONAL INSTRUMENTS

(1) liberty and security of person

(2) freedom from arbitrary arrest and detention

(3) deprivation of liberty [only on grounds or procedures established by law]

(4) compensation

In spite of the international instruments intended to protect human rights, the fact remains, and indeed it is acknowledged by the instruments themselves[38] that domestic legislation has practical effect in protecting the rights of its citizens. Domestic legislation remains, particularly in the third world, the main legal safeguard for human rights, especially in countries which have not signed the Optional Protocol[39], or where there is no regional safeguard.[40] For these reasons, it is necessary to examine the national safeguards through national legislation.

When I discussed the international understanding of arbitrary arrest and detention, I distinguished two factors in "arbitrariness":

(a) on grounds or in accordance with procedures <u>other than those established by law</u>;
(b) under the provisions of a law the basic purpose of which is <u>incompatible with respect for the right of liberty and security of person</u>; a law which is in itself <u>unjust</u>; a law which is incompatible with other human rights.

In my discussion of arbitrary arrest and detention in the Arab countries, I intend to examine the legal safeguards in general,

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38, As the ICCPR acknowledges by laying stress on the obligations of governments to put its provisions into effect by legislative or other measures, Article 2, paragraph 1,
39, As we saw, in countries which have signed the Optional Protocol, an additional legal remedy is provided by the opportunity of individual communication with the Human Rights Committee (OP ICCPR Article 1)
40, For example, although the United Kingdom has not signed the Optional Protocol, its citizens have an effective legal safeguard in their right of petition to the European Commission and Court of Human Rights,
Sir Humphrey Waldock "The legal protection of human rights - national and international" in An Introduction to the Study of Human Rights, p89

passing through other legislation which might be considered to contradict the spirit of justice, according to the national or international understanding.

In my discussion of international provisions dealing with arbitrary arrest and detention, I began by examining articles of wide and general application, concerning the right of liberty and security of person, then passed to more specific safeguards relating to the grounds and procedures for arrest and detention.

I intend to follow a similar approach for national provisions in the Arab countries : beginning with provisions safeguarding the right of liberty and security, which in general may be found at the consitutional level, but it should be borne in mind that some Arab countries have no constitutions, for example, Saudi Arabia, and other Arab constitutions are of a temporary nature.

Then I will pass to the grounds and procedures for arrest and detention, which are contained in the Law Codes. As with the international safeguards, I find myself obliged to discuss in addition, the effect (sometimes by temporary legislation) of the state of emergency on provisions safeguarding individuals against arbitrary arrest and detention.

In order to present a clear and balanced picture of the legislation which provides this protection, I intend to examine one country in detail, and then examine the legislation of other Arab countries in general terms.

(A) ARAB REPUBLIC OF EGYPT

Safeguards and guarantees for the right of the individual arrested or detained in Egypt are to be found in the Egyptian legal system. The 1971 Constitution states in Article 41 :

"Individual freedom is a natural right and shall not be touched. Except in cases of flagrante delicto, no person may be arrested, inspected, detained or his freedom restricted or prevented from free movement except by an order necessitated by investigations and preservation of the security of the society. This order shall be given by the competent judge or the public prosecution in accordance with the provisions of the law. The law shall determine the period of custody."[41]

The Egyptian constitution thus clearly protects the individual's liberty and security. As at the international level, deprivation of liberty is restricted to grounds and procedures prescribed by law. As well as arrest and detention, "inspection" may only be carried out in cases of flagrante delicto or when the order has been given by competent legal authority, in accordance with the law. It can be noted that the Egyptian Constitution provides that the period of detention will be specified by law.

Article 42 states :

"Any citizen who is arrested or imprisoned or whose freedom is in any way restricted shall be treated in such a manner as to preserve his dignity. It shall not be permissible to,,,detain or imprison him in places other than those which are subject to the prison laws."[42]

Thus the Constitution provides that the detainee should be treated with respect and the conditions of detention are regulated at the constitutional level by the provision that detainees should be detained only in places subject to the prison laws.

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41. CCPR/C/26/Add.1/Rev.1 of 16th March 1984 p3
42. Egypt ; violations of human rights An Amnesty International Report, 1983 p10

Further safeguards related to places of detention are contained in administrative provisions, providing for medical care and examination of prisoners.[43]

Some of the grounds and procedures mentioned at the international level in Article 9 of ICCPR, are contained in the Egyptian Constitution, as Articles 71 and 139 provide for the arrested or detained person to be informed immediately of the reasons for his arrest or detention, and promptly notified of the charges against him. It also provides for judicial control of arrest and detention, and protects the right to test the legality of his arrest or detention. It further provides for trial within a specific period or release.

Article 71, paragraph 1 states :

"Anyone arrested or detained shall be informed immediately of the reasons for his arrest or detention and shall be entitled to communicate with such persons as he wishes for the purpose of informing them of what has happened or of seeking assistance as prescribed by law. Any person arrested or detained shall be promptly notified of the charges against him and he, as well as third parties may protest in a court against the measures that have restricted his personal freedom. The law regulates the right of protest in such a way as to ensure that decisions are taken on protests within a specific period failing which the person arrested or detained must be released".[44]

This article contains an additional safeguard by allowing the detainee the right to communicate, both to inform people of what has happened and to seek legal assistance. This safeguard is elaborated in Article 139[45]*, which provides for communication for :*

"...seeking the assistance of a lawyer."

43, Report of the Human Rights Committee General Assembly Official Records ; Thirty-ninth session Supplement No, 40 (A/39/40) p58 paragraph 306
44, Egypt ; violations of human rights, An Anesty International Report, 1983 p10
45, ibid,

The Egyptian Constitution contains further safeguards for Egyptians seeking legal redress. Article 69 ensures that those who lack financial means to defend their rights are still protected, and Article 67 guarantees to anyone regardless of nationality the right to an attorney to defend him.[46] Other laws contained in the Code of Criminal Procedure automatically appoint an attorney at public expense for those who lack financial means.[47]

Other safeguards of justice are guaranteed by laws concerning costs, interpreters and so on. According to Article 71, paragraph 2, precautionary detention should specify the period of detention which must not be exceeded, and every individual has the right to complain to the court in regard to any measures restricting his freedom.[48]

Another important safeguard to human rights in general in Egypt is the constitutional provision which stipulates that :

"conventions to which the Arab Republic of Egypt accedes have the effect of law after they have been signed, ratified and published in accordance with the prescribed procedures",

This implies that the ICCPR has the force of law in Egypt, though it is not clear whether this means that its provisions may be directly invoked in court.[49]

After examining constitutional instruments, I will examine other legislation and procedures related to the state of emergency, as all these constitutional safeguards could be jeopardised by measures taken under the state of emergency.

46, CCPR/C/26/Add,1/Rev,1 16th March 1984, p7
47, Article 376, Egyptian Code of Criminal Procedure, ibid,
48, CCPR/C/26/Add,1/Rev,1 of 16th March 1984 p4
49, Report of the Human Rights Committee General Assembly Official Records ; Thirty-ninth session [1984] Supplement No, 40 (A/39/40) p55 paragraph 292

It seems that Act No. 162 of 1958 with its amendments of 1972, 1981 and 1982, has maintained a state of emergency in Egypt since its adoption. One could share the comment of the Human Rights Committee[50] that the question arises in this situation whether the provisions of the 1971 Constitution which I examined above, have any value in protecting human rights in Egypt. One could add other serious questions in regard to important principles, such as the separation of powers, the independence of the judiciary and the control of constitutionality of legislation.[51]

Egypt has not notified the United Nations of the existence of a state of emergency or any resulting derogation from its obligations under ICCPR[52]. The Egyptian representative has stated to the Human Rights Committee that the proclamation of a state of emergency was a sovereign right, introduced "to ensure stability".[53] One can comment that this is not a satisfactory explanation as to why the Egyptians have not complied with Article 4 of the ICCPR.

Act No. 162 of 1958 confers considerable powers on the President to authorise arrest and detention of persons considered to pose a threat to security. Subsequent amendments to this act extended these powers to the Minister of the Interior and the Prime Minister. Procedures of appeal against continued arrest and detention have shifted from the courts to direct appeals to the President and his

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50, ibid p56
51, Report of the Human Rights Committee General Assembly Official Records ; Thirty-ninth session Supplement No, 40 (A/39/40) p56 paragraph 295
52, ibid p58 paragraph 308
53, Egypt ; violations of human rights An Amnesty International Report 1983, p20

ministers.[54]

This represents a very serious shift of judicial control of arrest and detention away from the judicial power to the executive. It seems that under the emergency legislation, the executive authority has the power to promulgate legislation which could affect rights guaranteed in the Constitution.

A number of procedures of preventive detention have been in effect under emergency legislation in Egypt, representing later amendments to the original Law No. 162 of 1958. During the period from 1972 to 1980, provisional detention followed the procedure outlined on the following page.

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54. One could mention Article 42, paragraph 2 of the Constitution which provides that any measure incompatible with the letter or spirit of constitutional guarantees is invalid, and the Supreme Constitutional Court which is responsible for judicial control of laws and regulations, ensuring that they express the spirit of the Constitution. (Article 175 of the Constitution) This Court suspended a Presidential Decree ordering the arrest of a large number of people in 1981, but the state of emergency detention procedure was immediately invoked. There must be a very serious question of the value and effectiveness of these guarantees.

Provisional detention 1972-1980 : Law 162 of 1958 as amended by Law 37 of 1972[55]

Arrest of X

X is held in provisional detention; questioned by the state security niyaba within 24 hours of arrest; has access to lawyer

From first day X has right to appeal to state security court for release, The State Security Court decides ;

not to release X — *to release X*

X may renew appeal for release before the court after 30 days

X remains in detention for further 15 days to await decision of the President of the Republic, who decides;

to veto the court's decision — *to approve the court's decision*

after 30 days X may appeal again

appeal for release proceeds automatically to a different court of the same standing, which decides within 15 days

X is released

not to release X — *to release X*

X is released

55, This, and the following table are explanatory diagrams from ; Egypt ; violations of human rights An Amnesty International Report, 1983 p20 & p22

During 1981, Law 164 of October 1981, which remained in force until June 1982, amended the procedure as follows.

Provisional detention (1981-1982) : Law 162 of 1958 amended by Law 164 of 1981

Arrest of X

Detention for up to six months (no court appearance, restricted access to lawyer)

After six months X may petition the President of the Republic for release; if the President ;

does not respond or refuses the petition

X may be held for an additional period of six months (as long as the state of emergency is in force)

decides to release X

X is released

It seems that, under this procedure, the appeal should be directed to the President only after the period of six months has expired, and another appeal could be made after six months.[56] This means that the minimum period of detention in some cases may be six months, and the period of detention could be indefinitely extended by the Executive power.

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56. Egypt ; violations of human rights An Amnesty International Report, 1983 p20

After 1982, the procedure was modified again by Act No. 50 of 1982.[57] This act re-introduced a number of safeguards which had been lacking before in emergency legislation, for example, the provision that the detainee be informed immediately, in writing, of the reasons for his arrest or detention. The detainee's right to obtain the services of a lawyer and the right of the detainee or a representative to lodge an appeal against his detention to the Supreme Court of State Security thirty days after his arrest are also provided by this act. If this is rejected, another complaint may be made thirty days after the date of rejection. A further safeguard is provided as follows :

"The Court shall take a substantiated decision on the complaint within 15 days after the date of its submission and after hearing the statements of the person arrested or detained; otherwise it shall order his immediate release",

Thus, the amendments to the emergency law contained in Act No. 50 of 1982, comprise considerable safeguards for the rights of detainees, above all, the restoration of the final decision to order release to the courts, provided, for example, by the amendment to Article 6 of the emergency act, which states :

"...the court order shall be final in such cases",

Further examination of the effect of emergency legislation on the practice of arrest and detention will be found in Chapter 3, when I examine the communication between Egypt and the Human Rights Committee and Egypt, and the Egyptian response to Amnesty International.

57, CCPR/C/26/Add.1/Rev.1 pages 6 & 7

Appeal procedure (Amended by Act No. 50, 1982)[58]

arrest of X

1, He is informed, in writing, of the reasons for his arrest or detention
2, He has the right to communicate
3, He has access to lawyer

release within thirty days

If he is not released, he may make complaint to Supreme Court of State Security after thirty days

release

If not released, he may make a further complaint after thirty days of the rejection of his first complaint

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58, CCPR/C/26/Add.1/Rev.1, page 6

(B) Other Arab countries :

Beginning as before with the general issue of the individual's liberty and security, protection of this right is to be found at the constitutional level in most Arab countries. For example, the preamble to the Syrian Constitution states that :

"Freedom is a sacred right,,,"[59]

and Article 25, paragraph 1 of the Constitution provides :

"Freedom is a sacred right. The state shall guarantee the personal freedom of citizens and safeguard their dignity and security"[60]

The Jordanian Constitution, Article 7 provides that :

"Personal freedom shall be safeguarded"[61]

It seems that Tunisian legislation at the constitutional level takes different stand from Syria in regard to specifying the protection of the individual from arbitrary arrest or detention, even though the basic idea could be found in the preamble to the Constitution which proclaims that the people

"are determined to ,,,uphold human principles accepted among peoples who safeguard human dignity, justice and freedom"[62]

Article 8 of the Lebanese Constitution states :

"Personal freedom shall be guaranteed and protected,"[63]

59, Report of Amnesty International to the government of the Syrian Arab Republic, 1983, p5
60, Report from Amnesty International to the Government of the Syrian Arab Republic p19
61, CCPR/C/1/Add.56 of 25th January 1982, p4
62, CCCPR/C/28/Add.5 of 8th May 1985 p7
63, CCPR/C/1/Add.60 of 26th April 1983 p11

The legislation of most Arab countries provides, either at the constitutional level or in its Law Codes, that deprivation of liberty shall be only on grounds or according to procedures prescribed by law, for example, Article 28, paragraph 2 of the Syrian Constitution states :

No one shall be subjected to a search or investigation or be taken into custody except as prescribed by law"[64]

The Constitution of Morocco provides in Article 10 that :

"No one shall be liable to arrest, detention or punishment, save in the cases and in the manner prescribed by law,"[65]

Article 22, paragraph (b) of the Constitution of the Republic of Iraq prohibits the arrest, detention, imprisonment or search of anyone except by law. [66]

The Jordanian Constitution stipulates, in Article 8, that no person shall be arrested or detained, except in accordance with the provisions of the law.[67]

The Constitution of Lebanon provides, in article 8, that :

"No person may be arrested or kept in custody except in accordance with the law,"[68]

As for grounds and procedures for arrest in the Arab countries, one could make the general observation that warrants issued by competent legal authorities are required for arrests save in the cases of flagrante delicto, felony or where the accused is without residence or financial means.

64, Report by Amnesty International to the government of the Syrian Arab Republic, 1983 p 19
65, CCPR/C/10/Add.2 of 19th February 1981, p16
66, CCPR/C/1/Add.45 of 8th June 1979, 38
67, CCCPR/C/1/Add.56 of 25th January 1982, p10
68, CCPR/C/1/Add.60 of 26th April 1983, p11

Article 196 of the Lebanese Legislative Decree No. 138, of 12th June 1959 states :

"Except in cases of flagrante delicto, no person may be arrested by the members of the security forces except in virtue of an order or warrant issued by the competent authorities."

Another safeguard provided by the Lebanese legislators is Article 367 of the Lebanese Penal Code concerning the penalty for anyone convicted of unlawfully arresting or detaining any person.[69]

Article 24 of the Libyan Code of Criminal Procedure provides that an accused shall be arrested in cases of felony, or in flagrante delicto, if the crime is punishable by imprisonment for more than three months and if the offender is under surveillance or is a vagabond, or in the case of theft, violence, resistance to law enforcement personnel or violation of privacy. Article 30 of the Code stipulates that no one shall be arrested without an order issued by a legally competent authority.[70]

Section VI of the Moroccan Code of Criminal Procedure prescribes procedures for warrants and their execution, including the necessity for the warrant to be signed and sealed by a competent judge.[71]

Article 99 of the Jordanian Code of Court Procedure states that an accused person may be arrested in the following circumstances :

1. in the case of a felony;
2. in the case of an offence in which he is caught in flagrante delicto, provided that the said offence is punishable under the law by imprisonment for a period of more than six months;
3. when the offence is punishable by imprisonment, and if the accused person is either under police surveillance or lacks a recognised place of fixed domicile in the Kingdom;

69, CCPR/C/1/Add.60 of 26th April 1983, p16
70, CCPR/C/1/Add.20 of 24th January 1978, p4
71, CCPR/C/10/Add.2 of 19th February 1981, p16

4. in offences involving theft, rape, serious assault, the use of force or violence to resist the public authorities, incitement to moral corruption, or a breach of public decency.[72]

Article 92 of the Iraqi Criminal Procedural Law No. 23 (1971) provides that

"no one shall be arrested or detained without a warrant issued by a judge or a court, or under circumstances defined by Law."[73]

Further legal provisions concerning judicial control of arrest and detention include appearance before a judicial authority within a certain period, for example, Article 26 of the Libyan Penal Code provides that statements by an arrested person should be heard promptly ... his case shall be referred within forty-eight hours to the Public Prosecutor's Department, which shall interrogate him within twenty-four hours; the Public Prosecutor's Department shall decide either to keep him under arrest or release him. Article 115 of the Code provides that preventive detention should be ordered where there is sufficient evidence of the commission of the crime for which the arrest took place.[74]

Likewise, the Jordanian Code of Court Procedure, in Article 100, provides that officials of the judicial police must, without delay, listen to what the arrested suspect has to say. If they are not satisfied with his statement, he is sent within forty-eight hours to the competent Public Prosecutor who must question him within

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72, CCPR/C/1/Add.56 of 25th January 1982, p11
73, CCPR/C/1/Add.45 of 8th June 1979, p38
74, CCPR/C/1/Add.20 of 24th January 1978, p4

twenty-four hours and then order his release or his remand in custody. Under Article 121 of the Code, the Public Prosecutor has the power to release the detainee on bail, and the Court is entitled to exercise the same power when the case has been referred to it, as well as during the trial itself.[75]

Articles 102 and 103 of the Lebanese Code of Criminal Procedure stipulate that questioning of persons arrested under summons should be carried out immediately, and of those under warrant within twenty-four hours. After the time-limit has expired the accused must be brought before the State Counsel-General who will ask the examining magistrate to question him. Article 103 provides that a person arrested on a warrant is not questioned within twenty-four hours or brought before the State Counsel-General, his arrest will be considered an arbitrary act. [76]

The Iraqi Criminal Procedure Law, in Article 123, obliges the examining judge to examine accused persons within twenty-four hours of their arrest after informing them of the charges against them. Article 130, paragraph (b) provides that if the examining judge finds the evidence is sufficient for trial, he shall commit the accused to the competent court. If it is not sufficient the accused should be released immediately. Article 109 limits the period of detention to not more than fifteen days each time. It should under

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75, CCPR/C/1/Add,56 of 25th January 1982, p11
76, CCPR/C/1/Add,60 of 26th April 1983, p17

no circumstances exceed a period of six months. Any period of detention exceeding six months or a quarter of the maximum term of penalty is regulated by the court of session. Article 110 binds the examining judge to release the detainee against guarantee, if he is accused of an offence whose penalty is detention for three years or less, or a fine. If the arrested person is acused of a minor offence he may nevertheless be remanded if he is of no fixed abode.[77]

According to Section VI of the Moroccan Code of Criminal Procedure, an accused person on whom a warrant or summons to appear has been served is brought before the examining magistrate who must question him immediately. Article 141 states :

"Any person who has been arrested by virtue of a warrant to appear, and has been detained for more than twenty-four hours in a place of detention without being questioned, shall be deemed to have been arbitrarily arrested".

With regard to remand in custody, Article 152 of the Code stipulates that this is "an exceptional measure", and the articles which follow specify the rules for its practice.[78]

Legislative provisions both to allow the accused to test the lawfulness of his arrest or detention, and to provide for the punishment of anyone who illegally arrests or detains a person are also to be found in the legal Codes of Arab countries. For example, Article 33 of the Libyan Code of Penal Procedure provides that complaints concerning illegal detention shall be investigated and

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77. CCPR/C/1/Add.45 of 8th June 1979, pp39-41
78. CCPR/C/10/Add.2 of 19th February 1981, pp16-17

the detained person arrested immediately. Articles 433 and 434 of the Code provide that officials convicted of illegal arrest or detention of a person shall be punished by imprisonment.[79]

The Moroccan Code of Criminal Procedure, Articles 381 and 406, contain the procedure by which the accused may appeal.[80]

Article 367 of the Lebanese Penal Code states that :

"Any official arresting or detaining any person in cases other than those provided for by law shall be liable to the penalty of a term of hard labour."

Articles 368 and 369 specify penalties for officials who detain persons illegally, beyond the legal term, or refuse or delay bringing him before a judge.[81]

The Iraqi Penal Code, in Article 322, provides that a penalty of imprisonment shall be imposed on any official who arrests, detains or imprisons a person contrary to the provisions of law. Article 235 of the Criminal Procedure Law grants the accused the right to challenge judgements, decisions and measures taken by a magistrate court in the court of session.[82]

With regard to an enforceable right of compensation for any person unlawfully arrested or detained, legal provision is to be found in the Moroccan Code of Obligation and Contracts established by the Dahir of 12th August 1913, where liability is criminal or quasi-criminal. Under Articles 7 to 14 of the Moroccan Code of Criminal Procedure, proceeedings for compensation may be instituted directly

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79, CCPR/C/1/Add,20 of 24th January 1978, p5
80, CCPR/C/10/Add,2 of 19th February 1981, p17
81, CCPR/C/1/Add,60 of 26th April 1983 pp16-17
82, CCPR/C/1/Add,45 of 8th June 1979, pp41-42

in the criminal court. When damage results from an ultra vires decision by an administrative authority, action against the State for damages may be brought under the 1913 Dahir, while application for annulment is made to the Supreme Court. [83]

Likewise, the Iraqi legal system provides for civil compensation for any one who has been the victim of offences prejudicing justice, for example, perjury or false information, and has suffered material or moral damage, according to Articles 233-273 of the Penal Code. Article 324 of the Penal Code provides that a person may claim compensation against an official who has admitted that person to prison without an order or has refused to observe an order for his release. Compensation is administered in accordance with the Enforcement Law No. 30 of 1957.[84]

83, CCPR/C/10/Add.2 of 19th February 1981, p18
84, CCPR/C/1/Add.45 of 8th June 1979, pp17-20, 42-43

SECTION C

DURING THE STATE OF EMERGENCY

According to Article 4, paragraph 2 of the ICCPR, the rights contained in Articles 9 and 10 of the ICCPR are among those from which derogation may be made in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.

In the drafting discussion for this provision, the view was expressed that references elsewhere in the Covenant to "national security" and "public order" were not sufficient to give adequate legal guidance in time of major emergency. With the intention of preventing abuse, it was suggested that the emergency should be so serious as to threaten the life of the nation as a whole, but there was another view, that the Covenant should not mention or even imply the possibility of war, since a purpose of the United Nations was to prevent war.[85]

Guidelines as to the nature and extent of such derogation are contained in the first paragraph of the article, which specifies that any measures derogating from the Covenant should be :

"to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

85, "Derogations from human rights treaties" Professor Rosalyn Higgins British Yearbook of International Law 1976-77 [XLVIII] pp286-7

In paragraph 3 of the same article, the Covenant specifies procedures for derogation, including the obligation to inform other States Parties to the Covenant of "the provisions from which it has derogated and of the reasons by which it was actuated". It provides that the State should inform other States Parties of these matters through the intermediary of the Secretary-General of the United Nations, and that the termination of any such emergency measures should be announced through the same intermediary. (Article 4, paragraph 3)

It is worthwhile to mention also the comment of the Human Rights Committee with regard to derogation that measures taken under ICCPR, Article 4 are of an exceptional and temporary nature, and should last only as long as the life of the nation is threatened.[86]

Comments by the Human Rights Committee in the Landinelli case (R 8/34), have clarified certain issues raised by the provisions of Article 4. In previous cases, the Committee had dismissed invocations by States Parties of the right to derogate, with a standard reply, as follows :

"The Covenant (Article 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation"[87]

86, GC 5/13, HRC 36, 110
87, Review of International Commission of Jurists 1980 No, 24 pp46-7

In the Landinelli case, the State Party (Uruguay) attempted to justify its restriction on the political rights of certain individuals, by referring to its notice of derogation sent to States Parties, and stating that it had "temporarily derogated from some of the provisions relating to political parties". The response of the Committee was to suggest, for the first time, that the right to derogate "may not" depend on compliance with the requirement of notification to other States Parties. It also explained in detail why it was not able to recognise Uruguay's asserted right of derogation, saying that

1. *Uruguay's notice of derogation "confined itself to stating that the existence of the state of emergency situation was 'a matter of universal knowledge';*
2. *no attempt was made to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant or;*
3. *to show that such derogations were strictly necessary".*

The Committee concluded that : "A State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant". In their discussion of the merits of the case, the Committee drew attention to two important principles concerning state of emergency. The first is that measures taken during state of emergency must be of the shortest possible duration. The second very important principle is that, in the opinion of the Committee, the doctrine of National Security which underlies extended states of emergency, should be rejected. This point is very relevant to the situation of some Arab countries, where the doctrine of national security is often misused to establish or prolong states of emergency.

The Committee drew a strong distinction between those who promote their political ideas by peaceful means and those who advocate violence. Some governments, particularly those which do not provide lawful means for the transfer of political power, regard any criticism or opposition to their authority as a threat to national security.[88]

Further legal interpretation of the provisions for derogation from human rights treaties in the time of state of emergency can be found in the discussions and findings at the regional level, by the European Commission on Human Rights and the European Court of Human Rights. Article 15 of the European Convention on Human Rights and Fundamental Freedoms states, in paragraph 1 :

"In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

88, Niall MacDermot, Secretary-General of the International Commission of Jurists, in his introduction to States of Emergency ; their impact on human rights, A study prepared by the International Commission of Jurists, p i

(a) public emergency threatening the life of the nation

In the merits of the Lawless case[89], the European Court of Human Rights considered that :

"the natural and customary meaning of the words 'other public emergency threatening the life of the nation[90]' is sufficiently clear; ...they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed",

and the Court found that in the Lawless case, the existence of a public emergency threatening the life of the nation was reasonably deduced by the Irish government.[91]

As for the opinion of the Commission in the Greek case[92] on the question of whether there was on the 21st April 1967, a public emergency in Greece threatening the life of the nation, the Commission stated that such a public emergency comprised the following characteristics :

"1. it must be actual or imminent;
2. its effect must involve the whole nation;
3. the continuance of the organised life of the community must be threatened;

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89. Y.B.E.C.H.R. 1961 No 4 Paragraph 28
90. "Nation" was defined by the majority opinion of the Commission in the Cyprus case as "the people and its institutions, even in a non-selfgoverning territory, or in other words, the organised society, including the authorities both under domestic and international law for the maintenance of law and order",
Y.B.E.C.H.R. 2 (1958-59)
91. The factors which led to the state of emergency were ; the existence of a secret army in Ireland which was carrying out unconstitutional activity by violent means; the fact that this army was also acting outside Irish territory, thus threatening Irish Relations with their neighbour; and the increase in terrorist activity in 1956 and 1957
92. Denmark, Norway, Sweden, Netherlands v. Greece
Factors adduced by the Colonels for the state of emergency were ; the threat of a Communist takeover involving force; the state of public order; the constitutional crisis preceding the general election in May 1967. In spite of these factors, the Commission found that there was not, on 21st April 1967, a public emergency in Greece which threatened the life of the nation,
Y.B.E.C.H.R. 1969 No 12 p71f

4. the crisis or danger must be exceptional, in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate."[93]

According to the principle which is called the "margin of appreciation", the European Commission has considered that primary responsibility for determining whether conditions apply for a state of emergency lies with the State Party : the government decides, in the first instance, whether to invoke a state of emergency. According to the margin of appreciation, while the Commission recognises the discretion of the government, it reserves the competence and duty to comment upon the government's decision. The principle of the "margin of appreciation" was applied by the Commission in the Greek case.

93, Y.B.E.C.H.R. 1969 No 12 p72

(b) to the extent strictly required by the exigencies of the situation

The second provision which seeks to safeguard human rights in time of emergency is the strict control of using the right of derogation according to the necessity of the circumstances.

In the case of Lawless v. Ireland[94], the European Court of Human Rights found that the bringing into force and operation of part 2 of the Offences against the State (Amendment) Act 1940 was strictly required by the exigencies of the situation. This act provided, with certain safeguards,[95] for detention without trial of individuals suspected of intending to take part in terrorist activities. The Commission agreed with the contention of the Irish government that the measures taken under that Act were strictly required by the exigencies of the situation.

It seems that the Commission and Court considered the safeguards contained in Offences against the State (Amendment) Act 1940, were very important factors affecting their decision.

94, Y.B.E.C.H.R. No 4 1961 pp474-8

95. The safeguards included the following ; the application of the Act was subject to constant supervision by Parliament; the Act provided for the establishment of a "Detention Commission" comprised of an officer of the Defence Forces and two judges; any person detained under the Act could refer his case to the Commission whose decision was binding on the Irish government.

The Court judged that ordinary law had been unable to meet the necessity of the situation and that special courts which could have been set up under Offences against the State Act (1939) or military courts could not "suffice to restore peace and order" in Ireland in 1957. They also considered that the sealing of the border between the Republic of Ireland and Northern Ireland would have had extremely serious repercussions on the population as a whole beyond the extent required by the exigencies of the emergency. Therefore, as the Court considered that none of these means would have made it possible to restore peace and security, they found that administrative detention as provided by the Offences against the State Act (Amendment) 1940 appeared to be a measure required by the exigencies of the situation.[96]

In the case of Ireland v. United Kingdom[97]*, the Commission and Court examined allegations which included the charge that Article 5 had been violated by special powers brought into operation by the Northern Ireland government involving the arrest, detention and/or internment without trial of large numbers of people. These powers took the form of (a) an initial arrest for interrogation; (b) prolonged detention for further investigation; and (c) preventive detention for a period unlimited in law.*[98] *The Court found that it was not established that derogations from Article 5 exceeded the extent strictly required by the exigencies of the situation.*

96, Y.B.E.C.H.R. 1961 No. 4 Lawless Case (Merits)
97, Y.B.E.C.H.R. 1978 No. 21
98, The powers were based on regulations under the Civil Authorities (Special Powers) Act (N.I.) 1922, Cases and Materials in International Law D.J.Harris, 3rd ed, 1983, p483

I have briefly examined the international instruments protecting human rights under the state of emergency. Now I will examine national instruments concerned with the protection of rights during the state of emergency, taking Syria as an example, but briefly mentioning measures in other Arab states.

The conditions and the procedure of declaring a state of emergency are, as a rule contained in the constitution and laws. In Syria, the law concerning states of emergency is contained in Decree No 51 of 1962. [99] *Article 1 of Decree No. 51 lists three conditions which permit the proclamation and application of a state of emergency*

(a) a state of war;

(b) the threat of war;

(c) danger to security or public order, in all or part of Syrian territory, by reason of internal troubles or natural disasters.

Article 110 of the Syrian constitution of 1973, states that the President has the power to:

> *"... declare and terminate a state of emergency in the manner stated in the law"*[100]

It seems that the legislator of the Constitution of 1973 avoided restating the details of the conditions and procedure of the state of emergency in this constitution, but made the general provision

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99, States of Emergency ; their impact on human rights, A study prepared by the International Commission of Jurists, 1983 p281
100, Review of the Commission of Jurists 24 January 1980, pp12-16

that laws in force before the Constitution should remain, unless they contradict any provisions therein.[101]

Decree No 51 of 1962 gives the President unlimited power to

1. appoint an emergency law governor
2. to give to the governor all powers over internal and external security.[102]

Article 4[103] *of the Decree sets out the measures which the Governor can take. These include :*

1. placing of restrictions on the freedom of individuals...;
2. arrest of suspects or of anyone endangering public security;
3. authorisation to investigate persons and places;
4. delegation of these powers to any person to perform any of these tasks.

According to two decrees (Decrees No 147 and 148) of 1967, the proclamation of a state of emergency should be submitted to the Parliament for approval. The state of emergency can only be terminated by the authority who proclaimed it. Its duration is unlimited, and there is no requirement for periodic re-submission to parliament for approval. Likewise, the decree which institutes a state of emergency is unquestionable.[104] *It seems the only legal machinery of safeguard is the Constitutional Court, which, as stated*

101, Article 153 states that ; "Legislation in effect and issued before the proclamation of this Constitution shall remain in effect until it is amended so as to be compatible with its provisions."
Review of the International Commission of Jurists 24 January 1980 pp12-6
102, ibid, p12
103, ibid, p13
104, States of emergency ; their impact on human rights, A study prepared by the International Commission of Jurists, 1983, p281

in Article 145 of the Constitution, examines and decides on the constitutionality of laws passed by the People's Assembly or the President, if asked to do so by a quarter of the People's Assembly or by the President.[105]

It is worthwhile to mention that Article 104 of the Syrian constitution states that :

"The President of the Republic concludes treaties and international agreements and abrogates them in accordance with the provisions of the Constitution."[106]

It is also worthwhile to mention that the Syrian President had not in 1979, after Syria had signed the Covenant in 1969, ever officially informed the Human Rights Committee of any derogations from the Covenant as a result of the state of emergency.[107]

In contrast to Syrian domestic legislation, the Egyptian legislature contains provisions of a temporary nature[108] *in regard to the protection of individual rights and freedoms during a state of emergency, such as Act No. 164 of 1981 which amended some parts of Act No. 162 of 1958, concerning the state of emergency. Act No. 50 of 1982 states :*

105, Amnesty International Report from Amnesty International to the government of the Syrian Arab Republic 1983, p5
106, CCPR/C/1/Add,31 of 12th July 1978 page 2
107, CCPR/C/SR,160 of 8th August 1979 page 8
108, CCPR/C/26/Add,1/Rev 1 of 16th March 1984 page 6

"Everyone arrested or detained under the Emergency Act shall immediately be informed, in writing, of the reasons for his arrest or detention and shall have the right to communicate with anyone with whom he wishes to advise of what has happened. He shall also be entitled to avail himself of the services of an attorney and shall be treated in the same manner as any other person held in precautionary custody...the detainee, and any other persons concerned, may lodge a complaint against his arrest or detention."

Also, it could be said that, according to Article 175 of the Egyptian Constitution'[109], the constitutionality of laws during the emergency time is judicially controlled through the Egyptian Supreme Constitutional Court, and this organ is responsible to ensure that all laws and other regulations are in accordance with the constitution. It is also responsible for interpreting legislative provisions. This demonstration briefly reflects the additional protection of human rights and freedoms provided by the Egyptian legislature in time of state of emergency.

The Jordanian Constitution contains provisions for the establishment of the "Defence Act", in Article 124 '[110], and the declaration of martial law in Article 125, paragraph 1 '[111],

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109, CCPR/C/26/Add,1 Rev 1 of 16th March 1984, p8
110, Article 124 of the Jordanian Constitution states ;
"If it becomes necessary to defend the realm during an emergency, a legislative act, known as the Defence Act, shall be promulgated, under which a person designated in the Act shall be empowered to take such action and measures, including the suspension of the ordinary laws of the State, as may be necessary to ensure the defence of the realm, The Defence Act shall enter into force as soon as it is proclaimed in a royal decree issued on the basis of a decision of the Council of Ministers," CCPR/C/1/Add,56 of 25th January 1982 page 5
111, ibid,

however paragraph 2 of this article stipulates that :

"All persons engaged in the implementation of ,, instructions [issued by the King] shall be held legally responsible for their actions, in accordance with the provisions of the law, until they are relieved of such responsibility by a special legislative act promulgated to that end,"

In a sense, this could be regarded as a safeguard for human rights, as officials continue to be legally responsible for their acts even during the state of emergency.

The Moroccan Constitution also contains provisions for special measures to be taken in "public emergency" situations, in Article 35.[112]

In regard to the state of emergency, it seems that this article does not specify any temporary legislation, nevertheless, it only allows changes necessary for defence of the territory of the state. The declaration of a state of siege[113] on the other hand is potentially more of a threat to human rights as it provides that some crimes and offences will be transferred to the jurisdiction of military tribunals.

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112. Article 35 states ; "When the integrity of the national territory is threatened, or when events occur which might jeopardise the functioning of the constitutional institutions the King may, after consulting the President of the Chamber of Representatives and addressing a message to the nation, declare a state of emergency by Dahir. In consequence thereof, he shall be empowered, notwithstanding any provision to the contary, to take such measures as may be necessary for the defence of the territorial integrity of the state, the return to normal functioning of the constitutional institutions and the conduct of affairs of state,"
CCPR/C/10/Add.2 of 19th February 1981 page 13
113. Dahir of 1st September 1939, ibid.

SECTION D

IN THE LIGHT OF PRACTICES IN ARAB COUNTRIES

As we saw in the brief examination of national legislation concerned with the procedures of arrest and detention, the laws of most Arab countries, whether at constitutional or other levels, protect the individual from arbitrary arrest and detention. Throughout the Arab world, with a few striking exceptions, it can be said that legal provision for the protection of the individual in this respect is more or less equivalent to the provisions laid down in Article 9 of the ICCPR.

However, the situation with regard to the practice of arbitray arrest and detention in the Arab world bears little relation to the legal safeguards to be found in constitutions and legal codes. In a number of Arab countries, normal constitutional and other legal safeguards of the individual's right to liberty and security have been suspended. This may be by the imposition of state of emergency legislation as for example, in Syria, Jordan and Egypt, which vastly extends the power of the executive with regard to administrative detention, involving the arrest and detention of large numbers of people, on dubious legal pretexts, for example, that the individuals concerned pose a threat to national security.

In addition, the majority of Arab states restrict or prohibit political opposition to a greater or lesser degree, by restricting the activities of opponents by arrest, detention and sometimes trial for political reasons, and by prohibiting membership of certain parties, usually left-wing or Islamic organisations. Related to restriction of political

activity is the banning, in some Arab countries, of trade unions, which represents a restriction on the right of large parts of the population to defend their economic, political and social interests, as well as breaches of the rights of freedom of association and assembly. Another striking violation of the right to freedom of association in some Arab countries which has very serious implications for justice is represented by the abolition of lawyers' associations in Syria, Libya and Egypt.

Forms of restriction of political opinion and expression may be more clearly in breach of Article 19 of the ICCPR, but in my opinion, laws which seek to restrict or outlaw political opposition may also be regarded as arbitrary in the sense that they are often unjust (according to internationally accepted legal norms) and their practice is incompatible with respect for other human rights, particularly the basic right of liberty and security of person, which, ironically, is safeguarded in almost all Arab constitutions. Arrest and detention of individuals on the basis of their political opinion is a violation not only of their political rights, but also of their fundamental human right to liberty and security of person.

Restriction on political opposition in Arab states ranges from a ban on all political parties, as for example, in Saudi Arabia, to banning of specified parties, such as the Communist Party and other left-wing parties in most states, or less specific bans, as for example, in Egypt, a ban on organisations which "seek...to overthrow the basic national, social and economic orders, or to destroy any of the fundamental orders of society, or if...the use of force or terrorism or any other illegal

means is evident.."[114]

In some states opposition to or criticism of the government is an offence, for example in Syria, Decrees Nos 6 & 7 of January 1965 (still in force) prescribe :

- a mandatory death penalty for certain specified forms of collusion in verbal or physical acts hostile to the aims of the Ba'thist revolution...incitement..to demonstrations;
- non-mandatory death sentence for "actions held to be incompatible with the implementation of the socialist order in the state whether they are written, spoken or enacted, or come about through any means of expression or publication"
In Syria, according to Decree No. 49 of July 1980 (which is retroactive), membership of the Muslim Brotherhood is a capital crime.[115]

States of emergency have been in force for a number of years in some Arab states : in Syria martial law has not been lifted since its imposition in 1962, and in Jordan martial law has been in force since 1967, while in Egypt there has been an intermittent state of emergency for at least the last ten years. In each of these countries the state of emergency has seriously undermined protection for the individual's right to liberty and security by concentrating extensive powers of administrative detention in the hands of the Executive, for example, the Martial Law Governor in Syria, and the Prime Minister and President in Jordan and Egypt respectively. This has had the result of extending wide powers of arrest and detention to members of the security forces, and effectively taking means for the protection of individuals' rights out of the hands of the judiciary, as, for example, in Egypt where the President has taken over the role of hearing appeals against continued detention

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114, Article 98A of the Egyptian Penal Code Egypt ; violations of human rights An Amnesty International Report, p31
115, States of emergency ; their impact on human rights A study prepared by the International Commission of Jurists, 1983, p285

by the security forces from the judicial power, as we saw in my examination of procedures for appeal against detention in Egypt.

Preventive detention under emergency legislation is usually based on a real or perceived threat to national security. Thus the Martial Law Decree in Syria permits the Martial Law Governor to order the "preventive arrest' of anyone suspected of endangering public security and order".[116]

I will examine the practices of some Arab states in the light of the demonstration of the international instruments and national legislation safeguarding the right of the individual to be free from arbitrary arrest and detention, using the information available. I will analyse the practices according to the approach I used at the international and national level, beginning with procedures of arrest, then passing to the legal rights of detainees, including the right to a trial within a reasonable time, the right to challenge their detention through the judicial system, and their right to seek compensation for arbitrary arrest or detention.

116, Article 4 (a) of Legislative Decree Number 51 of 22nd of December 1962 Report from Amnesty International to the government of the Syrian Arab Republic, 1983, p50

1. Procedures of arrest :

According to Amnesty International, in some Arab countries, the procedures of arrest contained in the ordinary legislation, for example, the necessity for a warrant issued by a competent judicial or administrative authority, the requirement to inform the arrested person of the reason for his arrest, and the right of the arrested person to communicate, for example, with a lawyer, may not always be fully observed in the practice of arrest.

The arrest process in cases in Egypt in 1979 and 1981, reported by Amnesty International, falls short of these procedures, for example, by the lack of warrants for arrest and the failure of the arresting authority to tell the reason for the arrest. In another case in 1981, according to Amnesty International, the arrested man was not given the opportunity to contact his lawyer or his wife to tell her what had happened.'[117]

According to Amnesty International, allegations have been received of arbitrary arrest, carried out without warrants, of suspected opponents to the Iraqi government.'[118]

According to Amnesty International there is often breach of emergency law procedures in Syria in respect of warrants for preventive arrest. Arrest without authorisation or legal warrants is allegedly carried out by the security forces. In most cases of arrest of political prisoners

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117, Egypt ; violations of human rights An Amnesty International Report, 1982, pp10-11
118, Amnesty International Report and Recommendations of an Amnesty international mission to the government of the republic of Iraq 22-28 January 1983

which have come to the attention of Amnesty International no warrant or other authorising document was produced at the time of arrest.[119]

2. Pre-trial detention :

According to Amnesty International, legal provisions which regulate the period for which a person may be detained without charge or trial may not be observed strictly in practice in Arab countries, particularly in cases of detention for political reasons.

According to Amnesty International, in Syria, some individuals have been in preventive detention for more than twelve years, and many more have been in detention without trial for between eighteen months and eight years.[120]

According to information received by Amnesty International from former detainees in Syria, the security forces have blank Preventive Detention Orders signed by the Deputy Martial Law Governor to which the names of detainees may be added at arrest.[121]

According to Amnesty International, the organisation believes that there has been long term detention without trial of people arrested on political grounds in 1982 and 1983 in Morocco.[122]

According to Amnesty International, political prisoners in Bahrain have been detained for long periods without charge or trial. At least six have been held without charge or trial for between three and eight years under the Decree Law on State Security Measures of 1974.

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119. Amnesty International Amnesty International Report 1984, p338
120. Report from Amnesty International to the government of the Syrian Arab Republic, 1983, p18
121. ibid, p20
122. Amnesty International Amnesty International Report 1985, pp303-4

The Minister of the Interior denies that they are political prisoners, saying that "...each one is detained in custody strictly in accordance with the laws of the state", but as Amnesty International points out, six of the prisoners have not been charged or tried.[123]

In May 1983, when Amnesty International raised the issue of prolonged pre-trial detention with the Egyptian government following reports that some individuals had been held without charge or trial for periods in excess of one year in connection with the Jihad case, the Minister of the Interior replied that only 40 people remained in detention. In October 1983, the Egyptian Ministry of Justice stated that the number of detainees stood at twenty-seven.[124]

In Iraq, according to Amnesty International, political suspects are detained in the custody of the state security forces without charge or trial. In discussions with Iraqi officials in 1983, Amnesty International stated their concern that it had been alleged that arrest and detention procedures contained in the Code of Criminal Procedure were disregarded for political suspects. In response, the Iraqi government denied that political suspects were held and stated that no one could be held except on a warrant issued by a court. Nevertheless Amnesty International believes that in many cases arrests are carried out arbitrarily and without warrants, but comments that the full extent of the practice is unknown because of the failure of the Iraqi authorities to acknowledge, explain or record arrests.[125]

123, ibid, p305
124, Amnesty International Amnesty International Report 1984, p330
125, Amnesty International Amnesty International Report 1984, pp336-338

According to Amnesty International, under provisions of martial law in Jordan, there has been prolonged detention without trial of political prisoners. Under the provisions of martial law political prisoners may be held for long periods without trial and Amnesty International has information that some individuals have been held for more than four years. Even so, the Jordanian Prime Minister has reportedly instructed "...the competent body not to detain anyone longer than is absolutely necessary" and on another occasion, he denied that any political prisoners were held in Jordan, saying :

"The issue is related to national security,,,Any detainee is detained for security reasons,,,He is not detained just because he has a certain ideology, He is detained because he transforms this ideology into action".[126]

In Lebanon, according to Amnesty International, detention without trial or charge is carried out by the Lebanese government as well as militias, including Amal, Druze and Phalangist groups. Some "detainees" could be described as hostages while others are allegedly detained for disciplinary reasons.[127]

According to Amnesty International, in Libya hundreds of people have been arrested arbitrarily since 1980, for their political or religious belief, ethnic origin, or relationship with opponents of the government. In most cases, it is impossible to establish the basis of their detention, as they are usually held without charge or trial or else the charges are so vague, it is not clear whether they are charged with a specific offence.[128]

126, Amnesty International Amnesty International Report 1985, p320
127, ibid pp323-5
128, Amnesty International Amnesty International Report 1984, p351

In Saudi Arabia, according to Amnesty International, detention and trial procedures, having no habeas corpus provision, lead to long delays in charge and trial procedures. Political detainees are often held incommunicado or in solitary confinement for periods ranging from a few months to over a year, while the police or prosecutor carries out investigations and prepares for trial.[129]

According to Amnesty International, incommunicado detention is a wide spread practice throughout the Arab world, for example, in Morocco, under the procedure known as garde à vue, a detainee suspected of endangering internal or external security may be held incommunicado for up to eight days, with a possible four day extension, as a result of amendments to the Code of Penal Procedure of 1959. In practice, it seems that it may be indefinitely prolonged as the courts have often rejected appeals against prolonged detention. As a result, there is a lack of safeguard in regard to access to a lawyer.[130]

Amnesty International has information that twelve students have been held incommunicado since January-February 1983.[131]

In 1982, according to Amnesty International, more than two hundred people were held in incommunicado detention for a long period without charge or trial from a large variety of political groups and sections of the population.

129, Amnesty International Amnesty International Report 1985, p334
130, Amnesty International Report of an Amnesty International Mission to the Kingdom of Morocco, 10-13 February 1981, 1982 pp8-9
131, Amnesty International Amnesty International Report 1985, p332

A similar procedure of garde à vue detention is practised in Algeria, where Amnesty International reports that political prisoners held since 1983 were held in garde à vue detention for longer than the law allows.[132]

Amnesty International also reports the practice of long-term incommunicado detention under martial law in Syria. According to Amnesty International, who mention a number of cases,[133] *there seems to be no limit to the period for which the security forces may hold someone incommunicado under the state of emergency legislation. The period may be from a few days to several years.*

In Libya, Law No. 81 of 1975 permits detainees to be held in solitary confinement for unlimited time.[134]

3. judicial control of detention :

Effective judicial control is essential to safeguard the rights of those arrested or detained. However, when the independence and competence of the judiciary is restricted, by measures under state of emergency and by measures taken by the Executive to protect security, for example, administrative detention, as well as by the establishment of "courts" which are outside the ordinary judicial framework, this effective safeguard of the individual's rights is considerably weakened. Examples of a lack or restriction of effective judicial control may be found throughout the Arab countries.

132, Amnesty International Amnesty International Report 1985, pp303-304
133, Report from Amnesty International to the government of the Syrian Arab Republic, 1983 pp22-23
134, Human Rights Journal Vol 4 No. 1

The state of emergency has lead to the establishment of State Security Courts and Military Courts in Syria, which deal with cases related to national security and public order. Amnesty International comments that there is no legal right to challenge the lawfulness of arrest in court nor make any judicial appeal against wrongful detention, because according to Article 4 (a) of the State of Emergency Law, the Deputy Martial Law Governor decides whether to hold any arrested person in preventive detention, whether to refer the case to a military or state security court, or whether to order release, and appeals may only be made to the local security force commander, the Deputy Martial Law Governor or the President.[135]

Other courts established outside the ordinary legal framework include the "revolutionary" courts set up in Iraq and Libya. In Iraq, according to Amnesty International, the Revolutionary Court in Baghdad is a permanent special court which tries crimes against internal and external security, and the Special Military Court in Kirkuk is a permanent military court which tries Kurds charged with political offences. Revolutionary courts are also established on a temporary basis to deal with particular cases. Amnesty International believes that the revolutionary courts operate outside national and international law, since they are not independent of the military and the Ba'ath party, and their members have little or no judicial experience, often making judgements on political grounds. Another factor which appears to be lacking is an adequate right of defence, since Amnesty International has

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135, ibid pp20-21

received reports of accused persons not having access to lawyers until the day of trial, with the result that lawyers are not able to provide adequate legal counsel. There is no right of appeal to a higher judicial body, even in capital cases. Appeals for clemency may only be made to the Office of the President.[136]

In Libya, the ordinary legal system has been largely replaced by "People's Courts". Most proceedings are held in camera and in the absence of the defendants. The independence of lawyers and their freedom to defend political detainees effectively has been undermined by Law No. 4 of 1981 which abolished the private practice of law. "Revolutionary courts" are said to sit ad hoc, without or else with severely restricted defence facilities.[137]

Amnesty International has expressed its concern about the proceedings of "Basic People's Congresses". It seems that summary executions are carried out in the People's Congresses after the reading out of confessions.[138] *It seems also that defendants are not represented by defence lawyers and there is no possibility of appeal, indeed prisoners are sometimes retried after acquittal, and sentences made more severe, in some cases being changed to death penalties.*[139]

136, Report and recommendations of an Amnesty International Mission to the government of the Republic of Iraq 22-28 January 1983,,,, pp12-18

137, Human Rights Law Journal Vol 4 No,1 pp79-82

138, Eight people suspected of being anti-government were publicly hanged in June 1984, They were found guilty of being members of the Muslim Brotherhood and "agents of America", Several were shown making confessions and then being hanged on Libyan television, Two prisoners were alleged to have been hanged within an hour of their arrest,
Amnesty International Amnesty International Report 1985, pp327-330

139, ibid,

4. compensation :

As we saw, when I examined the national legislation, some countries provide the individual with the right to claim compensation for alleged wrongful arrest or detention. Nevertheless, it seems that this right is not widely practised, but an example may be drawn from Egypt, where compensation was paid in 1983 in respect of wrongful imprisonment, and torture.'[140] It could be said that such judgements reflect political change in Egypt as much as progress in improving safeguards for the rights of individuals.

140, Amnesty International Amnesty International Report 1984, pp331-332

PART TWO

LEGAL ANALYSIS OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT :

SECTION A

IN THE LIGHT OF THE INTERNATIONAL INSTRUMENTS

(1) basic documents

(2) declaration and convention against torture

The progress of civilisation brought with it in the last twenty years violence in all its frightening forms, and modern techniques, derived from misuse of science, increased the cruelty and horror of the methods of torture used. As L. Pettiti, President of the Paris Bar Association, described the transformation from "civil servant ..[to] violent policeman...common soldier.. [to] the brutal torturer... the free citizen.. [to] the man who is not free to speak."[141] "It is not without reason that the International Committee of the Red Cross has described torture as a cancer which attacks the very foundations of our civilisation. To fight this cancer, all possible means should be used..."[142] "If a legal mechanism could enable even one nation to resist the temptation of torture, it would deserve our support and total committment."[143] The question of torture and cruel, inhuman or degrading treatment or punishment becomes every day a more striking matter worldwide, the proof being the adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the General Assembly of the United Nations in December 1984, followed in 1985 by the appointment of a Special Rapporteur to monitor torture cases.[144]

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141. Martin, Eric "Torture, a disgrace in our day" in Torture ; how to make the international convention effective International Commission of Jurists 1980,pp14-15
142. and 143. ibid
144 The 1985 session of the Commission on Human Rights at Geneva requested the appointment of a Special Rapporteur to monitor torture cases UN Chronicle XXII,3 March 1985, p19

These measures show the continuing committment of the international community represented by the Commission on Human Rights to the prohibition and elimination of torture. The decision that the Special Rapporteur should seek and receive "credible and reliable information" from governments, specialised agencies, intergovernmental organisations and nongovernmental organisations,[145] *will reduce the opportunity for states to suppress information about violations in their own territory, while concentrating on violations in other states, as well as considerably widening the range of sources of information on violation of this right, wherever and whenever it occurs.*

The prohibition of torture and cruel, inhuman or degrading treatment or punishment is a basic human right, stated in several international documents, starting with the UDHR, Article 5,

"No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment,"

There is a wide acceptance by writers that the UDHR is now a part of customary international law. "..it is clear that, for an ever-increasing segment of the international community the abolition of torture is no longer merely a moral obligation, emanating in particular from the Universal Declaration of Human Rights, but rather a legal obligation of international law".[146] *The Common Article of the four Geneva Conventions*[147] *is another international instrument which contributes to the protection of individuals from torture and cruelty in time of war.*

145, Resolution 1985/33, UN Chronicle XXII,3 March 1985,
146, "The case for an effective and realistic procedure" by Jean-Jacques Gautier in Torture: how to make the international convention effective, ICJ 1980, page 31
147, Friedman, The law of War : a Documentary History Vol 1, p571

The ICCPR prohibits torture in Article 7 which states : "No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

In particular, no one shall be subjected without his free consent to medical or scientific experimentation",

More specific action against torture came in 1975 with the adoption of a Declaration against torture by the UN. The Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations in Resolution 3452 (XXX) in December 1975.

Article 2 states :

"Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights,"

and Article 3 states :

"No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances, such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justificationof torture or other cruel, inhuman or degrading treatment or punishment."

Another international step in the struggle against torture and cruelty of all kinds and those who practise it is represented by Resolution 32/64 of December 1977 in which the General Assembly of the UN asked states to support the Declaration, and to put it in action through domestic legislative machinery. It is worthwhile to mention that a number of Arab countries[148] accepted this declaration during 1979 and 1981.

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148. The countries were Egypt, Iraq, Qatar, Democratic Republic of Yemen

All the mentioned instruments testify to the fact that the international conscience condemns all sorts of inhuman treatment. The most ambitious attempt so far to outlaw the practice is found in the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, where the international community, as represented by the United Nations, defined torture[149] and attempted to bind States Parties to take effective measures to prevent it.[150] The Convention defines torture as a punishable offence and provides guidelines to States Parties for action to prevent it, and punish those responsible for inflicting it. It also sets up machinery for monitoring the application of the Convention.[151]

The international community in general welcomed the birth of a new instrument to protect this right, containing an implementation system that is more effective than those already existing in the field of human rights in general, and in particular the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment. The urgent need to strengthen the existing machinery for more effective protection of this right was a striking matter expressed by the United Nations on

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149, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1
150, Article 2, paragraph 1, ibid
151, The Convention provides for the establishment of a Committee, along similar lines to the Committee which monitors the implementation of the ICCPR, The Committee will consider reports submitted by States Parties on measures they have taken to implement the Convention, and to make general comments on them (Article 19)

several occasions, such as the Declaration of 1975[152], the call for unilateral declarations in 1977[153], leading to the adoption by the General Assembly in December 1984 of the Convention against Torture.

I will examine the discussions which took place during drafting of this instrument, as this will show both the spirit of compromise in which some states approached the task of creating an effective instrument and the issues on which agreement proved difficult to reach, due to lack of willingness to be legally bound.

The principal issues which arose during the seven-year drafting period for the Convention against Torture included the question of whether the monitoring system envisaged as part of the implementation of the Convention should be optional or mandatory, as well as the scope of the Committee which was established under Article 17 to oversee the working of the Convention, and the question of universal jurisdiction as provided in Articles 5 to 9.

On the question of universal jurisdiction as provided in Articles 5 to 9, there was a major change of position by some states from opposition and reservations during 1983 to general agreement in 1984, due in some states to political change, as for example, in Argentina.[154]

152, General Assembly Resolution 3452 (XXX).
153, Resolution 32/64 of 8th December 1977.
154, E/CN.4/1984/72, page 5

The Scandinavian countries supported universal jurisdiction, for example, the Netherlands'[155] welcomed the establishment and exercise concerning extradition and mutual assistance between states concerned. The Norwegian government'[156] emphasised the importance of universal jurisdiction as a major development in the effectiveness of such a Convention. Other European countries, including France'[157], attached importance to "universal jurisdictional competence".

Other countries, like Australia'[158], had some reservations about the provisions regarding universal jurisdiction, but did not see it as a major obstacle.

Another major issue in the discussions between members of governments arose in regard to the implementation and monitoring procedures. An original intention of the drafting committee was to make this new instrument a significant inprovement on previous instruments in regard to the implementation and monitoring system.

This was to be achieved by extending the competence of the Committee in monitoring the reports of states, and significantly, including the right to carry out enquiries, as well as the general point that the Comittee would be concerned with the right of torture alone, unlike the Human Rights Committee, who deal in general with the whole range of human rights. All these considerations in theory significantly improve the effectiveness of the Committee, and enhance the effective implementation of the instrument.

155, A/39/499 of 2nd October 1984, page 12
156, ibid page 14
157, ibid page 8
158, ibid page 4

While many countries attached great importance to the adoption of an effective system of implementation, some countries, for example, the USSR, strongly objected to such a system being mandatory. They argued that Articles 17-24[159] should have an optional character, on the basis that, in their view, such obligations were "not necessary for those states which were already bound by the implementation provisions of the International Covenant on Civil and Political Rights, and that therefore the proposed Committee against Torture would not have much work to do"[160]. They proposed therefore that these provisions should be included in an optional protocol. In my opinion, this would have had the same result as the Optional Protocol to the ICCPR in reducing the effectiveness of the instrument. The Soviet delegation also commented that, in order that the Convention should gain worldwide support, it might be easier for some states to become parties to the Convention if it did not contain mandatory implementation procedures. During the fortieth session, the USSR delegate at the working group dropped his insistence that <u>all</u> implementation should be optional, accepting mandatory provisions for the creation of an implementation organ and reporting by States Parties, while maintaining his objection to the mandatory character of Article 20[161]. As it was clearly a matter of concern to several countries, whether participating in the draft working group, or commenting on the 1984 draft Convention, it is worthwhile to examine the elements of

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159. E/CN.4/1983/63 Annex
160. E/CN.4/1983/63 Page 8
161. E/CN.4/1984/72, page 9

Article 20 which caused concern. Article 20 states :

1. If the Committee receives information which appears to it to contain reliable indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to submit observations with regard to the information concerned...

The first element concerning the competence of the Committee to receive information from different sources concerning the violation of this right in certain countries caused concern to some countries. For example, in the Arab world, the Iraqi government considered this competence as interference in States' internal affairs and a threat to sovereignty.[162] *Also, the delegate of Burundi*[163] *raised the question of the nature of the sources from which the Committee would receive information, and the question of how the Committee should judge its reliability. These worries cannot be considered as serious issues in my opinion, as Article 17, paragraph 1 defines the qualities required of elected Committee members as including expertise, high moral standing and recognised competence in the field of human rights. It also provides that they should serve in their personal capacity, rather than as government representatives, and that legal experience would be useful in those experts.*

2. Taking into account any observations which may have been submitted by the State Party concerned as well as any other relevant information available to it the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

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162. A/39/499/Add.1, of 24th October 1984, page 8
163. ibid page 3

This paragraph of the Article gives the Committee more flexibility to receive information from other sources than the State Party, which puts States under double control regarding the information they submit to the Committee. There is no justified fear in regard to this competence, especially as inquiries are on a confidential basis.

3. If an inquiry is made ...the Committee shall seek the cooperation of the State Party concerned. In agreement with that State Party such an inquiry may include a visit to its territory.

Bearing in mind that the Committee will carry out the inquiry in regard of reliable information in regard to systematic practice of torture in states, with the cooperation of states, only visiting the state with the agreement of the government concerned, the fear of certain governments that this threatens their sovereignty and constitutes interference in internal affairs seems unfounded.

5. All the proceedings of the Committee referred to in paragraphs 1-4 shall be confidential...the Committee may, at its discretion, decide to include a summary account of the results of the proceedings in its annual report made in accordance with Article 24[164]

Another comment could be made in regard to the reporting to the General Assembly. The focus of attention on massive human rights violations in a particular country, may create a sense of shame for States and might help them to improve their record in respect to human rights.[165]

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164. Article 24 : The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly.
165. Human rights in the world A.H. Robertson p33

Meanwhile, other delegations held the opinion that all implementation procedures should be mandatory, as the effectiveness of the Convention depended on the strength of these procedures. They considered that making aspects of implementation optional would seriously undermine the effectiveness of the struggle against torture, by allowing varying degrees of obligation on States Parties. The United States commented that it was no longer acceptable "for a government to claim that the way it treats its citizens is solely an internal matter if the treatment in question [violates] international instruments which set human rights standards."[166] *In addition, Canada observed that States need not fear Article 20, as investigations of torture allegations inside States' territory could only be carried out with the consent of the State Party. They commented further that it could be regarded as a "positive opportunity for those member States which suffer periodically from unsubstantiated charges that they are engaged in the practice of torture" to refute such allegations.*[167]

166, UN Chronicle XXII,1 1985 p33
167, ibid

In the event, it was only the part of implementation relating to inquiries which emerged with an optional character, with the adoption by the Third Committee in November 1984, of the proposal of the Byelorussian SSR, which gave States the option of declaring that they did not recognise the competence of the Committee under Article 20. This provision was incorporated in the Convention as Article 28.[168]

Article 28 states :

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognise the competence of the Committee provided for in Article 20,

2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time withdraw this reservation by notification to the Secretary-General of the United Nations,

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168, ibid,

Another observation could be made, that it was noted by the Iraqi government'[169] and the British government'[170] amongst others that the definition in article 1 is inadequate. The Iraqi comment on the draft convention pointed out that "cruel, inhuman or degrading treatment or punishment" is included in the title but not defined in the instrument, while the British comment found the definition of torture "rather loose and susceptible to subjective interpretation". In regard to Article 1, the United Kingdom and others criticised the reference to "lawful sanctions", with most countries noting that it should be understood that such sanctions must be lawful under the principles of international law as well as national law. I will examine this point in more detail when I discuss the acts which constitute "torture" and "cruel, inhuman or degrading treatment or punishment" from the international point of view.

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169. A/39/499/Add.1 of 24th October 1984, p8
170. A/39/499 of 2nd October 1984, p19

The General Assembly, Resolution no 39/46, on 10th December 1984, adopted the Convention, and opened it for signature.[171] *To date, more than thirty states have signed this instrument, amongst them, Algeria and Morocco.*[172] *This instrument was welcomed by the General Assembly, as the Secretary-General of the United Nations, Perez de Cuellar, commenting on the adoption of the Convention, said,"The world community has thus outlawed once and for all the abominable practice of torture."*[173]

When the Secretary-General asked for comments on the 1984 draft of the Convention, from the Arab countries, Iraq replied in October 1984,[174] *expressing that the spirit of the Convention conformed to that of the Iraqi Constitution and legislation in force but at the same time they had certain observations concerning Article 20 of the draft, as they considered it an interference in internal affairs and an infringement of the sovereignty of States. They also had some reservations with regard to universal jurisdiction as provided in Article 5, 6 and 7 of the draft convention. They also expressed their fears in regard to the implementation of Article 3 in regard to extradition, in that it might affect relations between states, commenting that the provisions of Article 8 were unnecessary. They commented, as I said, on the title concerning the lack of definition in Article 1, of cruel, inhuman or degrading treatment or punishment.*

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171. UN Chronicle XXII,1 1985, p31
172. UN Press Release L/T/3742 of 4th February 1986
173. UN Chronicle XXII,1 1985, p31
174. A/39/499/Add.1 of 24th October 1984, p8

Another Arab country, Syria, replied on 30th October 1984[175], saying that they had no substantive observations to make on the draft, but they considered it a progressive step for protection of humanity and human dignity from arbitrariness and injustice, and for "the extirpation of torture and that degrading treatment which is incompatible with fundamental human rights".

In spite of the spirit in which these two countries welcomed the new instrument, neither of them has signed it as yet.

I have examined the international instruments which contain protection from torture and cruel, inhuman or degrading treatment or punishment. However, as human rights and freedoms could be threatened in the time of state of emergency, it is worthwhile to examine the international provisions which protect rights and freedoms in such circumstances.

From a legal point of view, internationally and nationally, freedom from torture or other cruel, inhuman or degrading treatment or punishment should not be threatened or abrogated at the legislative level as it is one of the most important rights. Legally, the state of emergency or state of war does not justify derogating from this right. So in any circumstances whatsoever protection from torture and ill-treatment is absolute and sacred.

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175. A/39/499/Add.2 of 6th November 1984, p2

As we saw, intime of war, torture of persons taking no active part in the hostilities is absolutely prohibited by the Common Article 3 of the Geneva Conventions.

Limited derogation from certain obligations on States Parties to the ICCPR, is allowed in specific circumstances and with consideration of certain conditions, specified in Article 4, which I examined in my discussion of arbitrary arrest and detention.

It specifies that :

> 2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.

Therefore, according to Article 4 of ICCPR, the right not to be tortured is not derogable under any circumstances.

One can also mention a "general comment" of the Human Rights Committee, that it considers :

> "measures taken under Article 4 are of an exceptional and temporary nature, and may only last as long as the life of the nation concerned is threatened and that in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogation can be made."[176]

As we saw, the Convention aginst Torture reconfirms that this right is not derogable under any circumstances. According to Article 2, paragraph 2 of the Convention "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as justification of torture."

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176. Amnesty International Report from Amnesty International to the government of the Syrian Arab Republic, pages 2-3

SECTION B

IN THE LIGHT OF NATIONAL INSTRUMENTS

At the national level, the prevention of torture is codified in the Constitution and other legislation such as the Penal Code and the Code of Criminal Procedure in most Arab countries. Some of them took the further step of incorporating the international instrument (ICCPR) into their own legal system. For example, Article 151 of the Egyptian constitution provides that conventions to which Egypt accedes have the effect of law.[177] *The Syrian constitution contains a similar provision.*[178]

I will examine the domestic jurisdiction of some Arab countries, in order to evaluate the understanding of those states towards the prohibition of torture, cruel, inhuman or degrading treatment in theory and in practice, and to confirm the awareness of the internationally accepted standards of human rights, starting with the Arab Republic of Egypt.

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177. CCPR/C/26/Add.1/Rev.1, p2
178. Article 71 of the Syrian constitution states ; "The People's Council shall exercise the following powers; ...to approve international treaties and agreements..." , CCPR/C/1/Add.31, p1

As I mentioned, Egypt not only signed and ratified the ICCPR, but also entered it into its legal system as an expression of its committment to promote and respect human rights. The Egyptian report to the Human Rights Committee[179] submitted under Article 40 of ICCPR, emphasised this committment, stating :

> "Egypt's accession to the International Covenant on Civil and Political Rights on 14th April 1982 was an indication of its belief in the cause of human rights and in the need to protect the sacrosanct nature of the human personality and dignity. It was also an expression of Egypt's conviction that a sincere belief in the need to protect, and promote respect for, human rights is the only way to ensure the development of Egyptian society in a manner conducive to a decent life in a community governed by love, justice and equality."

This statement shows the Egyptian understanding of the international concept of human rights, and their committment to the international instrument. The principle of the sovereignity of the law, according to Article 64 of the Egyptian Constitution, is the basis of rule in the State. By examining the provisions of the constitution, we find that protection of human dignity is a basic element of Egyptian law.

In Article 42[180], it clearly specifies that anyone whose freedom is restricted must be treated in a manner in accordance with respect

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179. CCPR/C/26/Add.1/Rev.1, p2
180. CCPR/C/26/Add.1/Rev.1, of 16th March 1984 p3

for human dignity, and further provides that no mental or physical harm may be inflicted upon detainees. Article 57[181] provides for the compensation of victims. Article 126 of the Penal Code[182] prohibits torture, and the torturer may be punished by imprisonment, from three to ten years.[183]

In regard to article 57, one could mention examples of the implementation. Thus in 1983, compensation was awarded to people who had been tortured in the 1950s and 1960s.[184]According to the Egyptian response to questions from the Human Rights Committee[185], other provisions could be found in administrative aspects of the Egyptian legal system, such as obligatory medical examination to determine that a prisoner had not been subjected to maltreatment

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181, Amnesty International Torture in the Eighties, 1984, p228
182, ibid,
183, In 1976, a number of officials were convicted of torturing prisoners during the 1960s, including Salah Nasr, former Chief of Intelligence, who was sentenced to ten years imprisonment plus hard labour for ordering the torture of the writer, Mustafa Amin, Amnesty International Report 1984,
184, In April 1975, a Cairo court ordered the Egyptian Minister of War to pay $ 75 000 in damages to lawyer Ali Greisha, who alleged that he had been tortured in the Cairo Military Prison in 1965 and in 1966 before being sentenced to twelve years hard labour for "anti-government activities", The Court further suggested that four former ministers of justice be tried on charges of having condoned torture and the degradation of Egyptian justice under President Nasser in the late 1960s, Finally, the court asked President Sadat to order the demolition of Cairo Military Prison "as a monument to the humiliation of the Egyptian people,"
Review of the International Commission of Jurists No 16 June 1976 p36
In April 1983, two Cairo courts awarded £ E 40 000 and £ E 25 000 respectively to a lawyer and a teacher who were tortured following their arrests in 1954 and again in 1965, In May, the Cairo Court of Appeal awarded two retired army officers £ E 60 000 as compensation for their imprisonment and torture during the 1960s, The Court of Appeal also awarded £ E 20 000 to a former army major and his family as compensation for the torture he suffered during 1962, Amnesty International Report 1984
185, Report of the Human Rights Committee General Assembly Official Records, 39th session Supplement No, 40 (A/39/40) p58

TUNISIA

Tunisia shares with Egypt the inclusion of rules of international origin in its domestic legislation, as it is party to various international instruments concerning human rights, and according to Article 32 of the Constitution of 1959[186], such laws become part of national legislation.

The Constitution stresses the importance of protecting human rights and freedoms in the preamble, saying that "people are determined to ... uphold human principles, accepted among peoples who safeguard human dignity, justice and freedom". This is the basis of Tunisian legislation in protecting personal integrity, whether physical or moral. Article 5 of the Tunisian Constitution protects the person against his physical integrity.[187] Article 101 of the Penal Code[188] provides severe penalties for any public official, who in exercising his duties, unlawfully uses or causes violence or ill-treatment against any person; uses or causes violence or ill-treatment to obtain confession or statement from an accused person. Article 103 of the Penal Code also punishes threatening such behaviour.

186, CCPR/C/28/Add.5, 8th May 1985, p1
187, ibid, p7
188, ibid, p11

KINGDOM OF MOROCCO

In certain areas, Morocco gives precedence to international law over internal law.[189] As in the other countries I mentioned, this means that the provisions of the ICCPR has become part of the Moroccan legal system, since 3rd August 1979, when it entered into force for Morocco. The preamble of the Constitution confirms this principle, but Article 31[190] lays down the condition that such instruments should not affect "the provisions of the Constitution".

The Moroccan Constitution of 10th March 1972, provides in Article 10[191] :

"that no one shall be liable to,,,punishment, save in the cases and in the manner prescribed by law" However, there is no article which directly prohibits torture, but the Criminal Code and the Code of Criminal Procedure protect the dignity of individuals against any possible abuse of authority, as Articles 224-232 of the Moroccan Criminal Code protect against "abuses of authority committed by officials against individuals". Thus Article 231[192] states :

"Any magistrate, public official, or any superintendent or other officer of the public authorities or the police who, without lawful reason commits or causes to be committed acts of violence against persons, in or in connection with the exercise of his duties, shall be punished for such acts of violence according to their seriousness..."

The Moroccan legislative system also contains a number of administrative texts which are applied in punishing acts of torture and violence committed by police officers, through the channel of the Directorate-General of the Surêté Nationale.[193]

189, Article 31 of the Moroccan Constitution of 10th March 1972, in CCPR/C/10/Add.2, p4
190, ibid, p5
191, ibid, p15
192, ibid, p15
193, ibid, p15

KINGDOM OF JORDAN

The Jordanian Constitution, as others, guarantees the dignity of the individual, and the laws of Jordan prohibit torture or cruel, inhuman or degrading treatment or punishment, prosecuting persons who commit such acts, whether official or otherwise, according to the provisions of the Jordanian Criminal Law No 9 of 1961.[194] This also contains the provision, in Article 159, which states that evidence procured by torture or cruelty is not admissible in a court of law. The Code of Court Procedure, in Article 159, provides that any confession of guilt made by an accused person, in absence of the Public Prosecutor, shall be accepted only if the prosecution provides evidence concerning the circumstances in which the confession was obtained. This will again be controlled by the Court, to ensure that the confession was given by the free will of the accused.[195]

It seems that the current status of the Jordanian Constitution and the implementation of the ICCPR is very much affected by the Middle East problem, affecting the country's development, in particular in the political and economic spheres, and as a result, the protection of human rights. The Jordanian government, in its report to the Human Rights Committee in 1981, admitted that some aspects of legal protection of fundamental rights and freedoms had been restricted as a result of the security situation.

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194. CCPR/C/1/Add.55 of 7th August 1981, p3
195. CCPR/C/1/Add.56 of 25th January 1982, p9

The Jordanian government, commenting in regard to protection from torture and other cruel treatment, recognised that excesses were sometimes committed by some public security personnel but pointed out that such acts were condemned and outlawed.[196]

SYRIAN ARAB REPUBLIC

The Syrian constitution of 31st January 1973 states that as soon as an international convention, treaty or agreement is duly ratified and promulgated, it becomes part of the Syrian legal system.[197]
Thus Article 71 states :

> *"The People's Council shall exercise the following powers :*
>
> *....*
>
> *5, To approve international treaties and agreements which concern State security,,,or which run counter to the provisions of the laws in force or whose execution calls for the promulgation of new legislation."*

In regard to human rights protection, the preamble to the Syrian Constitution[198] *stipulates that:*

> *"Freedom is a sacred right, and popular democracy is the ideal formula which ensures for the citizens the exercise of their freedom, which makes them dignified human beings capable of giving and building, defending the homeland in which they live and making sacrifices for the sake of the nation to which they belong."*

196, Report of the Human Rights Committee General Assembly Official Records Thirty third session Supplement No 40 (A/33/40)
197, CCPR/C/1/Add,31 of 12th July 1978, p1
198, Report from Amnesty International to the government of the Syrian Arab Republic 1983

It seems that the Syrian legislator gave special attention to torture and degrading treatment by including it in the constitutional level in the Syrian legal system. It is described as a punishable offence. This shows a different style of domestic protection than the other countries I mentioned, where protection of the physical integrity of the person is included in general terms at the constitutional level, while the specific prohibition of torture occurs in Codes. Article 28, paragraph 3 of the Syrian Constitution states :

> *"No one shall be tortured physically or mentally, nor be subjected to degrading treatment. The law shall define the punishment for anyone who commits such an act."*[199]

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199. Report from Amnesty International to the government of the Syrian Arab Republic 1983

SECTION C

ANALYSIS OF THE RIGHT OF PHYSICAL INTEGRITY

(1) torture

(2) inhuman treatment

(3) degrading treatment

(4) degrading punishment

Now that I have examined the international and national instruments which prohibit torture and cruel, inhuman or degrading treatment or punishment, it is important to know what constitutes these acts and to analyse the international understanding as to the nature of these acts. I will begin with the definitions contained in the United Nations instruments concerned with torture, the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1975 (Declaration), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (Convention). As a result of the incompleteness of definitions contained in the international and national instruments, I find it necessary to examine the practices of the European Commission of Human Rights and the European Court of Human Rights which shed light on the content of torture and other forms of ill-treatment and the acts which constitute them.

TORTURE

The United Nations General Assembly's definition of torture can be found in the Declaration of 1975. Article 1, paragraph 1 states :

> ...torture means any act by which severe pain or suffering, whether physical or mental is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person, information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions, to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
>
> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

The definition contained in the Convention of 1984 states :

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

Therefore, it seems that the act of torture comprises a number of factors in combination. The basic act is

1. the infliction of severe mental or physical pain or suffering, with
2. intention,
3. by a public official
4. for a purpose (a) of obtaining information; or
   (b) confession;
   (c) as a punishment, directly or indirectly, whether for a crime committed or suspected;
   (d) to intimidate.

It seems that the Convention added other factors to the definition. For example, in regard to the intention, it broadened the purposes to include coercion of any kind and reasons based on discrimination. The responsibility for the act is extended to include the consent or acquiescence of a public official. The responsibility is also extended to include any person acting in an official capacity.

The European Commission of Human Rights and Court of Human Rights provided the only practical analysis to the meaning of certain acts prohibited in Article 3 of the European Convention on Human Rights.[200] In the Greek case[201], the Commission found that "purpose" is the criterion by which we can distinguish torture from inhuman treatment, and that torture is an "aggravated" form of inhuman treatment. In Ireland v. United Kingdom[202], the European Commission of Human Rights found admissible the allegation that the "five techniques"[203] practised by the British security forces constituted torture, but the European Court of Human Rights[204] found that torture was "deliberate inhuman treatment causing very serious and cruel suffering" and that the practices did not cause suffering of the particular intensity and cruelty implied by the term "torture".

200, European Convention on Human Rights, Article 3 "No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
201, Yearbook of the European Convention of Human Rights (Y.B.E.C.H.R.) 12, 1969
202, Y.B.E.C.H.R., 1976
203, The five techniques consisted of hooding, wall-standing, noise, deprivation of sleep, and reduced diet.
204, Eur. Court H.R., Series A, Judgement of January 18, 1978

Therefore, the Court's judgement implies that torture may be further distinguished from other forms of ill-treatment by its degree of severity. On the question of the purpose of ill-treatment being a factor in whether or not it constitutes torture, it is worthwhile to mention the dissenting opinion of Judge Fitzmaurice in the case. He pointed out that, according to the wording of Article 3, the motivation is irrelevant, saying "Torture is torture, whatever its purpose, if inflicted compulsorily."[205]

It seems that there is as yet no international interpretation in regard to the expressions of cruel treatment and cruel punishment.

205, Eur. Court H.R., Series A, Judgement of January 18, 1978

INHUMAN TREATMENT

In respect of inhuman treatment, the European Commission on Human Rights, in the Greek case, found that it involved the intentional causing of severe suffering, whether physical or mental, which is unjustifiable in the situation.[206]

In a later case (Ireland v United Kingdom), the Commission noted that the term "unjustifiable" was not meant to imply that there could be justification for such an act.[207]

The assessment of whether an act constitutes inhuman treatment depends on the circumstances of the case, the duration, its physical and mental effects of the treatment, and in some cases on the sex, age and state of health of the victim.[208]

The deportation or extradition of a person may constitute inhuman treatment if there are substantial grounds to fear that this might lead to the torture, or cruel, inhuman or degrading treatment, or even execution, of the person, in the state to which he is sent. For example, in 1977 Mohammed Amekrane, a Moroccan national, fled to Gibraltar after taking part in an unsuccessful attempt to assassinate the Moroccan king. His request for asylum was refused, and when the Moroccan government asked for his return, he was

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206, Y,B,E,C,H,R, 12

207, "Torture and inhuman treatment are never justifiable, and the definition is misleading if it suggests that they may be. But treatment which may be perfectly justifiable in some circumstances, may in different circumstances, be unlawful. The clearest case is of criminal punishment. A penalty which might be justified for a serious crime could constitute inhuman treatment or punishment if imposed for a petty offence. To this extent, at least inhuman treatment is a relative notion." The European Convention on Human Rights F.G. Jacobs, 1975 p28

208, See Ireland v United Kingdom n.204 above.

handed over. When he arrived in Morocco he was interrogated, sentenced to death, and executed five months later. A case was brought in his name, and his family, claiming that he was subjected to "inhuman treatment" because he was returned to Morocco, when it was known that he would be prosecuted for a political offence and sentenced to death if convicted.

The application was declared admissible by the Commission, but it did not result in judgement because a "friendly settlement" was reached, with the assistance of the Commission, with the United Kingdom making a payment to his family of £ 37 500. The United Kingdom understood that this did not imply an admission that the Convention had been violated. It might be commented that even though the case did not receive a judgement from the Court, the United Kingdom's large compensation implies that they believed the judgement would have been that the Convention had been violated.[209]

209, 16 Y.B.E.C.H.R. 356 (1973.) Report of the Commission adopted 19 July 1974

As we saw above, in Ireland v United Kingdom, the Court found that the "five techniques" constituted inhuman treatment. As well as inter-state applications, many applications have also been made to the European Commission by individual detainees, alleging violations of Article 3. Professor Jacobs,[210] divides such cases into two groups, according to whether allegations are of physical ill-treatment or brutality by prison or police officers, or of inadequate conditions of detention, lack of medical treatment and so on. While the latter might be categorised individually as forms of inhuman treatment, in the Greek case, the Commission found that in combination, they constituted torture.[211]

210, The European Convention on Human Rights F.G. Jacobs 1975 p28
211, 12 Y.B.E.C.H.R. (1969)

In the Greek case, the European Commission found that degrading treatment to be that which grossly humiliates an individual before others, or causes him to act against his will or conscience.[212] *In the case of Ireland v. United Kingdom, the "five techniques" employed by the British security forces were found to constitute degrading treatment "since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance"*[213]

It should be noticed that degrading treatment is not confined to physical acts alone. In 1970, in the East African Cases for example, the Commission considered that discrimination based on race could amount to degrading treatment.[214]

212, 12 Y.B.E.C.H.R. (1969)
213, 19 Y.B.E.C.H.R. (1976)
214, In 1970, the Commission considered the cases of 31 United Kingdom citizens or British protected persons who had been resident in Kenya or Uganda, who were refused entry to the United Kingdom. Although the Committee of Ministers decided in 1977 that "no further action" was required, after all the individuals had meanwhile been allowed to enter the United Kingdom, the Commission stated in its decision as to admissibility that "discrimination based on race could, in certain circumstances, of itself amount to degrading treatment..."
13 Y.B.E.C.H.R. (1970)

DEGRADING PUNISHMENT

In the Tyrer Case,[215] the Court stated that for punishment to be degrading, the humiliation involved should be more than that inherent in accepted forms of punishment imposed by courts for offences. Factors which made corporal punishment degrading were the institutionalised use of violence against a human being, and the assault on the person's dignity and physical integrity involved. The Court also mentioned the very important point that as they considered the Convention should be interpreted in the light of present day conditions, their judgement should be influenced in this case "by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe".

This case raises the question of the humiliation which may be involved in punishment administered according to law. Lawful sanctions may involve humiliation, and in some cases, pain and suffering. Of particular interest to this research is the humiliation, pain and suffering popularly believed to be germane to punishment in Islamic law. While it is true that lawful sanctions in Islam often involve the humiliation[216] of an offender, this principle is not peculiar to Islam. All judicial punishment involves humiliation of some degree. Indeed it is fundamental to punishment,

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215, Eur, Court H,R, Series A, Vol, 26, Judgement of April 25 1978

216, To take the example of flogging as an Islamic punishment, the detail of the procedure to be followed show clearly that it is humiliation rather than physical suffering that is the intention,

I will examine the conditions for the infliction of Hadd punishments in detail in Chapter 4,

from the humiliation of being identified as a criminal to the general forms of humiliation involved in imprisonment.

With regard to the question of pain and suffering involved in "lawful sanctions", it is worthwhile to examine again the articles in the UN Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment. The first article of each states that "it does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions". The Declaration adds that this should be consistent with the Standard Minimum Rules for the Treatment of Prisoners.

So, it could be understood that the term "lawful sanctions" is excluded from the practice of torture, but it leaves us again with the question of the nature of "lawful sanctions" and whether this should be understood as referring to national or international law. Some states tried to tackle the question. For example, the United Kingdom in their comment on the draft convention[217], stated that it should be lawful under international rules as well as national legislation. The Italian government[218] pointed out in reference to "lawful sanctions" in Article 1, that they too understood it to refer to international law.

217, A/39/499 of 2nd October 1984, p19
218, ibid p10

It seems to me that the urgent need to establish effective machinery in which many countries, particularly the Islamic states[219], could participate, led to compromise in the final text of Article 1.

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219. It might be noted that some "lawful sanctions" imposed under Islamic law which may be regarded as cruel, inhuman and degrading, are circumscribed by such conditions as to make their legitimate imposition extremely rare. In fact, the number and complexity of the conditions surrounding the imposition of certain Islamic punishments, for example, amputation, is such that they might be regarded as being largely deterrent in character. This, of course, is not reflected by contemporary practice of Islamic countries, in particular Iran.

SECTION D

IN THE LIGHT OF THE PRACTICES IN ARAB COUNTRIES

Now I will briefly examine the practice of torture on the Arab countries in the light of the international provisions I discussed above.

It seems that torture, cruel, inhuman, or degrading treatment and punishment are carried out in the Arab countries by a number of agencies. According to information published by Amnesty International, it seems that the organs which practise torture are similar in Arab countries. In general, Amnesty International and other organisations believe that torture is practised by branches of the security forces and intelligence services, the police and army.[220] *So the requirement that torture should be carried out by official authority is present.*

According to Amnesty International,[221] *in Syria, three branches of the security forces carry out torture of those whom they detain. They are Al-Amn al-Siyassi (Political Security), who are responsible to the Ministry of the Interior; Al-Amn al-Dakhili (Internal Security), who are also responsible to the Ministry of the Interior, and Maktab al-Amn al-Qawmi (National Security Bureau), who are apparently responsible to the Presidential Security Council. Syrian intelligence forces also carry out torture. They include Saraya al-Difa''an al-Thawra (Brigades for the Defence of the Revolution).*

220, Amnesty International Torture in the Eighties 1984 pp4-6
221, Amnesty International Report from Amnesty International to the government of the Syrian Arab Republic, 1983 pp12-13

Another organisation is Al-Wahdat al-Khassa (Special Units). Two organisations which are responsible to the Ministry of Defence are Al-Mukhabarat al-'Askariyya (Military Intelligence) and Al-Mukhabarat al-Quwwa al-Jawiyya (Air Force Intelligence).

According to Amnesty International, in other Arab countries torture is carried out by similar organs. For example, in Egypt[222] and Morocco[223], torture is carried out by the police and by the organ of state security intelligence. In Libya,[224] in addition to the security and intelligence forces, torture is carried out by so-called Revolutionary Committees.

Another indication about the official attitude to these practices is that many allegations claim that torture and ill-treatment took place in government or other official property. In Syria, these places include official civil prisons, official military prisons, detention centres for interrogation and investigation, police stations and buildings belonging to the security forces.[225]

According to Amnesty International, similar places are used in other countries, for example, in Saudi Arabia, the Drug Detention Centre in Dammam, which is a government building.[226]

222, Amnesty International Egypt ; violations of human rights, 1983 p12

223, Amnesty International Report of an Amnesty International Mission to the Kingdom of Morocco, 1982 pp16-17

224, "During 1982 and the early months of 1983 allegations of ill-treatment and torture were frequent and consistent. They indicate that torture of political suspects by the intelligence services and Revolutionary Committees during interrogation is routine and systematic",
Amnesty International Torture in the Eighties 1984 p237

225, Amnesty International Report from Amnesty International to the government of the Syrian Arab Republic 1983 p15f

226, "Several first-hand accounts named the Drug Detention Centre in Dammam as an interrogation centre where torture or ill-treatment frequently took place",
Amnesty International Amnesty International Report 1985 p335

By surveying the authorities who carry out these activities and the places where they are carried out, it may be concluded that the practice of torture is at least tolerated by governments, while not openly admitted as official policy.

That it is an official policy of certain Arab regimes may be shown by the identity of the victims of torture and the apparent reasons for their torture and ill-treatment. Many of the victims of torture in Arab countries fall into certain social categories, for example, students,[227] lawyers,[228] doctors,[229] trade unionists as well as those who are active in human rights movements.[230]

Another category of Arab society whose members are often the target of torture when detained is that of political opposition of various kinds.

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227. For example, according to Amnesty International, in 1982 AHMED MAKLOUF died as a result of torture after being detained following student demonstrations at Benghazi university in Libya.
Amnesty International Torture in the Eighties p237

228. For example, according to Amnesty International, in 1980 a Libyan lawyer, 'AMER DEGHAYES, died as a result of torture within three days of his being summoned for questioning.
Amnesty International Torture in the Eighties p236

229. For example, according to Amnesty International, a Syrian doctor who was detained in 1979, suffered torture before being released and fleeing the country. He said that he had been beaten on the soles of the feet and tortured with electricity. A British doctor who examined him in September 1980 found that he bore scars consistent with the alleged torture.
Amnesty International Amnesty International Report 1981 p377

230. For example, according to Amnesty International, in 1980, MUWAFFAQ AL-DIN AL-KOZBARI, the Syrian lawyer and First Secretary of the Syrian League for the Defence of Human Rights was arrested after a one day strike called by members of Syrian professional organisations to protest at the continuing state of emergency, and call for the end of martial law. He was ill-treated during his detention until his release in November 1983.
Amnesty International Amnesty International Report 1984 p363

Former members of government,[231] members of "illegal" political parties[232] and members of legitimate political parties opposed to those in power[233] are all examples of this category.

It seems that the intentions of torture are four-fold. As we saw in the definition in the Declaration, they are : to obtain information; to obtain a confession; as a punishment; and to intimidate. Torture is used to extract information from detainees about their real or alleged activities and those of others, as well as in order to gain confessions, again to real or alleged crimes.[234] It is also used to punish and to intimidate.[235]

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231. For example, according to Amnesty International, former President and Prime Minister of Syria, DR NOUR AL-DIN AL-ATASSI, along with other former government officials detained in 1970, were reportedly tortured and denied medical treatment during their detention.
Amnesty International Report from Amnesty International to the government of the Syrian Arab Republic 1983, p53

232. For example, according to Amnesty International, the Moroccan ZAAZAA ABDELLAH, along with another 25 political detainees, was tortured after being arrested and charged with "setting up illegal oragnisations" in 1970.
Amnesty International Report of an Amnesty International Mission to the Kingdom of Morocco, 1982 p60

233. For example, according to Amnesty International, members of legal political opposition parties (eg., UNEM)in Morocco are detained and ill-treated during detention or held in poor conditions.
Amnesty International Report of an Amnesty International Mission to the Kingdom of Morocco, 1982

234. Amnesty International Torture in the Eighties 1984 pp4-6 and 226-244

235. An example of the use of torture to punish and intimidate is found in the action of Libyan intelligence organisations against Palestinian and Libyan students who were arrested and severely beaten during three days in 1984 after they were involved in demonstrations at the university in Benghazi.
Arab-Asian Affairs Vol 125 May 1984 p7

Methods of torture used in the Arab countries are the same as those used in other countries. Those reported may be divided into a number of approaches ranging from crude physical attack on victims, with beatings and falaqa, to more elaborate means of inflicting physical pain, like the application of electrical current and the use of comparatively sophisticated equipment,[236] to mental torture, ranging from threats on members of the victim's family to their actual physical assault, or the torture of other detainees in front of the victim.[237]

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236. In Dammam interrogation centre common practices included being forced to stand for hours at a time, and being beaten on the soles of the feet and all over the body with sticks, rubber hoses, with clothes hangers, knotted rope or electric cables.

A former detainee alleged that in February 1984, at Dammam police station, his arms were tied to chains which were pulled when he refused to answer questions, thereby dislocating his shoulder joints; that he was shackled, hung upside down and beaten with wooden sticks; that cigarettes were put out on his arms and genitals, and that he was submerged in a large oil-drum full of cold water

Amnesty International Amnesty International Report 1985, p335

237. Former detainees held by the Iraqi security forces allege that the wives and children of some detainees were detained and held in nearby cells in order to put pressure on detainees to "cooperate during interrogation".

Amnesty International Amnesty International Report 1984, p339

PART THREE

LEGAL ANALYSIS OF EXTRA-JUDICIAL KILLING :

SECTION A

IN THE LIGHT OF THE INTERNATIONAL INSTRUMENTS

[unlawful deprivation of life]

There is no clearly accepted definition of extra-judicial execution in international law, since it has not been treated as a specific human rights violation before the early 1980s, UN interest focussing on enforced or involuntary disappearances.

Extrajudicial execution has been defined[238] *as :*

"Unlawful and deliberate killings of persons by reason of their real or imputed political beliefs or activities, religion, other conscientiously held beliefs, ethnic origin, sex, colour or language, carried out by order of a government or with its complicity".

This definition is useful as it mentions the main factors distinguishing extra-judicial killings from other executions carried out by governments, whether they arise from legal procedures, as capital punishment, or killings by government forces in time of war.

It is clear that extra-judicial executions are unlawful, whether because they are practised outside the judicial process or because they are carried out for reasons which contradict normal constitutional or international law. When I examine the practice of extra-judicial killing it will become clear that the motivation of such executions may often be categorised as political, religious or racial.

The other important element is the role of the government which, as we will see, may or may not be acknowledged.

In the absence of a definition of this practice at the international level, I will examine the international provision most closely associated with the arbitrary deprivation of life.

238, Amnesty International Report from Amnesty International to the government of the Syrian Arab Republic, p33

International protection

At the international level, the most fundamental right, the right to life is protected in the international human rights instruments in Article 3 of the UDHR, as follows :

"Everyone has the right to life,.,"

and in Article 6, paragraph 1 of the ICCPR, which states :

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Other paragraphs in this article of the ICCPR, which elaborate legal protection for the right to life, for example, provisions mentioning that capital punishment should only be imposed for "the most serious crimes" (paragraph 2), and that those sentenced to death should have the right to "seek pardon or commutation of the sentence" (paragraph 4), will not be examined in great detail in this research as I intend to concentrate on arbitrary, illegal and above all extra-judicial deprivation of life practised by governments. The regional conventions also protect this right in similar terms.[239]

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239. For example, the European Convention on Human Rights and Fundamental Freedoms, Article 2, paragraph 1; the American Convention on Human Rights, Article 4, paragraph 1; the African Charter on Human and Peoples Rights, Article 4.

In examining these instruments, it seems that this right is protected in general terms, and as with the other rights I examined, the individual's right should be protected by law. It seems that the instrument intends to protect the individual from arbitrary deprivation of life. As I showed in my discussion of arbitrary arrest and detention, the term "arbitrary" implies both illegal and unjust acts, for example, executions carried out illegally or according to an unjust law.

Illegal or arbitrary executions must be distinguished further from extra-judicial killings, since the latter are completely separate from the processes of law. Meanwhile, the former could be within the judicial process, but technically fail to fulfil the conditions required by the law. They may also be in accordance with law, but the law itself may be unjust or arbitrary.

The UN General Assembly, in its resolution 36/22 of 19th November 1981[240] condemned the practice of summary executions and arbitrary executions, deploring the spread of the practice throughout the world. The resolution mentions that many such executions are politically motivated. We will see that many extra-judicial killings are also politically inspired.

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240. A/RES/36/22 of 19th November 1981 in International Legal Materials 21 1982 pp203-4

Extra-judicial killing

Extra-judicial killings may be divided into different categories. These include deaths in detention, deaths where the exact fate of the victim is unknown, and executions carried out by governments, whether or not these are acknowledged.

Deaths in detention may be regarded as a form of extra-judicial killing. Deaths may occur while people are detained by police or security forces, either as a result of torture or ill-treatment during interrogation, or as a result of the conditions of detention.

It is not clear whether the obligation of detaining authorities to safeguard the life of those detained can be regarded as absolute at the international level. The question of government responsibility in this respect was raised by two cases before the European Commission on Human Rights.

In X v. United Kingdom[241], a prisoner alleged that his life was endangered by prison staff's "right to kill", though the British government argued that his life was protected by the ordinary law of homicide. The application was in any event declared inadmissible. Another case, Simon-Herald v. Austria[242], in which a prisoner alleged that prison conditions and the negligence of prison officials had endangered his life, was declared admissible by the Commission. A friendly settlement was reached, so no decision was made.

241, (4203/69) CD 34, 48
242, (4340/69) CD 38, 18

With regard to deaths resulting from poor conditions of detention, reasons include poor physical conditions and inadequate or non-existent medical care. At the international level, the UN Standard Minimum Rules for the Treatment of Prisoners[243] contains provisions which seek to safeguard the physical well-being of prisoners. Even though those rules lay down minimum requirements, their importance for the protection of human rights cannot be ignored. Countries should provide the necessary legislative and administrative measures based on the recognition of inherent human rights. The UN has called for the implementation of the Standard Minimum Rules since 1957.[244] These provisions may be found in Prison and other laws at the national level.

One can summarise the provisions contained in the Standard Minimum Rules as follows. They are divided into rules of general application[245] and rules for special categories of prisoners, with guidelines for the treatment of prisoners under sentence and abnormal prisoners, prisoners under arrest, or awaiting trial and civil prisoners.

Reasons given for deaths in detention include allegations of suicide by detainees, attempts to escape and attacks on prison guards. These may be regarded as attempts by the authorities to deny their responsibility for deaths in detention.

243, (4340/69) CD 38, 18
244, Review of the International Commission of Jurists 4 December 1969, p46f
245, These include recommendations on administration (provision of a register and for separation of different categories of prisoners, conduct of staff, their selection and supervision), accommodation (including facilities for personal hygiene, clothing and bedding), prisoners' regime (including food, exercise and medical care), work and discipline (including punishments and restraint).

With regard to deaths allegedly resulting from attempts to escape and attacks on prison guards, it is worthwhile to examine the UN Code of Conduct for Law Enforcement Officials[246], *Article 3 of which provides that :*

"law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty".

The commentary to this article specifies two more provisions, that :

",, in no case should this provision be interpreted to authorise the use of force which is disproportionate to the legitimate objective to be achieved,"
",, in general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardises the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender",

According to this code therefore, while prison officials may use force to prevent escapes or defend themselves, this force should be necessary and limited to the extent required by the circumstances.

The next category of extra-judicial execution is that in which the fate of the victim is unknown or at least undisclosed, so-called "disappearances". This includes execution of persons of whom the arrest is not acknowledged by the authority. In contrast with the principle that the government is responsible for safeguarding the life and freedom of its citizens, in such cases the government avoids accounting for the life and safety of individuals by denying any knowledge of their arrest and subsequent fate.

246, Adopted by the first UN Congresses on the Prevention of Crime and the Treatment of Offenders 30th August 1955 and approved by the UN Economic and Social Council on 31st July 1957,

At the international level, the UN Human Rights Commission established a Working Group on Enforced or Involuntary Disappearances. In its report[247], the Group commented that governments may not avoid their responsibility for what happens within their borders.

It is also worthwhile to mention the finding of the Inter-American Commission on Human Rights in respect of "disappearances", since the practice occurs widely in South American countries. The Commission found that where individuals have disappeared but the government concerned refuses to give any information about them, or about the progress of any investigations aimed at determining their whereabouts, it is legitimate to presume that there has been a violation of the article[248] protecting the right to life in the American Declaration on the Rights and Duties of Man, and that agents of the government or individuals protected or tolerated by it, "have not been uninvolved" in the violation.

The next category of extra-judicial execution is that of executions carried out by governments. These may or may not be acknowledged by the government.

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247. Report of the Working Group on Enforced or Involuntary Disappearances E/CN.4/1435 (January 26th 1981)
248. Article I of the American Declaration on the Rights and Duties of Man

Those acknowledged by governments include summary executions ordered by the authorities, and other executions carried out on judgements from courts lacking legal safeguards, or as arbitrary punishment for crimes, which under national and international law do not warrant the death penalty. Legal safeguards for those charged with capital crimes, for example, the right to appeal to a higher court, are contained in all national legislation, and at the international level, Article 4 of the ICCPR contains basic minimum procedures for death penalty cases.

As I mentioned briefly in my discussion of political reasons for arbitrary arrest and detention, some governments have prescribed harsh punishments, including the death penalty, for political "crimes". It may be said that international and most national law does not allow for such a harsh penalty for "crimes" of a political nature.

Those which governments do not acknowledge include those cases where the circumstances are known, but the government does not consider itself responsible. These include executions carried out by local or military authorities which are not necessarily ordered or approved by the government, executions by paramilitary groups supported or tolerated by the government, and executions ordered or carried out by civilians in the service of government or in semi-official capacities.[249]

2492. For example, the Revolutionary Committees,

SECTION B

IN THE LIGHT OF THE NATIONAL INSTRUMENTS

In the Arab world the religious background must be regarded as a factor in the retention of capital punishment. The constitutions of most Arab countries claim to draw guidance from the teachings of Islam, and some mention that the principles of Islamic legislation (Shari'a) constitute a primary source of law.[250]

Other Arab countries have reverted to the Qur'an as the ruling constitution, for example, Libya, which revoked its formal constitution in 1977 and claims to rely on the teachings of the Qur'an.[251]

In fact, the Islamic religion permits the death penalty only as the punishment for certain specified crimes, for which detailed provisions may be found in Islamic law, which will be examined in Chapter 4. It must be said that nothing in Islamic teaching permits extra-judicial killing, as capital punishment is allowed only for specified serious crimes, within the judicial framework.

The Qur'an says :

"Do not kill a soul which Allah has made sacred except through the due process of law" (6;151)

As Abul A'la Mawdudi[252] *points out, Islam prohibits all killing except that done in the due process of law. Decisions about the imposition of the death penalty should not be left to a court which disregards God's will and is under the influence of the administration, since such a justiciary may miscarry justice.*

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250. For example, Article 2 of the Egyptian Constitution, CCPR/C/SR.499 of 4th April 1984, p2
251. CCPR/C/1/Add.20 of 24th January 1978, p1
252. In his "Human Rights in Islam" 2nd ed 1980, p23

A state cannot seek justification in the Qur'an if it murders citizens because they oppose unjust policies and actions, or criticise it for its misdeeds.

Even this brief examination shows that no state can seek justification for the practice of extra-judicial killing in the teachings of Islam. As the practice is outlawed by international law, so it is forbidden by the teachings of revealed religion.[253]

The death penalty is prescribed as a punishment in the legislation of most Arab countries. The provision of Article 6, paragraph 2 of the ICCPR, which recommends that capital punishment should be imposed only for the most serious crimes is to be found in the law codes of most Arab countries, as the death penalty is restricted to crimes such as premeditated murder, espionage or attempts to overthrow the government. In general, the death penalty has been restrictively applied to these crimes save where national security or the ruling regime has been threatened. Many sentences have been commuted to life imprisonment and a number of pardons have been granted. By examining the legislation of some Arab countries, I will demonstrate what safeguards of the individual against extra-judicial execution exist in Arab countries' national legislation.

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253. I will examine this point in more detail in Chapter Four.

As I pointed out the death penalty is restricted to serious crimes in the Arab countries. In Iraq, the Law for the Reformation of the Legal System in Iraq No. 35 (1977) restricts the implementation of deprivation of life to the most serious offences existing in Iraqi legislation.[254]

The general principles that penalties are to be imposed only in accordance with the law in force at the time of the offence, and that they cannot be carried out except in accordance with final judgement rendered by a competent court, are to be found in Article 280 of the Criminal Procedure Law No 23 of 1971. There are safeguards for the imposition of the death penalty in Iraq. Article 254 of the same law provides any such judgement by a Court of Session should be examined by a Court of Cassation, even when no appeal against the judgement is submitted. The death penalty should be considered by the full chamber of the Court of Cassation, (Article 257, paragraph (b) of the same law). Article 285, paragraph (b) provides that the decision must be ratified by the President of the Republic by a Republican Decree issued in accordance with Article 58, paragraph (m) of the Iraqi constitution.[255]

254, CCPR/C/1/Add.45 of 8th June 1979, pp29-34
255, ibid,

Anyone sentenced to death in Iraq may submit a petition seeking pardon or commutation of the sentence. The jurisdiction of the President of the Republic to take any decision regarding death penalties is absolute. According to Article 58, paragraph (m) of the constitution he may ratify it or issue a special amnesty. Article 286 of the Criminal Procedure Law empowers the President to issue a decree to execute the penalty, commute it or pardon the one sentenced to death.

In Jordan, the death penalty is likewise imposed only for serious crimes, as Jordanian Criminal Law No 16 of 1960 specifies premeditated murder and espionage.[256] In addition, the Jordanian Penal Code prescribes the death penalty for "crimes involving an attack on the life of His Majesty the King, an attempt to change the constitution by force or incitement to armed rebellion against the existing constitutional authorities and to crimes of premeditated murder, murder committed in the preparation, furtherance or perpetration of a felony, and parricide."[257] Similar provisions to those in the Iraqi Criminal Procedure that penalties may only be imposed if they were prescribed by law at the time the crimes were committed are contained in Jordanian legislation.

256, CCPR/C/1/Add,55 of 7th August 1981, p3
257, CCPR/C/1/Add,24 of 13th April 1978, p3

In Jordan, the death penalty becomes final only after it has passed through all the judicial stages and in addition, Article 357 of the Code of Court Procedure stipulates that the case file shall go through the Minister of Justice and the Prime Minister to the Council of Ministers, who shall examine the file, express its opinion on the case to the King, and submit its decision on the case to him. The King has the power to grant a special pardon on the recommendation of the Council Of Ministers, (Articles 50 and 51 of the Constitution). A general amnesty may be proclaimed by means of a special legislative act, according to Article 53.

The Egyptian Penal Code provides the death penalty as a punishment for a number of offences against the state and against the individual. The former may be divided into those harmful to external security, like the crime of espionage and conspiring with a hostile state to damage Egypt's defence or military operations, and those against internal security, such as armed attacks on law-enforcing authorities, use of arms or explosives with the aim of overthrowing the regime, and political assassinations. Under provisions of Article 83A of the Egyptian Penal Code the death penalty may be imposed for any offence against external security, as contained in Articles 77-85. Under the same provision the death penalty may be imposed for offences against internal security, as contained in Articles 86-102.

Offences against the individual for which the death penalty may be imposed include premeditated and deliberate murder and torture resulting in death.

Additional offences carrying the death penalty are contained in the Military Code. They include collaboration with the enemy, sedition, misuse of a position of authority and desertion.[258]

In Libya, the death sentence may legally be imposed under article 17 of the Penal Code.[259] *The Libyan Penal Code specifies certain crimes punishable by death, including premeditated murder (Article 368), taking up arms against the state (Article 165), facilitating the entry of an enemy into the country (Article 166), plotting with foreign state to wage war against the state (Article 166), sabotage of military establishments in time of war (Article 179), armed revolt against the state (Article 201), sabotage, loot and murder (Article 202) and incitement to civil war (Article 203).*[260]

A possible safeguard is that sentence shall not be carried out unless it becomes final, after the exhaustion of all appeal procedures. The approval of the People's General Congress shall be sought before it is carried out, (Article 430 of the Penal Code).

In Syria, the Court of Assizes is competent to judge offences if the punishment is the death penalty. The decision of this court is subject to appeal to the Criminal Court of Appeal. There is no appeal against the judgement of the Court of Appeal but the accused may apply to the Supreme Court of Cassation to quash the verdict.[261]

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258 Amnesty International Egypt ; violations of human rights An Amnesty International report, pp15-16
259, CCPR/C/1/Add,20 of 24th January 1978, p2
260, ibid,
261, Amnesty International report from Amnesty International to the government of the Syrian Arab Republic, p48

The Lebanese Penal Code provides in Article 549 that :

"Wilful homicide shall be punishable by death if it was committed ;
1, with malice aforethought;
2, in order to prepare, facilitate or execute a crime or an offence,,,;
3, on the person of a parent or child of the culprit;
4, with the attendant circumstances that the culprit had made use of brutality or acted cruelly towards persons,"

The Penal Code, in Article 43, provides that the sentence should not be carried out before it has been referred to the Reprieve Commission, and has been approved by the Head of State.[262]

In Morocco, the Penal Code contains provisions for the death penalty which may be imposed for crimes of violence, including murder and arson, and crimes which endanger the safety of the state. Article 163 of the Moroccan Penal Code prescribes a mandatory death penalty for an attempt on the life of the monarch, heir to the throne, or other members of the royal family.

Other articles of the Penal Code relate to internal security of the state, prescribing the death penalty for those who attempt to instigate civil war by providing arms or inciting the people to arm themselves. Article 181 relates to the external security of the state, such as giving information or aid to potentially hostile foreign powers.[263]

262, CCPR/C/1/Add,60 of 26th April 1983, p9
263, Amnesty International Amnesty International Briefing Morocco, October 1977, pp13-14

Article 648 of the Code of Criminal Procedure states that the Public Prosecutor shall report every sentence of death to the Minister of Justice as soon as it has been announced, and no sentence of death may be executed unless a petition, mandatory if necessary, has been made, (Article 649). Articles 51, 53 and 54 provide the rights of pardon and amnesty.[264]

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264. CCPR/C/10/Add.2 of 19th February 1981 pp14-15

SECTION C

IN THE LIGHT OF THE PRACTICES IN ARAB COUNTRIES

As we saw when I examined the legislation of the Arab countries, even though the right to life is not directly protected by the constitution or other laws, we saw, in connection with the death penalty, some protection for those charged with capital offences.

One can say therefore that even though the constitutions do not provide protection of the right of life as such, the laws imply that deprivation of life may only be carried out as a penalty in accordance with the law.

It might be said that the nature of extra-judicial execution as opposed to judicial execution as a legal penalty is comparable to arbitrary arrest and detention as opposed to lawful arrest and detention, in that in both cases, grounds and procedures for their legal practice are established in law, and the failure to satisfy these requirements makes the arrest arbitrary and the execution extra-judicial. To be specific, the lawful grounds of arrest are comparable to the nature of the crimes for which the death penalty may be imposed, and the legal safeguards for those arrested and detained are comparable to the legal safeguards for those charged with capital offences.

Extra-judicial executions, as we saw earlier, are killings carried out by, or with the complicity of, the authorities without the minimum guarantees of due process of law.

I intend to examine the practice of extra-judicial killing according to the categories I distinguished earlier, beginning with deaths in detention.

Deaths in detention may be regarded as a form of extra-judicial killing. Deaths may occur while people are detained by police or security forces, either as a result of torture or ill-treatment during interrogation, or as a result of the conditions of detention.

Reasons given for deaths in detention include allegations of suicide by detainees, attempts to escape and attacks on prison guards. These may be regarded as attempts by the authorities to deny their responsibility for deaths in detention.

According to Amnesty International[265], the death of a Syrian student, whilst in the custody of the Syrian security forces in April 1983, occurred as a result of torture. Syrian guards allegedly threw his body from the third floor window of a hospital to make his death appear as suicide.

In Libya, according to Amnesty International, three lawyers were among many who died in custody in 1980, allegedly as a result of torture.[266] In 1982, three students allegedly died under torture in custody of the security services.[267] During 1984, some detainees who bore marks of torture were seen on Libyan television making confessions, one of whom reportedly died later under torture. In the same year a Norwegian was reported to have died under torture whilst in the custody of a Revolutionary Committee.[268]

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265. Amnesty International Amnesty International Report 1984, p364
266. Amnesty International Amnesty International Report 1981, p370
267. Amnesty International Amnesty International Report 1983, pp320-321
268. Amnesty International Amnesty International Report 1985, p329

Deaths in detention also occur as a result of poor conditions of detention, including lack of medical care for prisoners.

According to Amnesty International, a prisoner died in Beni Mellal Prison in Morocco in 1984, and his fellow detainees alleged that he was denied necessary medical care.[269] Amnesty International also believe that up to twenty military prisoners have died in Morocco as a result of poor prison conditions - "windowless, filthy and unventilated cells, extremes of temperature, solitary confinement, arbitrary punishments, inadequate food and the complete lack of any medical care".[270]

In Egypt during 1981, according to Amnesty International, at least three detainees died while in the custody of the security forces in Tora prison as a result of lack of medical care.[271]

Amnesty International reports the testimony of a Syrian doctor held in Damascus, which alleges that a number of prisoners died as a result of the appalling conditions in which they were held, and that official medical care in Tadmur was virtually non-existent, and it was left to imprisoned doctors to try to cope with sick prisoners and to treat after-effects of torture.[272]

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269. Amnesty International Amnesty International Report 1985, p333
270. Amnesty International Amnesty International Report 1984, p356
271. Amnesty International Amnesty International Report 1982, pp319-320
272. Amnesty International Amnesty International Report 1985, p338

The second category of extra-judicial execution I distinguished was the practice known as "disappearances", in which the fate of the victim is unknown or at least undisclosed.

As I pointed out, this includes execution of persons of whom the arrest is not acknowledged by the authority. In contrast with the principle that the government is responsible for safeguarding the life and freedom of its citizens, in this case the government avoids accounting for the life and safety of individuals by denying any knowledge of their arrest and subsequent fate.[273]

In Morocco, Amnesty International is aware of more than 80 Saharans who were detained by the Moroccan security forces as long ago as 1976. The Moroccan authorities have never acknowledged their detention.[274]

According to Amnesty International, thirty eight Syrian youths were reported "disappeared" after detention by the security forces in March 1980. They were reportedly transferred from Deir al-Zor prison to an unknown destination in summer 1980, and their parents have received no response from President Assad as to the fate of their sons.[275]

273, Check reference
274, Amnesty International Amnesty International Report 1984, p354
275, Amnesty International Report from Amnesty International to the government of the Syrian Arab Republic, p32

The next category of extra-judicial execution is that of executions carried out by governments. These may or may not be acknowledged by the government.

Amnesty International reports wide-spread extra-judicial executions in Iraq, during the past few years, where death penalties are passed and carried out with inadequate legal safeguards. As I showed in my discussion of the revolutionary courts in the section on arbitrary arrest and detention, these courts lack trained legal officers, and other basic safeguards, including the right to be represented and the right to appeal. They report that hundreds were executed in 1984, including many military personnel, alleged deserters, conscientious objectors and officers accused of plotting against the government.

Other reported executions include those of students and Kurds, as well as alleged members of al-Da'wa al-Islamiyya.[276]

In Syria, at the beginning of 1984, Amnesty International received reports that 39 prisoners had been extra-judicially executed during a massacre at Tadmur prison in June 1980, including 38 youths who had "disappeared" in 1980.[277]

276, Amnesty International Amnesty International Report 1985, p315
277, Amnesty International Amnesty International Report 1985, p339

Amnesty International also has evidence of mass political killings carried out by the Syrian security forces in the towns of Jisr al-Shughur (at least 24 people) in March 1980; Tadmur, in Palmyra prison, in June 1980 (between 600 and 1,000 people); Sarmada in July 1980 (at least 22 people); Aleppo in August 1980 (more than 80 people); Hama in April 1981 (350 people) and February 1982, when total numbers of dead after fighting between security forces and alleged members of the Muslim Brotherhood were estimated to be between 10,000 and 25,000.[278]

Syria, like Libya, also practises extra-judicial killings of political opponents abroad. For example, two Syrian members of an opposition party are reported to have been killed by Syrian agents in Athens in July 1983, and in Yugoslavia in 1981. In 1982, the wife of an ex-Prime Minister of Syria was murdered by Ba'athist agents in West Germany.[279]

278, Amnesty International Report from Amnesty International to the government of the Syrian Arab Republic, pp3-38

279, "The lawless regime of Hafez Assad" Arabia February 1984 30 pp22-23

In Libya, according to Amnesty International, extra-judicial executions of political opponents are often carried out by Revolutionary Committees. In December 1980, the organisation received reports that five were executed after being arrested in a mosque, including a mosque official.[280] In 1984, eight people were publicly hanged in June because it was alleged that they were members of the Muslim Brotherhood and agents of America. Two of these prisoners were allegedly executed within an hour of their arrest.[281]

Amnesty International has expressed its concern about the proceedings of the Basic Peoples Congresses, which pass and carry out death sentences without adequate legal safeguards.

On 5th February 1980, a meeting of the so-called "Revolutionary Committees" held in Benghazi, issued a declaration calling for "the physical liquidation "of the enemies of the revolution living abroad as well as of other "elements obstructing revolutionary change" in Libya.[282]

In May 1980, "Colonel" Gaddafi declared that :

"The counter-revolutionary forces may continue to work against the revolution despite the fact that they have been disarmed and their political, economic and social weapons have been taken away. In this case physical liquidation becomes inevitable."
"The counter-revolutionary forces should be physically liquidated. The revolutionary task will not end unless the opposition is liquidated. This is not only applied to those who are abroad but to all counter-revolutionary forces..."[283]

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280. Amnesty International Amnesty International Report 1981, p371
281. Amnesty International Amnesty International Report 1985, p327
282. Amnesty International Amnesty International Report 1980, p346
283. Amnesty International Political Killings by Governments 1983, pp69-77

On 3rd March 1981, "Libyan Revolutionary Committees" were reported to have "reaffirmed their determination to continue the physical liquidation of the enemies of people's authority at home and abroad".[284]

On 11th March 1983, Amnesty International warned that the lives of Libyans living abroad were again under threat following a decision on 17th February 1983 by the so-called General People's Congress to hunt down and liquidate all Libyans considered hostile to the "revolution". "Every citizen is responsible for the liquidation of the enemy of the revolution."[285]

Since the beginning of this Libyan policy, more than a dozen Libyan citizens have been killed, and many assassination attempts have occurred in the United Kingdom, the United States of America, Italy, Greece, Lebanon, West Germany and other countries. In most cases the suspects arrested and brought to trial were Libyan nationals.[286]

Public statements by Libyan authorities inside and outside Libya make it clear that the policy of killing so-called "enemies of the revolution" is government-inspired, and these extra-judicial executions are carried out at the instruction of the Libyan regime. The Libyan regime does not attempt to conceal this policy, but an announcement from the Libyan People's Bureau in Brussels stating :

"Many countries liquidate their political enemies secretly, only the Jamihiriya publicly announces this policy, because we are entitled to do so and all the laws support us."[287]

shows that the Libyan regime announces this policy to the world.

284, Amnesty International Amnesty International Report 1982, p336
285, Amnesty International Amnesty International Report 1984, p353
286, Amnesty International Amnesty International Reports 1980-1985
287, Amnesty International Amnesty International Report 1984, p353

CHAPTER THREE

ARAB RESPONSE TO THEIR HUMAN RIGHTS POSITION

PART ONE

GOVERNMENTAL

SECTION A

GENERAL

As we saw in Chapter One when I examined the participation of the Arab governments in international human rights instruments, most Arab states signed, ratified or acceded to the principal instruments.'

This Chapter will examine, in part one, the official response of Arab governments to human rights. This will include Arab regional efforts, and the response of Arab governments to their obligations under the international human rights instruments.

I will examine the efforts of the Arab League at the regional level, as well as other official response to the UN in general, including Arab countries' communication with the United Nations Human Rights Committee, under Article 40 of the ICCPR. I will then examine the response of Arab governments to the non-governmental organizations, concentrating on Amnesty International.

In part two, I will briefly examine the efforts of Arab non-governmental organizations in the field of human rights, regionally through the work of the Union of Arab Lawyers, and nationally through the effort of human rights committees, bar associations and other institutions, as well as individuals and groups in Arab countries.

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1. See Tables 1 & 2 in Appendix A

As we saw in Chapter One, the major governmental response at the regional level was the establishment of the Permanent Arab Commission on Human Rights by the League of Arab States. In August 1966 the Economic and Social Council of the United Nations invited the League of Arab States to attend sessions of the Commission on Human Rights. They responded to the aim of the United Nations of establishing regional commissions for human rights,[2] and in 1967 they responded to the setting up of such a Commission, by recognising the field of human rights as a vital one and saying that they believed the starting point for such a commission should be within the framework of international or regional inter-governmental organizations.[3]

The Council of the Arab League set up a Permanent Arab Commission on Human Rights at a Conference on Human Rights in Beirut in 1968. Each member of the Arab League is represented on the Commission.

The aim of the Commission is to promote joint action by the Arab countries and the protection of the rights of "the individual Arab and promoting respect for human rights in Arab countries in general".[4]

The Council of the League decided to establish a Committee of Experts to prepare a draft of a Convention on Human Rights, by Decision No. 2668.[5]

2, Recommendation 6(XXIII) of 23rd March 1967
3, Robertson, pp162-163
4, Robertson, p164
5, Jamil Husayn "In favour of the establishment of an Arab Court for Arab Human Rights" Al-Mustaqbal al-Arabi April 1983, pp16-40

At the international level, the Arab League participates in international conferences, and sends an annual communication to the United Nations Commission about its activities. The United Nations maintains formal relations with the League of Arab States.[6]

The activities of the Arab League in the field of human rights are limited. The Council of the Arab League is made up of government representatives, and therefore their concern is mainly with political issues, such as the situation in the Middle East, with human rights concern focussing mainly on violations of human rights by the Israeli forces in the occupied territories. One can say that an important achievement was in its participation in UN investigation of alleged human rights violations in the occupied territories.

As I said in Chapter 1, the Commission has so far been limited in effectiveness, and has not tackled many serious issues in the human rights position in Arab countries. This indicates the governmental character of the composition of the Commission. As we saw, the League of Arab States maintains relations and seeks to develop

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6, For example, Resolution 38/6 adopted by the General Assembly in Plenary "by which the Assembly requested the Secretary-General to strengthen cooperation and coordination between the United Nations and the organizations of the United Nations system and the Arab League to enhance their capacity to serve the mutual interests of the two organizations in the political, economic, social and cultural fields", Annual Review of UN Affairs, 1983
7, "Procedural due process in human rights fact-finding by international agencies" by Thomas M, Franck and H, Scott Fairley American Journal of International Law Vol, 74 1980 p315

cooperation with the United Nations. This relationship was recently re-confirmed by Resolution 40/5 of the UN General Assembly of 25th October 1985, in which both parties re-affirmed their intention to work together "to promote the purposes and principles" of the United Nations.[8]

A similar intention for cooperation on human rights issues is demonstrated by Arab states involved in the Organisation of the Islamic Conference, which also maintains relations with the UN. A resolution[9] *re-confirming cooperation between the organisations, states their intention :*

"to continue cooperation in their common search for solutions to global problems, such as,,,fundamental human rights,"

8, Resolutions and Decisions adopted by the General Assembly during the first part of its Fortieth Session, 17th September - 18th December 1985 (Press Release GA/7272, 13th January 1986, p5)
9, UN General Assembly Resolution No 40/4 of 25th October 1985, ibid.

SECTION B

TO THE UNITED NATIONS

(1) general

(2) on the rights of life, liberty and physical integrity

As we demonstrated in Chapter One, most Arab countries have signed, ratified or acceded to the most important human rights instruments, though none have so far signed the Optional Protocol to the International Covenant on Civil and Political Rights. In order to analyse the nature and degree of their response to obligations undertaken by signature of the ICCPR, specifically Article 40, which as we saw in Chapter One, requires States Parties to submit reports on the steps taken to give effect to the rights in the Covenant and the progress made in securing these rights and freedoms, I intend to examine the communication between Arab states and the Human Rights Committee in this respect.

I intend to examine the position of some countries in detail as they appear to represent differing angles of the Arab governments' response to human rights on the international level.

I will begin with the Syrian Arab Republic, which submitted its initial report in 1977[10], and was chosen as the first country to have its report considered by the Human Rights Committee. The Syrian representative introduced the report by saying the Syrian government was then making every possible effort "to eliminate all aspects of underdevelopment inherited from foreign domination", and replace it with modern human values. She outlined the threat posed to Syria's efforts by "world zionism and imperialism", but stressed her government's committment to the basic principles of human rights.[11]

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10. CCPR/C/1/Add.1/Rev.1
11. CCPR/C/SR.26 of 18th August 1977, p2

The Syrian report pointed out that the provisions of the ICCPR should not raise difficulties, as laws in force in Syria were fully compatible with obligations arising under the ICCPR.[12]

In their supplementary report[13]*, the Syrian government confirmed that on signature, ratification and promulgation according to Syrian internal legislation, the ICCPR became part of the internal law of that country.*[14] *Syrian legislation contains provisions ensuring that the laws and regulations are compatible with the rights and freedoms protected by the constitution.*[15] *Furthermore, it was pointed out that its provisions might be invoked by a Syrian citizen before the judicial or administrative authorities.*

Egypt acceded to the ICCPR on 14th April 1982, and submitted its initial report to the Human Rights Committee in March 1984.[16] *The Egyptian representative introduced his country's report by emphasising that his country attached great importance to human rights and human dignity. He stressed that his government had the will to implement the provisions of the Covenant, and that the promotion of human rights could not be ignored for any development of individual personality.*[17]

12, CCPR/C/1/Add,31 of 12th July 1978
13, CCPR/C/1/Add,1/Rev,1 of 1st July 1977, p1
14, CCPR/C/1/Add,31 of 12th July 1978, p2
Article 104 of the Syrian constitution of 1973 states that "The President of the Republic concludes treaties and international agreements and abrogates them in accordance with the provisions of the constitution."
15, Act No, 19 of 2nd July 1973 provides judicial review as it established a constitutional court, ibid,
16, CCPR/C/26/Add,1/Rev,1 of 16th March 1984
17, CCPR/C/SR,499 of 6th April 1984, p2

He pointed out that Egyptian law, being based on Islamic jurisprudence, laid stress on religious and moral values, and thus played a major role in promoting respect for human rights.

With regard to the status of the Covenant in the Egyptian judicial system, the Egyptian constitution provides that "Conventions to which the Arab Republic of Egypt accedes have the effect of law after they have been signed, ratified and published in accordance with the prescribed procedures".[18]

The Libyan government signed and ratified the ICCPR which entered into force for Libya on 23rd March 1976. They submitted an initial report to the Human Rights Committee in 1977, in which they listed measures protecting human rights contained in the Constitutional Declaration of 11th December 1969.[19]

However, in 1978, another report was submitted in which it was explained that the Constitutional Declaration had been revoked on 2nd March 1977, and Libya had reverted to the Qur'an which thereby became the ruling constitution. It pointed out that certain legislative provisions remained in force. The later report contained details of provisions affected by the change, and the representative said that the Penal Code had not been affected by the constitutional changes. Since the Constitutional Declaration was revoked, the Committee expressed its concern as to the legal effects of the constitutional change, particularly in regard to incorporation of the provisions of the Covenant into national law.

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18. Article 151 of the Egyptian Constitution promulgated on 11th September 1971 and the amended constitution ratified on 22nd May 1980 CCPR/C/26/Add.1/Rev.1 of 16th March 1984, p2
19. CCPR/C/1/Add.3 of 14th March 1977

Though clarification was sought by the Committee in this respect, the Libyan representative declined to answer at the time. [20]

Morocco ratified the ICCPR on 3rd August 1979 and when submitting their country's report to the Human Rights Committee in 1981, the Moroccans stressed the fact that their country attached importance to spiritual values and legal principles to protect human rights, as provided in the Moroccan constitution.

He also stressed that his country, since independence had shown its desire to promote respect for the fundamental rights of the human person, mentioning international instruments acceded to by Morocco as an expression of its will to promote respect for human rights.[21] *The report mentions that in some areas Moroccan legislation gives precedence to international law over national law, on condition that the provision does not conflict with a provision of the constitution.*

Article 31 of the constitution provides : "Treaties which might affect the provisions of the constitutions shall be approved in accordance with the procedures laid down for amendment of the constitution". Consequently, according to the Moroccan report, the provisions of the Covenant have become part of the internal legal system. The Moroccan report also stressed that Islamic jurisprudence constitutes the basis of Moroccan public and private law.[22]

20, Report of the Human Rights Committee General Assembly Official Records ; Thirty-third Session Supplement No,40 (A/33/40) pp 10-12
21, The instruments are listed in Morocco's report to the Human Rights Committee, CCPR/C/10/Add,2 of 19th February 1981 pp1-2
22, ibid, pp2-3

The Kingdom of Jordan submitted its initial report to the Human Rights Committee in 1978.[23] This was supplemented by two addenda submitted in 1981 and 1982.[24]

In the Jordanian supplementary report of 1981, the Jordanians' committment to the principles and ideals of the Covenant was stressed. However, the report pointed out that the general situation of the Middle East had impeded the development of the state of Jordan and in consequence, the political and civil rights of the people of Jordan had not been allowed to develop as the government would have liked. Nevertheless, the report stated that Jordan guaranteed, as far as possible[25], to the individuals within its territory, the rights contained in the Covenant.

With regard to the status of the ICCPR in Jordan, the report stated that international agreements which Jordan ratifies or accedes to will have the force of law and precedence over all domestic laws with the exception of the constitution.[26]

As we can see, the representatives of these countries each stress their government's committments to protecting human rights, in the light of the ICCPR.

23, CCPR/C/1/Add.24 of 13th April 1978
24, CCPR/C/1/Add.55 of 7th August 1981 and CCPR/C/1/Add.56 of 25th February 1982
25, This, no doubt, excludes the rights of individuals in occupied territories,
26, The report says that this is confirmed by court decisions, particularly the Supreme Court,
CCPR/C/1/Add.55 of 7th August 1981, pp1-2

They each point out how the Covenant enters into force for their country, with the exception, for example, in Syria, Morocco and Jordan, of provisions incompatible with the constitution. The representatives of Egypt, Morocco amd Libya pointed out that their domestic legal systems draw inspiration from Islamic jurisprudence. The Jordanian and Syrian representatives stress the fact that the development of human rights protection is inhibited in their countries as a result of the Middle East conflict, particularly in the occupied territories, where almost half of the Jordanian population is under a foreign government. These general responses to the Human Rights Committee seem to indicate primary acceptance of the international instruments by Arab countries, and an encouraging attitude to the reporting obligations, with the exception of the Libyan representative who declined to clarify the legal effects of constitutional change for the implementation of the provisions of the Covenant.

Now I will discuss the response of the Arab governments to the rights of liberty, physical integrity and life, concentrating on their communication with the Human Rights Committee, but including other statements in the forum of the United Nations.

Again, I will begin with the Syrian Arab Republic. In its reports, it outlined constitutional and other national protection for the individual's rights to liberty, physical integrity and life, which we saw in Chapter Two.

In regard to the individual's liberty, as we saw, this right is protected at the constitutional level in Syria by article 25, paragraph 1 of the Syrian constitution. When questioned by the Human Rights Committee in respect of Article 9 of the ICCPR as to whether any persons were held without trial for political reasons, the Syrian representative replied that he would transmit its questions to his government.[27]

However, when questioned about state of emergency legislation in Syria, and the effects of this on safeguards for human rights, the Syrian representative replied that preventive arrest of suspects or persons posing a threat to security or public order was authorised by state of emergency legislation.[28]

27, Report of the Human Rights Committee General Assembly Official Records ; Thirty-fourth Session Supplement No.40 (A/34/40), p73, paragraph 299
28, CCPR/C/SR.160 of 8th August 1979, p10

He listed crimes for which he said emergency legislation authorised "the withdrawal of the enjoyment of certain rights". These included crimes against the external security of the state, crimes which threatened internal state security and crimes against public safety. Decree No. 51 of December 1952, which concerns the state of emergency, states that these offences shall be tried under martial law.

When considering Syria's supplementary report in 1979, the Committee expressed its concern in regard to the Syrian government's lack of explanation of state of emergency procedures, saying "The questions that had been asked...were largely unanswered".[29]

As we saw in Chapter Two when we discussed the state of emergency in Syria, the Syrian government has not informed the Secretary-General of derogations under Article 4 of the ICCPR. In response to the Committee's question on this omission, the Syrian representative stated that "the present Government, because of its popular basis and fresh organisation, felt itself secure enough to have no need to proclaim a state of emergency".[30]

Later in this meeting, he asked that the record of the meeting should "reflect the fact that the President of the Syrian Arab Republic had declared before the People's Council that there was no martial law and no emergency measures in Syria <u>except for reasons of State security</u>." This statement refers to a speech by President

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29. CCPR/C/SR.160 of 8th August 1979, p8
30. ibid p11

Assad on 9th March 1978, in which he admitted the abuse of detention powers under emergency legislation, and announced that in future such powers would be limited to cases "in connection with the security of the state as stipulated by the law".[31]

It is worthwhile to mention that he released 179 people wrongly detained under emergency legislation, however it seems that the beneficiaries of the decision were persons detained for civil offences, and political opponents continue to be wrongly detained.[32]

In regard to the physical integrity of the individual, as we saw in Chapter 2, the Syrian legislator gave special attention to the individual's physical integrity by safeguarding it at the constitutional level.[33]

In response to detailed questions from the Committee during consideration of the initial report, including a question about laws to ensure respect of the provisions of this article by police and other authorities, a question about interrogation methods, and a question about remedies for victims[34]*, the Syrian representative replied in general terms, saying only that anyone inflicting torture was punished under the law.*[35]

31, Human rights in the world ; Syria Review of the International Commission of Jurists, no 24 January 1980, p13
32, States of emergency ; their impact on human rights A study prepared by the International Commission of Jurists, p287
33, Article 28, paragraph 3 of the Syrian constitution states ;
"No one shall be tortured physically or mentally, or shall be subjected to degrading treatment, The law shall define the punishment for anyone who commits such an act.
34, CCPR/C/SR.26, p3
35, ibid p9

In regard to the individual's right to life, as we saw in Chapter Two, the death penalty in Syria is restricted to serious crimes, and its practice is regulated by law. Details of these provisions were contained in the first Syrian report.[36] A member of the Committee asked about the practice of the death penalty in Syria, in view of the fact that in states of emergency States tended to resort more readily to capital punishment.

The Syrian representative replied that the Syrian Penal Code provides for the death penalty, particularly for wilful murder and crimes against state security, but he claimed that the practice was relatively rare, adding that the right of seeking appeal or pardon was provided.[37]

It is noticeable that the Syrian representative tends to answer in general terms, or repeats provisions stated in the initial report, in particular avoiding details with regard to questions on Article 7 and Article 6. He does not mention the fact that constitutional safeguards for human rights in Syria have been virtually suspended by the state of emergency for over twenty years.

In answer to some questions, particularly about the state of emergency, his replies are confusing and contradictory, as he says the government has not proclaimed a state of emergency, but he admits that it uses emergency legislation in matters threatening state security. He gives no explanation to the Committee as to why the Syrian government has not informed the Secretary-General of

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36, CCPR/C/1/Add.1/Rev.1 of 1st July 1977, pp2-3
37, CCPR/C/SR.160 of 8th August 1979, pp10 and 12

derogations from the Covenant, giving only the political reply that his government is popular, and feels no need to proclaim the state of emergency.

In regard to the death penalty and the comment by a Committee member that states of emergency tend to lead governments to resort to this measure, the Surian representative claimed the practice was relatively rare, although as we saw in Chapter 2, mass executions are carried out by the Syrian security forces, and the death penalty is often imposed by military courts.

Next I will consider the response of Egypt to the Committee's questions in regard to the three issues. I will begin with the right of the liberty of person. As we saw in Chapter 2, while this right is formally protected by the laws of Egypt, starting from the constitutional level, as in Syria, the practice of the right has been restricted, and legal safeguards in the matters of arrest and detention have been weakened by emergency legislation.

In its report, Egypt gave details of "legislative provisions of a temporary nature" concerning the restriction of the individual's rights in regard to arrest and detention during the state of emergency.[38]

38, CCPR/C/26/Add.1/Rev.1 of 16th March 1984, p6f

With regard to Article 9 of the ICCPR, the Committee sought clarification a number of questions, including of the circumstances in which an individual could be arrested and how long a person could be detained before appearing before a judge under Act No. 162 of 1958. It also asked whether a person could be arrested on political grounds, rather than for a criminal offence.[39]

The Committee noted that the intervention of the executive power (the President of the Republic) in cases of preventive detention was a serious violation of the principle of separation of powers.

The Egyptian representative stated that he could not answer these points immediately, but his government would submit a supplementary report in which all questions would be answered.[40]

With regard to the protection of the individual's physical integrity, the Committee noted that although the Egyptian constitution prohibited torture, as we saw in Chapter 2, allegations of torture had been made against the Egyptian government. Therefore it asked the Egyptian representative what measures had been taken to investigate such complaints, how effective they had been, and what compensation was available to victims.

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39. CCPR/C/SR.500 of 4th April 1984, p3
40. Report of the Human Rights Committee Official Records Thirty-ninth Session Supplement No. 40 (A/39/40), p58

In reply, the Egyptian representative gave details of training required for prison personnel, inspection of prisons, and certain legislative texts governing imprisonment. He said that the situation in Egypt as regards torture and maltreatment "could not be compared with that of many other countries". He specified certain measures protecting prisoners such as obligatory medical examination, and investigation of all allegations of torture. He said a recent law stipulated that there was no statute of limitation applicable to torture.[41]

With regard to the individual's right to life, as we saw in Chapter 2, Egypt retains the death penalty. As we saw, the Penal Code and the Military Code specify offences for which the death penalty may be imposed. In response to questions from the Committee on the abolition of the death penalty, the Egyptian representative stated that Egypt did not think it was necessary to abolish capital punishment because "it was to safeguard society". He pointed out that it was imposed only on "persons jeopardising the independence or integrity of the State", those voluntarily joining an army hostile to Egypt and those found guilty of wilful homicide or homicide accompanied by theft.

He commented that all had the right to a fair trial, and brought the example that those accused of the murder of President Sadat had not yet been sentenced because each of the accused had the right to

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41, Report of the Human Rights Committee Official Records Thirty-ninth Session Supplement No. 40 (A/39/40), p58

defend himself to show that even in the case of serious offences affecting Egypt's security, this right was safeguarded. He did not, at this stage, answer questions put by the Committee on deaths in detention.[42]

The Egyptian representative also declined to answer certain questions about the weakening of human rights safeguards due to emergency legislation immediately, but promised a reply by his government. Likewise, he did not add to the information contained in the report with regard to arrest and detention. He was only prepared to answer in general terms with regard to torture and the death penalty, though he mentioned prison regulations and a recent law on torture.

As I said, Libya submitted its first report in 1977, but when the Committee began its consideration of this report in January 1978, the Libyan representative read out a new report which outlined constitutional changes affecting the provisions contained in the first report.[43]

In respect of the rights safeguarded by article 9 of the ICCPR, the Committee expressed its opinion that it considered safeguards in Libyan legislation inadequate with respect to pre-trial detention, and they requested more information on circumstances in which such detention could be prolonged. The Committee also asked whether emergency courts dealt with political crimes. Some members also

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42. ibid, p58
43. Report of the Human Rights Committee Official Records Thirty-third Session Supplement No. 40 (A/33/40)

asked what acts were considered political crimes in the Libyan Arab Jamahiriya, and asked if anyone was detained in Libya for political reasons.

In respect of the right of physical integrity, the Committee did not raise the issue of torture with the Libyan representative, but asked only if a Libyan court could order corporal punishment, and if so, under what conditions and for what crimes.

With regard to the right to life, some members of the Committee asked for more details of the categories of crimes punishable by death, and specifically the role of the Mufti. The Committee also asked whether the death penalty was applicable to other crimes, such as incitement to change the government or regime.

With respect to all the questions posed by the Committee during consideration of the report, the Libyan representative stated that he would prefer to submit his response in writing. No supplementary information has yet been received by the Committee.

Although the Libyan representative did not express the attitude of his government to these rights in discussion with the Human Rights Committee, one can see the official attitude of the Libyan government in regard to Article 7 of the ICCPR in a statement during dicussions of the Third Committee dealing with Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[44]

44, United Nations General Assembly Thirty-third Session Official Records Summary Record of the Thirty-second meeting A/C.3/34/SR.32 of 5th November 1979, pp5-6

The Libyan representative expressed her government's concern at what she described as the increasingly widespread use of torture, as a result of technological innovations that made new methods possible, mentioning the important role non-governmental, regional and national organizations had to play in "concerted action in the fight to prevent torture in any form", saying that the international community had an obligation to work towards that goal.

She stated that her own country had suffered the practice of torture during imperialist days, but now the prevention of torture was an integral part of its Penal Code. Her country's legislation reflected the principles of Islam, which stress the importance of tolerance and compassion, and completely condemned the practice of torture and other cruel, inhuman or degrading treatment.

In her statement she said that her government welcomed documents produced by the UN intended to protect the physical integrity of anyone detained. She concluded by saying that in spite of international efforts the practice of torture continued, mentioning the regime in South Africa and alleged violations in the occupied territories, but said that her delegation was confident "that right would eventually prevail".[45]

45, ibid,

As we saw in Chapter 2, Moroccan legislation contains a number of safeguards for the rights provided in Article 9 of the ICCPR, and these were specified in its report to the Human Rights Committee.[46]

Members of the Committee posed a number of questions, asking for details of how often a magistrate could extend custody of the detainee, since it appeared from article 152 of the Code of Criminal Procedure that remand in custody was an exceptional measure, whether courts could review the lawfulness of the grounds for detention, as provided under Article 9, paragraph 4 of the ICCPR, or if they were restricted to testing the lawfulness of proceedings, and whether the Moroccan authorities were required to inform the detainee's family of his place of detention. A member of the Committee also asked under what circumstances someone could be arrested without a warrant or detained on the strength of a warrant to appear, and if anyone was detained without trial in Morocco for political reasons, and if so, on what authority and for how long.

A member of the Committee commented in regard to Article 9, paragraph 5 of the ICCPR concerning compensation, that the provision under Dahir of 12 August 1913, specified criminal liabilty of individual officials, but that the intention of the article was to establish the objective responsibility of the state rather than personal responsibility of officials.

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46. CCPR/C/10/Add.2 of 19th February 1981

The Moroccan representative made a lengthy reply on several aspects of Article 9, starting by saying that administrative detention is prohibited by law, since only the judicial authority is competent to order detention. The criminal police were permitted to detain people for the purpose of identification, but the period should not exceed 92 hours, the only extension being a period of 48 hours on the approval of the King's Prosecutor, unless the case threatens state security, when the period may be doubled. The police must record both the day and hour on which the suspect was detained, and released or before the judicial authority. The record should be accompanied the signature of the accused or a statement indicating his refusal to sign. A similar entry should be initialled by the King's prosecutor in a record maintained at the place of detention.

These provisions were for cases punished by imprisonment. If the police have to hold someone during investigation for more than 92 hours, to secure an extension of 48 hours, they must bring the accused before the King's prosecutor, who may grant the extension. Detention pending trial was ordered by the examining magistrate only in certain circumstances. The Code of Criminal Procedure provides that when the punishment is imprisonment for less than two years, the accused may not be detained for more than a month, when it exceeds two years, he may not be detained for more than four months which may be extended for a further period of four months by the examining magistrate. The detainee is able at all times to request conditional release, and this must be examined by the

magistrate who should decide within five days, or by the chamber of correctional appeal which must decide within fifteen days.

The Code further provides that a detainee must be released immediately if he is acquitted, given a suspended sentence or fine, or when the sentence imposed by the court of first instance is completed. When committal is ordered by the King's prosecutor in cases of flagrante delicto, the detainee must be brought before the court within three days and the court must decide to release him or confirm his detention. The prosecutor is prohibited from ordering the detention of someone who has committed a political offence.

According to the Code of Criminal Procedure, the accused person is advised that he may decline to make a statement and that he has the right to appoint council. The judge may appoint a lawyer for him if he wishes after the first appearance.[47]

With regard to Article 7 of the ICCPR, the Committee put questions to the Moroccan representative regarding allegations of torture and ill-treatment of detainees, noting that torture was not prohibited by the Moroccan constitution. In view of the fact that the Moroccan report had quoted Article 10 of the Moroccan Constitution which states that no one shall be liable to...punishment, save in the cases and manner prescribed by law, a member of the Committee asked for

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47. CCPR/C/SR.332 of 13th November 1981, pp6-7

details of punishment prescribed by law and the circumstances of lawful application. Members asked for information concerning cases in which a penalty had been imposed for torture or ill-treatment of prisoners, and cases in which complaints had been made by individuals of such ill-treatment.[48]

It was also asked whether the UN Standard Minimum Rules for the Treatment of Prisoners had been adopted in Morocco, and if not, whether existing regulations governing the treatment of detainees had been applied in recent years, and if so how this was done, and whether there had been any cases of sanctions imposed accordingly. The Committee asked what were the rules concerning solitary confinement.[49]

In response, the Moroccan representative confirmed that torture and ill-treatment were prohibited under Moroccan law, as Article 231 of the Criminal Code provided for punishment of a public officer who without legitimate reason committed, or caused to be committed, acts of violence against persons in the exercise of his duty. He repeated that no distinction was made on the grounds of prevailing circumstances, such as state of war or state of emergency. In fact, it seems, the Moroccan representative repeated what was contained in his country's report.

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48. CCPR/C/SR.327 of 9th November 1981, pp 6, 8 & 12 and CCPR/C/SR.328 of 9th November 1981, p10

49. Report of the Human Rights Committee General Assembly Official Records : Thirty-seven Session Supplement No. 40 (A/37/40), p32

In addition, he mentioned some of the measures taken to re-educate and re-integrate offenders into Moroccan society, including vocational training. He also mentioned some of the procedures for the supervision of prisons.50

The Committee asked for information about the death penalty being imposed for crimes against the external and internal security of the state, and for what other crimes that penalty could be imposed, how many death sentences were imposed each year, and how often the sentence was carried out in cases where internal security was threatened. The question of "disappearances" was also raised as the Moroccan representative was asked if any such cases had been investigated in Morocco.

In reply, the Moroccan representative stated that recently several who had faced death sentences had been pardoned by the King. Furthermore, there were currently two facing death sentences who had asked to be pardoned. No capital punishment could be executed unless it had been preceded by a petition for reprieve which had been refused.[51]

50, CCPR/C/SR.332 of 13th November 1981, pp 4, 6 & 7
51, CCPR/C/SR.332 of 13th November 1981, p7

One can say that although the Moroccan representative gave a long and detailed analysis of legal provisions for arrest and detention, in regard to torture and capital punishment, he answered in general terms or did not answer the questions put to him, particularly about the imposition of the death penalty for crimes against internal security. Nor did he make any comment on "disappearances", though the issue was raised by the Committee.

Finally, I will examine the Jordanian response, as Jordan submitted its initial report in 1978,[52] supplementary information in 1981[53], and further supplementary information in 1982.[54] During consideration of all this information by the Human Rights Committee, questions were asked on the three rights I am concerned with, and other related matters.

The Jordanian representative, introducing his supplementary report, stated that it was "not possible to understand the human rights situation in Jordan without having an idea of the political, social and economic obstacles that the country had been facing since Israel's occupation of the West Bank and the Gaza Strip in 1967, which had caused an influx of hundreds of thousands of refugees, living in wretched conditions, to the East Bank". He said that this situation had forced his government to declare a state of emergency, and his government was considering notifying the United Nations of this under article 4 of the ICCPR.

52, CCPR/C/1/Add.24 of 13th April 1978
53, CCPR/C/1/Add.55 of 7th August 1981
54, CCPR/C/1/Add.56 of 25th January 1982

With reference to Article 9 of the ICCPR, the Committee asked what safeguards were available to persons : whether the remedy of habeas corpus were available, whether a detainee could be released on bail, what contact the detainee could have with his family, whether an individual could be detained for reasons other than those given in the report, whether the normal procedures for arrest were respected and whether administrative detention existed and how long it could last.

The representative replied that the remedy of habeas corpus was not available, but it was possible for a person who had been arrested or imprisoned on order of the administrative authority to appeal to the courts, except in cases where it was necessary to keep the accused person in solitary confinement, as in cases of espionage for example. The detainee had the right to receive visits from his lawyer, and if his detention was prolonged, visits from his family. He stated, in connection with the procedures for arrest, that in Jordan no one could be arrested unless he was charged with an offence, or other conditions relating to mental illness. He also said that any one arrested or detained could submit a petition to the Supreme Court, and if the Supreme Court decided that the arrest or detention was illegal, the person concerned was released without delay, but in certain cases, for example, premeditated murder, the accused was not released and could not challenge the legality of his arrest. However, a person could only be detained on the order of the Prosecutor of the district responsible for pre-trial procedure, who decided whether that person had been lawfully arrested or not. The

government could not be sued for damages in the cases of illegal arrest, but if the person concerned had been arrested as a result of untrue statements, he could sue the author of those statements.

In connection with Article 7 of the Covenant, the Committee noted the Jordanian report had recognised that excesses were sometimes committed by some public security personnel, but those practices were not institutionalized and had always been condemned and outlawed. Specific information was sought on such cases. In addition, the Committee were interested in whether the victims of torture were entitled to compensation. They also asked for details of solitary confinement in Jordan, and the contact of detainees with their families and counsel. They asked about supervision of prison conditions and complaints procedures, as well as asking if the International Red Cross were given access to visit prisons in Jordan.

In response, the representative confirmed that the practice of torture had not been adopted by the judicial or investigating authorities in Jordan. This is encouraged by a number of provisions in the Code of Court Procedure which, in article 63, obliges the public prosecutor to inform the accused that he is not obliged to answer the charge brought against him unless his attorney is present. If the accused refuses to appoint an attorney or if he fails to produce an attorney within 24 hours the investigation proceeds without the attorney. Other safeguards include the right of

the attorney to contact his client in private at any time, and the provision that any confession of guilt made by an accused person, suspect or defendant in the absence of the public prosecutor shall be accepted only if the prosecution provides evidence concerning the circumstances in which the said confession was made, and provided that the court is satisfied that the accused person, suspect or defendant made the confession voluntarily and of his own free will, (Article 159).

The representative mentioned the Middle East problem again at this stage by reminding the Committee that in the occupied territory half of the population of Jordan were allegedly subjected "night and day" to various forms of torture, without distinction "between men and women or between old and young". He said that "the prisons of the occupied West Bank are full of Arab citizens who are tortured in the harshest manner for months", mentioning the case of the inmates of Nafha and Ramala prisons.[55]

In regard to Article 6 of the Covenant, the Committee asked whether Jordanian Criminal law provided guarantees stipulated in the Covenant for the possibility of amnesty, pardon or commutation, whether there was a movement to abolish the death penalty in Jordan, and if so, what was the government's attitude towards them.

The Committee also asked if capital punishment could be imposed by the Military Courts, and in which cases, and whether the death

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55, CCPR/C/1/Add.56 of 25th January 1982, p9

penalty could be inflicted on someone who attempted to prevent the authorities from exercising their functions and who was empowered to judge the author of such an attempt.

In the second supplementary report, the Jordanians demonstrated all the provisions dealing with death penalty, including the crimes for which it may be imposed and provisions for amnesty, pardon and commutation.[56] The representative explained that Article 138 of the Penal code prescribed the death penalty for all persons who prevented the government from discharging its constitutional responsibility of conducting the smooth running of the affairs of the country, for example by coup d'état. He pointed out that no one had been condemned for such a crime.[57]

During consideration of the reports from the Arab countries the Human Rights Committee mentioned on several occasions that they faced some problems in assessing the reports, because of technical difficulties, including the shortness of some reports, the failure of providing full information, for example, about the legal remedies available, and the lack of legal texts in some cases. In addition, they mentioned that it would have been helpful if the Arab states had given fuller information concerning the principles of Islam and its relationship with national legislation. They were particularly interested in any difficulties which might arise in implementing certain provisions of the Covenant in Muslim countries.

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56. See Chapter 2
57. CCPR/C/SR.362 of 15th July 1982, p4

Although the Committee asked, on a number of occasions, that countries specify the areas where they had experienced difficulties in implementing the Covenant, few countries made reference to such problems, with the exception of Jordan which stressed the effect of the Middle East conflict and the problems of the occupied territories.

Also, the Committee showed interest in the precise definition of certain terms used by Arab governments which are usually connected to exceptions from the protection of human rights. The Committee noted that the concepts of "public order" or "national security", "serious crime" might be interpreted differently in different countries, therefore it would be helpful if countries provided more details, in the light of the laws protecting human rights and freedoms. The Committee expressed concern on several occasions about the effect of state of emergency legislation on the protection of human rights, particularly in the light of the adoption of Martial law in some countries, and the establishment of military and state security courts in many countries, which had serious implications for the protection of individuals' rights. The Committee even expressed its doubts about the value of the constitutional provisions protecting human rights in some Arab countries in the light of the prolongation of the state of emergency, in some cases, for over twenty years.

SECTION C

TO NON-GOVERNMENTAL ORGANISATIONS

(AMNESTY INTERNATIONAL)

Now that I have examined the response of some Arab governments in the forum of the United Nations in general, and under their international obligations according to the ICCPR in particular, I will examine their response to other non-governmental organisations concerned with human rights issues, such as Amnesty International.

I wil concentrate on the response of some Arab governments in matters of concern to this research raised by Amnesty International, following a similar method to my discussion of their response within the United Nations, taking certain governments as examples in detailed discussion and making general analysis with regard to others.

This demonstration will cover the information received by Amnesty International through its delegation missions, and information received from national bodies, whether individuals or human rights committees acting on behalf of victims.

I will also examine communication between the organisation and certain governments including any recommendations. I intend to re-examine legal issues in the light of the communications including direct discussions between the organisation's delegates and officials of some Arab governments.

(A) THE ARAB REPUBLIC OF EGYPT

In 1982, Amnesty International submitted a memorandum to the Egyptian government outlining its concerns about alleged human rights violations in that country. This was published in 1983.[58] As a result of the memorandum, discussions took place between the organisation and the government, including a mission which visited Egypt in May 1983. Communication between the two parties has taken the form of memorandums and discussions with officials. Some of the communication was published in 1984. [59]

It is worthwhile to mention that the Egyptian government invited Amnesty International to send a mission to Egypt to discuss issues raised in the memorandum. Discussions were carried out with high ranking government officials, including the Ministers of the Interior and Justice, and the Minister of State for Foreign Affairs. Delegates also met members of the judiciary, including the Prosecutor-General and the Socialist Prosecutor-General.[60]

Concerns of Amnesty International included the extension of the state of emergency, and the existence of legislation permitting the arrest and imprisonment of individuals for the non-violent expression of their beliefs, in contradiction of provisions of the ICCPR.[61]

58, This was published as Egypt ; violations of human rights ; an Amnesty International Report, 1983
59, Amnesty International ; update to 1983 report ; an Amnesty International Update, 1984
60, ibid p3
61, ibid p4

Amnesty International voiced its concern that under Law 50 of 1982,[62] the Minister of the Interior may appeal against the court's decision to provisionally release a detainee, with the matter being reviewed by a second court. Amnesty International commented that "direct intervention by a member of the executive authority introduces a political element into the judicial procedure" in contradiction to Article 9, paragraph 4 of the ICCPR. They repeated this concern with regard to appeals where the power to review decisions of the courts had been extended to the Prime Minister as well as the President.[63]

Another concern expressed by Amnesty International was at certain laws under which political prisoners are charged and tried, including Law No.40 of 1977, which they believe to be inconsistent with Egypt's undertakings under the Covenant. The organisation expressed its concern in regard to 40 prisoners detained without charge or trial whose arrest and detention was acknowledged by the Minister of the Interior, calling for their trial or release. They were also concerned about those detained in connection with the asassination of President Sadat, specifically with the facts firstly, that since they were to be tried in the Supreme State Security Court, they would have no right of appeal against the sentence, secondly, that allegations of torture and ill-treatment of the detainees had been received by the organisation and thirdly, that many of the detainees may face the death penalty, in connection with what are essentially political offences.[64]

62, See diagram, p81
63, Egypt ; update to 1983 report ; an Amnesty International update, 1984, p6
64, ibid pp7-8

With regard to the prohibition of torture, Amnesty International had voiced its concern in its memorandum, calling for an independent body to investigate allegations of torture and other ill-treatment.

During the mission, Amnesty International ascertained that the niyaba was responsible for investigating such allegations, and provided other safeguards such as ensuring that confessions are not obtained by illegal means, and carrying out prison inspections to safeguard proper treatment of detainees. They made a number of recommendations aimed at improving the safeguards provided by the niyaba.[65]

While the organisation did not consider that allegations of torture in Egypt which it had received provided evidence that this was a routine practice of Egyptian officials, nevertheless it expressed concern at serious and consistent allegations of torture received during the period October 1981- March 1982.[66]

It welcomed the decision of the Supreme State Security Court to investigate allegations of torture in the Jihad case, and called for the results to be made public, saying that the niyaba in "its role of representing the public interest" should "take steps to bring to justice those responsible for the infliction of torture or ill-treatment", and ensure compensation for the victims.

65, Amnesty International Egypt ; update to 1983 report ; an Amnesty International update, 1984, pp8-9

The recommendations included review of the niyaba's procedures, in regard to prison inspection and investigation of prisoners' complaints. They recommended that visits to prisons should be more frequent, thorough reports on visits should be made to a central authority and other interested parties, and that instructions should be provided for investigations of prisoners' complaints, findings on which should be made public.

66, ibid p9

Finally, Amnesty International stressed that it opposed the death penalty in all cases without reservation.

Another communication by the organisation was addressed to the Minister of State for Foreign Affairs, seeking clarification on two issues : the first concerning 40 juveniles detained without charge or trial in the Jihad case; the second in regard to deaths during detention, giving the names of five alleged to have died in detention.[67]

The formal response of the Egyptian government to Amnesty International's observations was contained in a letter and memorandum received by the organisation late in 1983.[68]

The memorandum, which was prepared by the Ministry of Justice, examined a number of legal issues raised by Amnesty International. It pointed out, in its introduction, that under the Egyptian legal system all detainees should be brought before the district attorney within 24 hours. His detention may only be prolonged for more than four days by the decision of a court.

With regard to detention procedures, the memorandum claimed that state of emergency legislation (Law 162 of 1958, as amended by Law 50 of 1982) in Egypt contained safeguards compatible with the ICCPR. It also referred to the abolition of Law 34 of 1972 and Law 2 of 1977 on the protection of national unity and the "diffusion of rumours affecting the security of the State" and

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67, Amnesty International Egypt ; update to 1983 report ; an Amnesty International update, 1984, p14

68, Published in Amnesty International Egypt ; update to 1983 report ; an Amnesty International update, 1984

certain other offences. It emphasised, with regard to the Executive's right to appeal against a court decision to provisionally release a detainee, that the final decision to order release rested with the court, that is, with the judicial power.

With regard to Law 40 of 1977, the memorandum stated that the purpose of that law was to esatblish the rules governing political parties and protecting national unity. It claimed that this was compatible with the ICCPR.

In respect of trials, the Egyptian Ministry of Justice stressed the fact that even though state of emergency legislation was in force, nevertheless the principle of the independence of the judiciary from executive authority was safeguarded, pointing out that Egypt had not felt it necessary to suspend legal safeguards, as permitted by Article 4 of the ICCPR, since the provision was only used in rare cases directly affecting state security.

With regard to the 40 detainees whose case was mentioned by Amnesty International, the Egyptian reply stated that the cases of the 27 still in detention were being investigated in view of their "possible and imminent release".[69]

In respect of the allegations of torture and ill-treatment, the reply stated that the prosecution has the responsibility and authority to investigate allegations of torture and ill-treatment, acting as an independent judicial body, according to Law 46 of 1972. It also mentioned the provisions in the Constitution which prohibit

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69, ibid, pp12-13

violation of personal freedom and forbid physical or moral assault on detainees. It claimed that these provisions and legislation in force ensure the independence of the prosecution in investigating allegations of torture and ill-treatment, which in any case, are regarded as serious criminal offences in Egyptian Criminal Law.[70]

In response to the letter of August 1983 addressed to the Minister of State for Foreign Affairs, the Egyptian Ministry of Justice replied in October of that year. With regard to the first enquiry, the letter confirmed that the juveniles in the Jihad case had been referred to the Juvenile Court. It also pointed out that they had been released prior to this decision.

With regard to the deaths in detention, the Egyptian reply gave details of investigations carried out or in progress in the cases mentioned by Amnesty International. In one instance, the case had been re-opened by the Prosecutor-General, in another they alleged that the victim had not been in detention at the time of death. A third case was found to be due to severe illness resulting in liver failure. In the other cases, investigations were still in progress.[71]

In December 1984, Amnesty International submitted a document concerning evidence of torture in the period 1981-1983[72] to the

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70, ibid, pp12-13
71, ibid, pp14-15
72, This document was entitled Egypt : Evidence of Torture 1981-1983, and it was submitted to the Egyptian government for comment in 1984. The organisation planned to publish it early in 1985,

Egyptian government, proposing among other things, a study of all legislation governing arrest and detention procedures including legislation under state of emergency which continued to be the dominant factor in Egyptian legal life by further extensions, the last in September 1984 to April 1986.[73] It seems that the Egyptian government did not respond yet to this document.

It is worthwhile to mention the response of the Egyptian government during discussions between Amnesty International delegates and Egyptian officials, including the Minister of the Interior, in regard to several issues such as the prolongation of the State of Emergency, and detention procedures in such circumstances. The Minister of the Interior explained the need for the extraordinary measures provided under state of emergency legislation as being necessary to "combat terrorism". He also stressed the fact that he was not using the full power accorded to him under such legislation.

With regard to the Jihad case, the Egyptian authorities emphasised that it was the government's policy in this case to establish dialogue with the detainees, pointing out the success of this approach by saying that a number had renounced membership of the Jihad.[74]

In discussions about Law 40 of 1977, which I mentioned above, the Minister of Justice said that the provision was necessary

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73, Amnesty International Amensty International Report 1985, p307
74, Amnesty International Egypt ; update to 1983 report ; an Amnesty International update, 1984, p4

in order to avoid proliferation of political parties in Egypt. Amnesty International repeated its recommendation to the Egyptian authorities that legislation dealing with political parties shouldbe in line with the provisions of the ICCPR.

In response to Amnesty International's concerns at cases which were retried, the fact that political prisoners convicted by State Security Courts, or during state of emergency, are deined the right of appeal, as well as the power of the Executive to intervene in judicial proceedings, the Egyptian authorities pointed out that Article 14, paragraphs 5 and 7, were not among those from which derogation from obligations under the Covenant was not permitted. They also pointed out in their written memorandum to Amnesty International that they did not consider that their law was inconsistent with the Covenant, since it does not contradict the provision in Article 14, paragraph 7, which states :

"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted,.."

The Egyptian authorities claimed that the word "finally" did not apply in certain cases, because Egyptian law permitted retrial to be ordered in exceptional cases.[75]

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75. ibid, p13

(B) THE KINGDOM OF MOROCCO

In 1981, an Amnesty International mission visited Morocco and held talks with government officials on human rights issues, including garde à vue detention, torture and ill-treatment of detainees, imprisonment of political prisoners and "disappearances". They held discussions with officials of the Ministry of Justice, Ministry of the Interior, Prison Administration, Rabat Court of Appeals, the Parliamentary Commission on Prisoners, and the Prime Minister.

During discussions, the delegations concentrated on the practice of garde à vue detention, since this creates the conditions for other violations to occur.

With regard to garde à vue detention, Amnesty International alleged that it is routine for officials not to show arrest warrants, no official notification of the arrest is made to the victim's family, and sometimes official confirmation of arrest is made only when the prisoner is brought before the juge d'instruction, which may be months after the arrest. Amnesty International alleged that although by law the Public Prosecutor must be informed of all arrests, in some cases, the Public Prosecutor denied knowledge of an individual's arrest.

Although the period of garde à vue detention is normally limited by law, Amnesty International expressed its concern that in political cases or cases allegedly involving the internal or external security of the state, the period might be extended to several months or more than a year. It also alleges that lawful procedures for such extensions are not carried out, as there is sometimes no written authorisation or this is made retroactive.

Amnesty International also expressed its concern about long periods of preventive detention when detainees are held by the juge d'instruction while he carries out investigations as to whether to bring the suspect to trial or dismiss the case, as well as the matter of release pending trial.

Amnesty International expressed its concern in regard to allegations of torture and ill-treatment of detainees, and poor conditions of detention, during garde à vue detention and detention under the juge d'instruction. Also, the organisation raised the issue of "disappearances", particularly in southern Moroccan towns, giving lists of cases and names of individuals about whom the organisation was concerned.

During discussions, Moroccan officials made some response to Amnesty International. Beginning with arrest procedures, the authorities insisted that warrants were always issued for arrests, save in cases of flagrante delicto. They agreed with the allegation that the family of the detainee was not formally notified that an arrest had been made, but said that families could find this out from the Public Prosecutor, and in any case they were likely to hear through informal channels. One official stated that it was "practically impossible for them not to know".[76]

The authorities admitted that the detainee had no legal right to challenge the lawfulness of his arrest in the courts or to make any judicial appeal against garde à vue detention. The authorities claimed that the Prosecutor was always informed of all detentions, and a list of detainees was maintained in places of detention and checked by him every fifteen days.

With respect to Amnesty International's concerns about the limits to garde à vue detention, a number of varyimg answers were made by officials. I will mention a few of these.

The Ministry of Justice admitted that periods of garde à vue were sometimes very long and that numbers of extensions might reach up to twenty in cases were state security was involved. They claimed that such lengths were necessary for the police investigation, and

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76, Amnesty International Report of an Amnesty International Mission to the Kingdom of Morocco 10-13 February 1981, pp17-18

pointed out that the law permitted as many extensions as necessary in cases affecting state security. They admitted that excesses may have occurred, and provisions for garde à vue were perhaps too severe. They mentioned a projected change in legislation in this respect.

However, the Prosecutor of the Court of Appeals of Rabat said that even in cases where state security was threatened, garde à vue detention could only be extended three times, and the maximum period should only be ten days.

According to officials of the Ministry of the Interior, the period of garde à vue detention was not long, and in any case did not last more than a month. With regard to cases mentioned by the delegates, officials answered that they saw no reason for such long periods, repeating that garde à vue detention was under the jurisdiction of the King's Prosecutor and it was his responsibility to investigate irregularities.

As far as the procedure for extensions was concerned, officials dismissed allegations of irregularities in the practice of the Prosecutor. They admitted that extensions were sometimes granted by telephone but claimed that this happened only rarely.

In response to Amnesty International's questions about the obligation to bring a detainee before the Prosecutor within forty-eight hours and only in exceptional cases could the extension be granted without the detainee being brought before the Prosecutor, officials disagreed with the organisation's interpretation of the law, but admitted that the Prosecutor did not see the detainee when granting extension, nor record the reasons why this was so.

With regard to allegations of ill-treatment of detainees and poor conditions of detention, again Moroccan officials made varying responses. While the Ministry of Justice confirmed that prison conditions were satisfactory and ill-treatment did not occur, they denied responsibility for the detainee during detention and said they could not confirm or deny allegations of ill-treatment. Meanwhile officials of the Ministry of the Interior claimed that legal responsibility for the treatment of detainees belonged to the Ministry of Justice, particularly the King's Prosecutor. As the Prosecutor had not brought complaints against police officers or complained about conditions of detention, they claimed that "the police themselves could not be faulted".[77]

77, ibid, p20

With regard to questions about "disappearances" the organisation's delegates raised among other issues the question of detainees arrested by the Moroccan security forces and held in official custody, whether or not their detention is acknowledged by the authorities, as allegations were received by the organisation that hundreds of civilians in southern Moroccan towns have been taken into custody as a result of the dispute between Morocco and the Polisario Front for control over the Western Sahara. Many of them never reappeared since, and the authorities have never officially confirmed their detention.

Moroccan officials at the Ministry of Justice and the Ministry of the Interior promised to make enquiries about a list of approximately thirty cases which Amnesty International have been investigating, pointing out that it would be difficult for the Moroccan government to know with certainty the whereabouts of those people, especially when that part of the country is considered by officials as a war zone, where much of the population is nomadic.[78]

Other categories of people who had "disappeared" after they have been taken into custody by Moroccan authorities, including people who had "disappeared" after they had been tried, were the subject of discussion between Amnesty International's delegates and officials of the Ministries of Justice and the Interior, who promised to enquire about these cases. The Moroccan authorities have never acknowledged their detention or the fate of some prisoners despite repeated enquiries by Amnesty International.[79]

78, ibid, p27
79, Amnesty International Amnesty International Report 1984, p357

In response to questions about pardons for political prisoners, officials pointed out that clear procedures exist in Moroccan legislation for pardons, and many prisoners harmed their own case by refusing to ask to be pardonned. They named five major occasions when royal pardons are considered : such as 11th January (Anniversary of the Recuperation of the Saharan Territories); Aid Sghir (the feast at the end of Ramadan); Aid Mawlid (the birthday of the Prophet); Aid Kbir (the Feast of Sacrifice); and 3rd March (anniversary of the Enthronement of King Hassan).

Amnesty International's report was not met by any response from the Moroccan government before publication, though the organisation had asked the government to respond to its concerns. When it was published in 1982, Moroccan embassies issued an official statement to the Press, and Moroccan officials referred to it in communication with the Press, but no direct response was made to the human rights questions it raised. Moroccan officials criticised the timing of the report, which coincided with a planned visit by King Hassan to the United States, but made no comment on the issues it raised.[80]

80, Amnesty International Amnesty International Report 1983, p325

In 1984, Amnesty International sent a letter to King Hassan, voicing its concern about a treay of federation between Morocco and Libya, and a subsequent agreement on security and freedom of movement, some provisions of which the organisation regarded as a potential threat to certain human rights. Under these provisions either country would have the right to expel each other's citizens for security reasons, and forbid these citizens to carry out political activities against the other country.

Amnesty International was concerned that the provisions might lead to forcible repatriation or imprisonment of political opposition. By the end of 1984, the organisation had received no reply from the Moroccan authorities.[81]

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81. Amnesty International Amnesty International Report 1985, pp330 and 333

(C) REPUBLIC OF IRAQ

In 1983 an Amnesty International delegation visited Iraq and held discussions with government officials, including the Minister of Justice, the Minister of the Interior, the President of the Revolutionary Court, the Attorney-General and other high-ranking officials, on matters of concern to the organisation.

These included allegations of arbitrary arrest and prolonged detention without trial of political suspects, torture and ill-treatment of detainees, lack of legal safeguards in the Revolutionary Court, and executions for political offences.

Amnesty International claimed that arrest and detention procedures contained in the Iraqi Code of Criminal Procedure were disregarded in the case of political suspects, and that torture and ill-treatment of detainees was routinely carried out during interrogation.

During meetings in 1983, the Ministry of the Interior assured the delegates that "the government is concerned with torture and fights it."[82] They said that cases of torture happened occasionally and were dealt with severely.

82, Report and recommendations of an Amnesty International Mission to the government of the Republic of Iraq 22-28 January 1983, p5

They assured the delegates that arrest and detention procedures provided that no arrest could be made without a warrant, detainees could contact their families as soon as they were arrested, regular visits by relatives were allowed and medical examinations were available within twenty four hours of the arrest.

Amnesty International voiced its concern about the provision of the death penalty in Iraq for a wide range of political offences, and the fact that hundreds of people are executed each year for political offences. The death penalty may be imposed for crimes against the security of the state, including non-violent political activity, for example : political activities by, and relating to members of the Ba'ath party who are associated with, or work for other political parties, and political activity within the armed forces detrimental to the Ba'ath party. Another capital offence, which has been made retroactive, is membership of 'Al Da'wa Al Islamiya.

Amnesty International pointed out that such provisions are contrary to the UDHR, because they prohibit the rights to freedom of expression and association, even prescribing the death penalty for this freedom. Amnesty International also expressed its concern that many death sentences since 1980 were handed down by special courts, where trials are summary and legal safeguards are lacking.

The Iraqi official response[83] to the publication of Amnesty International's report alleged that the memorandum contained "a number of falsehoods, which misrepresent the reality of the situation and contradict proved facts".[84]

With regard to allegations of torture, it repeated that the government of Iraq repudiates all types and all methods of torture wherever they occur and at whatever level. It claims to maintain democracy and denounce all forms of torture and coercion.

The government called for one of the fifteen alleged victims of torture mentioned in the Amnesty International report to be returned to Iraq so that investigations might be made into the allegations, since Iraqi law prohibits such practices. Amongst other comments, the governmnet stated that they believed the victims were not Iraqis.[85]

In June 1984, Amnesty International received a letter from the President of the Revolutionary Court stating :

"The Constitution and Iraqi legislation contains provisions and guarantees ensuring the dignity and freedom of man and preventing all kinds of torture, Legal application and esatblished practice confirm the observation of these principles."

With regard to Amnesty International's claim that legal procedures for arrest and detention are not followed in the case of political suspects, the official responses stated that no crime or punishment minus the legal provision for it is a basic principle of Iraqi law, and that no one may be detained without evidence of having

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83, Report and recommendations of an Amnesty International Mission to the government of the Republic of Iraq 22-28 January 1983, p29
84, This was also published by Amnesty International in the above document,
85, ibid, p32

committed a crime or without a warrant issued by legal authority.

It said that no political suspects were deatined in Iraq, and claimed that what Amnesty International meant by "political detention" was the imprisonment of a member of a political party, including the Ba'ath party, who have committed ordinary non-political crimes.

It denied that detainees were not allowed outside contact, claiming that detainees are entitled to contact relatives, appoint a defending lawyer and be seen by a doctor. Furthermore, they claimed that solitary confinement and concentration camps did not exist in Iraq.

In regard to confessions allegedly extracted by torture or cruel treatment, it noted that the memorandum was vague and did not mention cases. It claimed that in addition to refusing to accept any such confessions, the judicial authorities require that legal proceedings be taken against the interrogator. It asked for an example of the practice in Iraq.

With regard to deaths in detention, the official Iraqi response stated that such allegations were based on conjecture and not supported by concrete evidence. Again, they asked for details in regard to thirty people who were said to have been killed under torture while in custody between July 1979 and March 1981.

The Iraqi report alleged that Amnesty International was acting on the basis of unsubstantiated reports without seeking to verify the accuracy of the information they contained.

In response to a call from Amnesty International for the government to investigate the whereabouts of hundreds of people who had "disappeared" after reportedly being arrested between 1979 and 1982, the Iraqi government replied by accusing the organisation, among other things, of prejudice and alleging that the names which Amnesty International had supplied were fictitious.[86]

86, Amnesty International Amnesty International Report 1984, p337

Finally, I will briefly examine the response of three other countries, the Libyan Arab Jamahiriya, the Syrian Arab Republic, and the Kingdom of Jordan.

Amnesty International's concerns in Jordan during the 1980s have included the prolonged detention without trial of political prisoners, lack of legal safeguards in military courts, and the death penalty.

During 1980, Amnesty International alleged that four had been detained and sentenced to ten years imprisonment for being members of the Communist party, and that nine detainees were held without trial. They also asked about 131 detainees allegedly held in Al-Mahatta Central Intelligence Prison in Amman. They expressed their concerns in a letter to the Minister of the Interior. They also wrote to King Hussein to express their concern at the growing number of death sentences, and executions carried out at Al-Mahatta Prison.[87]

The Jordanian representative to the Human Rights Committee, during consideration of Jordan's report in 1981[88] *criticised statements made by Amnesty International in a document called "Briefing fr the Human Rights Committee concerning Jordan", saying that it contained "untrue statements" and "ill-intentioned and false rumours".*

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87. Amnesty International Amnesty International Report 1981, pp367-8
88. CCPR/C/SR.331 of 9th November 1981, p4

With regard to Amnesty Intenational's allegations about a lack of legal safeguards in military courts, the representative mentioned an American study carried out by a committee of jurists, which showed that cross-examination applied in the Jordanian legal system, even by martial law courts. Even though sentences of military courts may not be appealed, he pointed out that the Prime Minister in his capacity as Martial Law Governor has the power to increase, reduce or annul the sentence.

With regard to the four prisoners allegedly sentenced to ten years imprisonment for belonging to the Communist Party, he stated that one of them had in fact been sentenced for involvement in subversive activities and instigation of acts designed to undermine the security of the state. With respect to the nine allegedly held without trial, he stated that information obtained by the Jordanian government showed that the allegation had no basis in fact. With regard to the 131 detainees allegedly held in Al-Mahatta Prison, information concerning which Amnesty International had allegedly received from a minister. Ali al-Bashir, the representative stated that there was no such minister and no such prison, and the figure of 131 detainees referred to the number of prisoners convicted of crimes. He also stated that the organisation's concern over the growth in death sentences in Jordan was unjustified, since only 4 people had been executed in recent years in Jordan.[89]

89, CCPR/C/SR.331 of 9th November 1981, p4

Amnesty International's concerns in Syria[90] during the 1980s include the widespread practice of arbitrary arrest and detention, torture and ill-treatment of detainees, and extra-judicial killings, including disappearances. The organisation expressed its concern in a memorandum to the government on 26th April 1983, asking the Syrian government to respond by 6th June 1983, for discussion. When they received no response, a telex was sent on 13th June to President Assad, saying that the organisation hoped to receive a response by 24th June 1983, and if no response was received, it would publish its concerns in due course.

The Syrian embassy in London has informed Amnesty International that an early date for a visit could not be anticipated, but the memorandum was being studied, and they would be sent the requested comments in due course. During 1984, there was no response to Amnesty International's proposal to send a delegation to Syria to discuss issues and recommendations contained in the memorandum.[91]

During 1984, Amnesty International submitted information about its concerns in Syria to the UN Human Rights Committee, saying the evidence revealed "a consistent pattern of gross violations of human rights".

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90. They were expressed in detail in Report from Amnesty International to the government of the Syrian Arab Republic, 1983.
91. Amnesty International Amnesty International Report 1985, pp337-339

Amnesty International's concerns in Libya include widespread arrest, detention and imprisonment of people for the non-violent expression of their political beliefs, frequent and consistent allegations of toture or ill-treatment of detainees, lack of legal safeguards in the so-called Revolutionary Courts, executions and extra-judicial killings, including the policy of "physical liquidation of enemies of the revolution".

As the Libyan Arab Jamahiriya signed and ratified the ICCPR in 1970, Amnesty International has repeatedly called on the Libyan government to renounce its policy of extra-judicial killings at home and abroad, and fully implement the provisions of the Covenant. as yet, no reply has been received.

Amnesty International has repeatedly called for the release of political prisoners, but the only response has been statements that there are no political prisoners in Libya, and a speech of Gaddafi in March 1981[92], in which he stated :

"those who are put into [the Jamahiriyal prisons are there because they are the enemies of the people and they fight for restoring the government above the people. There is no shame and there is nothing wrong in putting these people in prisons or in treading on them with your feet."

Throughout the 1980s, Amnesty International often expressed its concerns in general, and in specific cases and issues, including those of people who were denied fair trial, tortured before trial, and had their sentences over-ruled by administrative decree. At no time was there any direct response from the Libyan authorities.

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92. Amnesty International Amnesty International Report 1982, p335

In March 1983, Amnesty International launched a worldwide campaign to expose political killings by governments, publishing details of assassination attempts on at least 14 Libyan citizens since the call for "liquidation of enemies of the revolution abroad".[93]

In a written response to Amnesty International, the People's Bureau in Brussels described the policy as lawful action. It said :

"...many countries liquidate their political enemies secretly, only the Jamahiriya publicly announces this policy, because we are entitled to do so and all the laws support us."[94]

In 1984, Amnesty International published a document detailing human rights concerns in Libya[95]*, and as I mentioned in discussion of Morocco, the organisation wrote to the Libyan government expressing its fears that the provisions of a treaty of confederation signed between the two countries might lead to persecution of individuals for their political beliefs. No reply was received from the Libyan authorities.*[96]

As in Syria, lack of response to the organisation led to the submission of information to the UN Human Rights Committee about its concerns in Libya, under the UN procedure for confidentially reviewing communications about human rights violations. The report stated that evidence showed "a consistent pattern of gross violations of human rights" and called for UN investigation of the issues.[97]

93, Amnesty International Political Killings by Governments, 1983 p69f
94, Amnesty International Amnesty International Report 1984, pp353-354
95, Amnesty International Violations of human rights in the Libyan Arab Jamahiriya, November 1984
96, Amnesty International Amnesty International Report 1985, p330
97, ibid.

PART TWO

NON-GOVERNMENTAL

Non-governmental organisations and committees concerned with human rights in the Arab world are trying to establish an Arab Convention and Court on Human Rights, with a more effective commission, similar to other regional developments, in the absence of any successful governmental achievements.

At a conference in Baghdad in May 1979, an Arab Convention on Human Rights was proposed by the Union of Arab Lawyers, which might be able to overcome the present problems of real achievement and more guarantees for the fundamental rights and freedoms of the Arab populations.[98] This loyal effort pointed out, at a number of conferences, the urgent necessity of establishing permanent constitutions in Arab countries, containing safeguards for human rights and fundamental freedoms.

In addition, in December 1983 in Tunis, they called for more limitation of emergency powers and temporary courts, and that Arab countries should sign and ratify the United Nations Covenants, Optional Protocol and Conventions on human rights issues, and implement them as part of their domestic legal systems.[99] They also called for the establishment of non-governmental organisations, and development of human rights ideas at all levels of education and the media.

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98. Robertson, p165
99. Al-Mohamy (The Lawyer) Law Quarterly Review (Libyan Bar Association) 10 1984 pp72-73

In January 1980, a meeting of the Permanent Bureau of the Arab Lawyers Association in Amman (Jordan) adopted resolutions dealing with the independence of the legal profession, and the establishment of committees of human rights for Arab Bar Associations.[100]

The organization sent a written declaration to the Secretary-General of the United Nations under ECOSOC Res. 1296(XLIV), stating that at their meeting they had discussed "the situation of human rights and fundamental freedoms in the Arab countries". After the debate, they adopted a number of resolutions, details of which they sent to the Secretary-General, calling on lawyers in Arab countries to mobilize public opinion against all emergency constitutions and legislation, denounce illegal administrative practices, boycott emergency judicial bodies and work for their abolition. They also called for a Day of Solidarity with political prisoners, and of Action for the abolition of emergency regimes and courts, and reaffirnation of the primacy of law. The Scretariat undertook to investigate violations and illegal practices in regard to human rights as well as drafting an "Arab covenant on fundamental freedoms and rights", and working with other Arab NGOs to establish an "Arab court of human rights". They also undertook to try to bring Arab states to ratify the international covenants and the optional protocol.[101]

100, Human Rights Internet Newsletter March/April 1980 Vol,5 Nos 6 & 7 p61
101, E/CN,4/NGO/282 of 21st February 1980, pp1-3

The Arab Lawyers Union expressed, on several occasions, their fears about the effects of repressive measures on one of the most important factors in any state, the judicial power, particularly the independence of lawyers and the freedom to provide proper legal defence for political prisoners. It seems that reports from the Union of Arab Lawyers[102] *about the arrest and harrassment of lawyers in Syria, Libya*[103] *and Egypt led to the adoption of a resolution by the UN Sub-commission on Prevention of Discrimination (Resolution No 13 (XXXIII) calling for the respect "for the right of all judges and lawyers freely and without interference to form or to participate in professional organisations of their own".*[104]

The organisation has also participated in organising seminars in the field of human rights, cooperating with organisations like the International Commission of Jurists, for example, in holding a seminar on Islam and human rights at the University of Kuwait in 1980.[105]

It seems to me that this organization is attempting to improve the human rights and fundamental freedoms in the Arab world in the absence of governmental initiatives.

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102 , E/CN.4/NGO/285 of 3rd March 1980, pp1-2
103, "In January 1981 Law No 4 came into force stipulating that lawyers could no longer practise privately and were to be treated as officials of the Ministry of Justice," Human Rights Law Journal 4,1 1983 p81
104, "Human Rights and the United Nations; Progress at the 1980 Session of the UN Subcommission on Prevention of Discrimination and Protection of Minorities" Hurst Hannum Human Rights Quarterly Vol 3,1 1981
105, Human rights in Islam ; report of a seminar held in Kuwait, December 1980 organised by International Commission of Jurists, University of Kuwait and Union of Arab Lawyers, 1982

In April 1983, Arab individuals, including intellectuals, scholars, professionals and political activists, met in Tunis to discuss human rights violations and the crisis of democracy in the Arab world. The declaration they published as a result of their meeting is known as the Hammamat Declaration.'[106] *No representative of any Arab government was present. The group issued a declaration, and set up a committee to contact concerned groups in the Arab countries and draw up a legal framework for establishing a permanent monitoring committee.*

On 1st December 1983, a second meeting took place in Limassol in Cyprus, as a result of the refusal of the Egyptian, Kuwaiti and Jordanian governments to allow it to take place in their capitals.'[107] *At the meeting the group decided to establish a non-governmental organization for the Defence of Human Rights and Fundamental Freedoms in the Arab Homeland. The organization called on all Arab governments "to acknowledge human rights and freedoms specified in the UDHR". They called for the defence of all individuals whose human rights are violated, demanding "that all political prisoners in the Arab countries be released or immediately brought to trial." They demanded that all illegal courts and emergency legislation be abolished, and the illegal activity of the security forces be ended.*

They called for the improvement of the conditions of political prisoners and that representatives of the Arab Organization of Human Rights should be allowed to visit political prisoners.

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106. Merip Reports January 1984 14 1 23
107. Hammamat Declaration Merip Reports January 1984 14 1 23

The organization undertook to send representatives to investigate claims of violations of human rights, and where possible, provide concerned parties with information about alleged violations.[108]

Even though no official organs or instruments, like a Court or Convention, to protect human rights in the Arab world have yet been created, there is unofficial effort at the local level in many Arab countries. There have been proposals, as yet not acted upon, for an Arab Court and Commission of Human Rights.[109]

As I mentioned, the Expert Commission of the Arab League has begun work on a draft Arab Convention on Human Rights. Nine members have responded to the draft.[110]

Their responses ranged from acceptance without reservation to outright rejection, with some suggesting fundamental changes and others asking only for minor modifications.[111]

Unofficial suggestions for the contents of the Arab Convention on Human Rights reflect hopes that such a convention could achieve meaningful protection of human rights in the Arab world. For example, it is suggested that the Convention should be in regard to political and civil rights alone, as it should be legally binding on States and the inclusion of economic and social rights would make this difficult to achieve, bearing in mind the differing economic

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108. Al-Mohamy (The Lawyer) Law Quarterly Review (Libyan Bar Association) 10 1984,pp78-81
109. Jamil Husayn "Human rights in the Arab homeland ; obstacles and applications" Al-Mustaqbal Al-Arabi 1984 6 62 pp132-155
110. They are Syria, Libya, Kuwait, Saudi Arabia, Egypt, Lebanon, Jordan, Iraq, PLO.
111. Arab Affairs Publication of the Arab League No. 13 March 1982, pp494-5

circumstances of Arab states. The need for an Arab Court and Committee on Human Rights to administer the Convention along similar lines to the American and European regional developments cannot be doubted.

Also extremely important in view of the particular circumstances of certain Arab states is the principle that communications from individuals, groups and non-governmental organisations alleging violation of the Convention should be admissible as well as communications from member states. With regard to the particular circumstances of some Arab states, scholars have suggested that a number of special principles should be observed with regard to the right of the individual to complain.

These include the suggestion that the competence of the Committee to consider allegations from an individual of violation of the Convention by a state should not be conditional on that state's acceptance of the Committee's competence, as in the Inter-American Commission on Human Rights, and the suggestion that the competence of the Committee should not rely on its acceptance by a minimum number of member states.'[112]

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112. Jamil Husayn "In favour of the establishment of an Arab Court for Arab Human Rights" al-Mustaqbal al-Arabi April 1983 pp16-40

Further, the very important point has been made that the principle of the prior exhaustion of local remedies is not appropriate to the circumstances of the Arab world. In some Arab countries, it is difficult or sometimes impossible for a victim to practise his right to a local remedy, whether because there is no such remedy available or because he is detained, in exile, or under some other threat.'[113]

This would not be intended to replace the general principle of exhausting available local remedies, but rather to provide an additional safeguard to the rights of individuals at risk and otherwise without remedy.

Other efforts have been made by national bodies, such as bar associations in Arab countries and committees for the defence of human rights.

Two national institutions in the field of human rights in Syria which are recognised by the Syrian government are the League for the Defence of Human Rights and the League of Association of Jurists. Their statutes were submitted to the UN Commission on Human Rights by the Syrian government in 1979.'[114]

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113. ibid.
114. E/CN.4/1321/Add.3 in Human Rights Internet Newsletter March-April 1980, Vol 5 Nos 6 & 7 p63

The activities of the former are non-political and "humanistic", to "consolidate in the minds of citizens" the principles of the Universal Declaration of Human Rights "...and to promote those principles, to secure human rights and basic freedoms and to defend them in words and practice". The organization hopes to achieve those principles by educating individuals and institutions by lectures and publications, constituting committees to promote those principles.

The League of the Association of Jurists aims to promote the concept of sovereignty of law, and to defend human rights, and to support the constitution and its institutions. It also supports Arab unity and works to promote the revival of Islamic jurisdiction, as well as seeking to strengthen its links with other world jurists institutions."[115]

In spite of the Syrian government's recognition of the League for the Defence of Human Rights, its First Secretary, Muwaffaq al-Din al-Kozbari, was arrested and subsequently detained without charge or trial for three years, following a day of protest and strikes in which the Syrian Bar Association, doctors, engineers and other professional groups called for an end to the state of emergency."[116] *Many were detained as a result of the protest, and it led also to the dissolution of the Councils of the Bar Associations as well as associations of medical practitioners, engineers and architects by*

115, E/CN.4/1321/Add.3 of 21st February 1979
116, Amnesty International Report from Amnesty International to the government of the Syrian Arab Republic, 1983, p54

Presidential Decree "for exceeding their mandates".[117]

Likewise, three members of the Association marocaine des droits de l'homme were sentenced to three years imprisonment, including Abderrahman Ben Amar, a lawyer and member of the organization's administrative committee.[118]

The Committee for the Defence of Human Rights and Political Prisoners in Libya carries on communication at the regional and international levels, preparing reports and communiques, describing the activities of the Libyan regime, and calling for support from other organizations. This has included the submission of a memorandum to the Union of Arab Lawyers in 1980 in which they described some of the repressive measures taken by the Libyan regime from 1973, including their actions in abolishing the laws and the judiciary, delegating the courts to the so-called "popular committees", and planning to abolish the legal profession. They also describe how Gadaffy detained lawyers, jurists and intellectuals giving the reason that these people were sick men who needed treatment in detention centres. They presented a draft resolution to a meeting of the Arab Lawyers Union, recommending condemnation of, and a call for an end to the policy of physical liquidation, and arbitrary detention without charges, as well as a call for the

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117, States of Emergency ; their impact on human rights ; A study prepared by the International Commission of Jurists, 1983, p287
118, Amnesty International Amnesty International Report 1984, p355

release of political prisoners, and the return to normality of the judicial system.'[119] Organizations like the Arab Lawyers Union and Amnesty International have expressed their concern about the passage of Law No. 4 of 1981, which abolished the legal profession in Libya. In November 1981, a number of Libyan lawyers abroad issued a a statement denouncing this measure and alleging that the courts were ruled "by the absence of conscience and law".'[120]

The Bar Associations of the Arab countries have a long history of defending human rights, and this often leads to action being taken against them by governments. For example, in Egypt, the Bar Association has a long tradition of defending human rights, with its Committee for the Defence of Freedoms often ensuring that political prisoners have defence counsel. The Bar Association also spoke out on several occasions against the continuation of the state of emergency. The Bar Council was abolished by the People's Assembly on 22nd July 1981, when President Sadat accused the council of activity of a political nature. Former members of the council were arrested and detained. The Bar association was later headed by a temporary Bar Council set up by the President and approved by the People's Assembly.'[121] According to the Egyptian representative at the Human Rights Committee, the Bar Association had appealed to the courts and had won its case.'[122]

119, The Committee for the Defence of Human Rights and Political Prisoners in Libya, Selected Documents September 1981
120, Amnesty International Amnesty International Report, 1982, p336
121, Amnesty International Egypt ; Violations of human rights, 1983, pp26-27
122, Report of the Human Rights Committee General Assembly Official Records ; Thirty-ninth Session Supplement No.40 (A/39/40), p58

CHAPTER FOUR

QUESTION OF HUMAN RIGHTS IN ISLAMIC LAW AND THEORY

SECTION ONE

ISLAM AND INTERNATIONAL LAW

After I examined the principal sources of human rights and related developments in international law in Chapter 1, I examined in Chapter 2, the international instruments in the light of the international understanding of the rights of life, liberty and physical integrity, and the practices of some Arab countries in respect of those rights. In Chapter 3, I examined the official response of some Arab governments in the light of their international obligations, and their response to non-governmental organisations, as well as the response of non-governmental groups in the Arab world to their human rights position.

Finally, we come to the question of international law in Islamic theory, where I will examine the Islamic concept of international law, the understanding of this faith of what is known as "the Islamic Law of Nations", evaluating its relationship with the principles of modern international law governing the relations between nations, in time of peace as in war. I will also examine the understanding of this ideology in regard to what are internationally recognized today as human rights, particularly, the rights of liberty, physical integrity and life. Finally, I will examine the position of Islamic law in some Arab countries.

This analysis should shed light upon the sharp difference between the content of Islamic teaching and contemporary practice in Muslim countries, demonstrating the fact that many practices have no grounds or foundation in the Islamic religion. The religion has been used as a platform for raising political and constitutional matters.

The practices of certain states have led to a distorted picture of this ideology in international public opinion, as this faith has been misused to further the purposes of corrupt leaders and illegitimate regimes.

My discussion will be in outline, first because I am not qualified in Islamic law, and second since neither space nor time would permit an exhaustive examination of the issues involved. Hence, I will focus only in certain aspects which are of interest to this research, and other issues in regard to the stand of Islamic law on international law and human rights in general, and to the rights of life, liberty and physical integrity in particular.

As we saw already in this research, human rights provisions have found their places to different degrees in constitutions and declarations, treaties and conventions, whether at the national or international level. As we saw in Chapter 2, they have found their place in Arab countries' national legislation, in their constitutions and other laws.

Besides incorporating international provisions dealing with human rights, most Arab countries name Islam as the state religion, and claim to draw inspiration for constitutional and other legislative principles from its teaching. For example, article 2 of the Egyptian constitution stipulates that the principles of Islamic legislation (Shari'a) constitute a primary source of law.'

1, CCPR/C/SR.499 of 6th April 1984, p2

Likewise, the Syrian Constitution of 31 January 1973 proclaims the Syrian Arab Republic to be a democratic, popular, socialist and sovereign state with Islamic jurisprudence as its main source of legislation.[2]

The Tunisian Constitution refers to Islam in the preamble to the constitution, which states an undertaking " to remain true to the teachings of Islam", and article 1 of the constitution makes Islam the religion of the Tunisian State.[3]

The Libyan Arab Jamahiriya in article 2 of the Constitutional Declaration of 1969 states : "Islam is the religion of the state..."[4] *Later, in March 1977, the constitutional declaration was revoked and Libya reverted to the Qur'an, which became the ruling constitution.*[5]

In Saudi Arabia, there is no written constitution, but the Qur'an serves as the Constitution of the state.[6] *In Jordan the constitution makes Islam the state religion.*[7] *Likewise the Constitution of Morocco (1972) states in its preamble: "The kingdom of Morocco is a sovereign Muslim state, ...", and affirms that Islam is the religion of the State..."*[8]

2, Report from Amnesty International to the government of the Syrian Arab Republic, 1983, p4
3, CCPR/C/28/Add,5 of 8 May 1985 p19
4, CCPR/C/1/Add,3 of 14th March 1977, p14
5, CCPR/C/1/Add,20 of 24th January 1978, p1
6, "Kingdom of Saudi Arabia" in Middle Eastern Constitutions and Electoral Laws, Abd A, al-Maryati, 1968, p293
7, CCPR/C/SR,362 of 15th July 1982,p9
8, Report of an Amnesty International Mission to the Kingdom of Morocco, 10-13 February 1981, 1982, p5

Thus, one can say that to varying degrees the Islamic law acts as a source of legislative principles both in constitutions and in the civil codes in Arab countries.

The truths of this faith were reflected in different forms in various times of understanding. Apart from the beginning of the middle ages, when the Islamic world witnessed its Golden Age of the Whdet Al Emama, ("United Nation" or Islamic state), the period of the rule of the Prophet and his four successors (al-Khulafa'a al-Rashideen), the unified Muslim nation did not endure. By the sixteenth century, it had divided into smaller empires, the most powerful being those of Turkey, Persia, India and Egypt. In modern times, regional empires divided again into national states, in some cases, after periods of colonial rule by European powers.[9]

Divisions in the Muslim nation have continued to the present day, as although there are many Muslim countries they are unable to establish any effective organization or institutions for unity.

In early days, the Islamic state was one State (Umma) with one leader (Kalifa) and this represented the ideal according to Islamic theory. Islamic theory does not allow for the official recognition of separate territorial sovereignties. This reality did not last as the Islamic State suffered the consequences of the growth of factions. As a result of this, the Muslims live in an unpleasant present they are unable to reject, with ideal goals and hopes they are unable to reach.

9, Islam ; a cultural perspective, Richard C, Martin, 1982, p142

Increasing divisions led the jurists (fuqaha) to continue their call for the ideal of the Islamic Unity as in the time of the Prophet and his successors, one nation (Umma) and one leader (Kalifa). In spite of the fact of the practice of the Muslim states, the reality remains that the separation of states which is not connected with Baghdad, or Cairo or even Kostantina (Constantinople) was considered an illegitimate act.'[10] As a result of all this, the Islamic World was unable to achieve international co-operation between its states, as legal recognition between them did not exist, with each one claiming its legitimacy and denying the others.

The Islamic state did not suffer the effects of struggle between religious and secular authority as it was always the Imam (leader) who held the two powers, and the fact remains that any sort of independence took a more or less administrative character until the Firman of October 1871 in Tunisia and until 1840 in Egypt, when the two states were given a wider authority but remained part of the Ottoman Caliphate. Since Islamic theory does not allow, as I mentioned, the recognition of separate states, clear and complete independence was not granted till the mid twenties when states declared their full authority and legitimacy as individual states, and in the final days of the Ottoman Caliphate the Arab candidate, Sharif Husayn of Mecca, declared himself the Caliph of the Muslims.''

10, Lectures in public international law Benghazi- University Faculty of Law 1971-72 In The Islamic And European middle ages given by Dr, Mohsin Al-Sheshkli pp296-340
11, Modern Islamic Political Thought, Hamid Enayat, 1982, p70,

As Islamic legal theory in general is based on a divine source, Muslims regard it as perfect, and therefore applicable to all human beings at all times everywhere.[12] The two principal sources of Islamic law are the Qur'an and Sunnah and one can say that, from the theoretical aspect, the Islamic law of nations (Siyar) is a part of Islamic law, based on the same sources, and maintained by the same sanctions. However, as this law governs a wide range and variety of relations, it was important to apply other secondary sources such as the consistent practice of Muslim heads of state (Khalifas), and other sources beside the conventional ones, such as the rules established in treaties and peace agreements made by Muslims with non-Muslims, as well as the participation of jurists and judges within the general framework of Islam.

In Islam, with its universal appeal to all mankind, the Shariah has enshrined the principles of Islamic international law right from its inception, as it regulates the conduct and behaviour of the Muslim nation whether in time of war, peace or neutrality.[13].

The Prophetic Sirya and the Koulafa Sirya are the main sources of influence in international Islamic jurisprudence, establishing the regulation of relations between the Islamic state and others.

In the time of Abbasid Caliphate, Shaybani recorded the lectures by Imam Abu Hanifa[14], in which the term Siyar was first used to mean international law, in his famous books.[15]

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12. See Chapter I, Islam as a source of human rights, p13f
13. Shariah ; the Islamic law Abdur Rahman I. Doi, 1984 p421
14. A leader of one of the four schools of Fiqh.
Shari'a ; The Islamic law A. Rahman I Doi, 1984, pp88-90
15. Kitab al-siyar al-saghir and Kitab al-siyar al-kabir

The successors of Shaybani, who tried to give the Siyar a specific definition, describe the Islamic law of nations as:

" the law which describes the conduct of the believers in their relations with the unbelievers of enemy territory as well as with the people with whom the believers had made treaties, who may have been temporarily (musta'mins) or permanently (Dhimmis) in Islamic lands; with apostates...; and with rebels.."

Others defined the term as :

"The ways of conduct of the warriors and what is incumbent upon them and for them [i.e., the rules binding upon them and others]."[16]

Theoretically, the general concepts of the science of al-Siyar[17] do not restrict its jurisdiction to specific nations only, but since the Islamic law of nations was part of the Shari'a it was designed to govern the various relations of Muslims with Muslims and non-Muslims inside and outside the territory of the Islamic State, as it regulates the conduct of the Islamic state with non-Muslim states, and the treatment of non-Muslim individuals resident in Muslim territory.

Another observation could be made that an Islamic Law of Nations does not exist as a separate system based on different sources but is part of the Islamic doctrine binding upon all who believe in this faith, as well as upon those seeking to be subject of Islamic justice.

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16. The Islamic Law of Nations Majid Khadduri, 1966, p22f
17. Al Siyar "..the earliest name given by Muslim scholars to the special branch of law dealing with war, peace and neutrality seems to have been Siyar... from Sirat, meaning conduct and behaviour.."
Shari'ah : the Islamic law Abdur Rahman I. Doi, 1984 p421

ISLAMIC CONCEPT OF INTERNATIONAL LAW

In order to examine the Islamic concept of international relations, as well as the interrelationships of Muslims with non-Muslims, I have to examine the divisions of the world according to this theory into the Islamic territory which is known as the Dar al-Islam and the "territory of war" (Dar al-harb). The territory of Islam (Dar al-Islam) contains Islamic and non-Islamic communities which have accepted Islamic sovereignty, and the rest of the world is known as the territory of war (Dar al-Harb).[18] *In between those two divisions, Islamic theory recognized another division for territory, of peaceful arrangement (the Dar al-Ahd) where a covenant of peace and security was given to non-Muslim communities.*

As Jihad is an issue often raised in Islamic thought in general and particularly in Islamic international law, I will start by examining this issue and what is related to it. It is true that the establishment of God's sovereignty, and universalization of the Islamic ideology, is the ultimate aim of this faith, through striving and undergoing hardship, or Jihad. The doctrine of Jihad is comprehensive and broad. It does not necessarily mean the use of force and violence, but may take other forms, as we will see. A state of war has existed between Islamic and non-Islamic states, when unavoidable.

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18. The Islamic Law of Nations Majid Khadduri, 1966, p11

War for defence against aggression and injustice is permitted when it is unavoidable, with many conditions as the Qur'an says:

> "Permission to take up arms is hereby given to those who are attacked, because they have been wronged, Allah has power to grant them victory;those who have been unjustly driven from their homes,only because they said;'Our Lord is Allah," (Qur'an 22 ; 39, 22 ; 40)
>
> "Fight for the sake of Allah those that fight against you, but do not attack them first,Allah does not love the aggressors," (Qur'an 2 ; 190)

If war becomes an unavoidable necessity, Muslims are instructed to incline towards peace, at any stage of the armed conflict, if the other party is prepared for a peaceful solution, as the Qur'an says:

> "But,if the enemies incline towards peace, do you also incline towards peace, and trust in Allah! For He is the one that hears and knows (all things), (Qur'an 8 ; 61)

If Jihad with its physical meaning (war) becomes an unavoidable necessity, then Muslims engaged in fighting are strictly instructed to observe human dignity and morality, under all circumstances, and combatants have rights as well as civilians.

In accordance with Islamic theory, there can be a Jihad through speaking up for truth particularly against an illegitimate or unjust leader or government, as the following Hadith of the Prophet confirms :

> "The Messenger of Allah has said ; The highest kind of Jihad is to speak up for truth in the face of a Sultan (government or other authority or any leader) who deviates from the right path'."

After this brief survey of the understanding of this faith in regard to the term Jihad, it could be said that the early jurists concerned themselves to matters in the Islamic law of nations under the general heading of Jihad, and their treatment of the law of war was more or less the main issue.

Now I will examine the legal status of several international issues under Islamic law. As we saw, the Qur'an and the Sunnah are the two principal sources of Shari'a, and along with secondary sources, they contain numerous references in regard to issues of concern to international law. They confirm the fact that Islamic political thought recognises very important principles of that science, in time of war and peace, such as the protection and immunity of diplomats, humanitarian law, and treaty agreements.

Starting with humanitarian law in Islam, I will try to shed light on the understanding of this faith of the set of international rules which has for its object the rights of man in time of war or armed conflict, postponing consideration of human rights in time of peace to a later section.

In common with modern humanitarian law, Islamic law seeks to regulate the conduct of war by controlling the means of war, including the kinds of weapons used, and protecting the rights of non-combatants, and to a lesser extent, combatants, particularly in the case of prisoners of war. In addition, Islamic law governs the procedures for declaring war and seeks to safeguard life and property during war-time.

The Qur'an contains numerous verses dealing with humanitarian considerations in time of armed conflict, from which I quote the following as an example :

> *"He will assuredly help those who, once made masters in the land, will attend to their prayers and pay the alms-tax, enjoin justice and forbid evil. Allah controls the destiny of all things. (Qur'an 22 ; 41)*

With regard to the use of weapons, although the serious threats to humanity which exist now, such as chemical warfare and nuclear weapons, did not exist in that time, still Khalil al-Maliki in his book on Jihad said that : "it is prohibited to use weapons capable of causing to the combatant injuries that exceed the possible benefit achieved by his opponent". He gave the example of the prohibition of the use of poisoned arrows.[19]

It seems that the view of this scholar is consistent with the Qur'an which prohibits excessive killing even when it is permitted :

> *"You shall not kill any man whom Allah has forbidden you to kill, except for a just cause. If a man is slain unjustly, his heir is entitled to satisfaction. But let him not carry his vengeance too far, for his victim will in turn be assisted and avenged." (Qur'an 17 ; 33)*

Islam also prohibited other excessive destruction, including destruction of property, firing of crops and looting,[20]*in the advice of the Prophet's companion.*

Strict codes of conduct for Muslim combatants were implemented to protect life and property, as shown by the advice of the first Calipha (leader) Abubakar[21] *to Yazid bin Abu Sufyan*

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19. "A general review of humanitarian international law in Islam" by Muhammad al-Ghunaimi, in First Egyptian Seminar on International Humanitarian Law, 1982, p61
20. Lectures in public international law Benghazi University, Faculty of Law, 1971-72 In The Islamic And European Middle Ages, given by Dr. Mohsin Al-Sheshkli p322
21. Islam ; a cultural perspective Richard Martin, 1982, pp39-40

in his war on the coasts of Syria states:

> "When you travel, do not drive your comrades so much that they get tired on the journey, Do not be angry upon your people and consult them in your affairs, Do justice and keep them away from tyranny and oppression, because a community that engages in tyranny, does not prosper, nor do they win victory over their enemies,
> When you become victorious on your enemies, do not kill their children, old people and women, Do not go even closer to their date palms, nor burn their harvest, nor cut the fruit bearing trees, Do not break the promise once you have made it, and do not break the terms of treaty, once you have entered into it,
> You will meet on your way people in the monasteries, the monks engaged in the worship of Allah, leave them alone and do not disperse them, let them please themselves and do not destroy their monasteries, and do not kill them, May peace of Allah be upon you,"[22]

Islamic teaching also regulates the conduct of the Muslim combatants in aspects such as protection of the wounded and prisoners of war, saying that they should be released or ransomed :

"...bind your captives firmly, Then grant them their freedom or take ransom from them, until War shall lay down her armour, Thus shall you do, Had Allah willed he could himself have punished them, but he has ordained it thus that he might test you, the one by the other." (Qur'an 47 ; 4)

and that prisoners should be fed :

"...give sustenance to the poor man, the orphan and the captive, saying "We feed you for Allah's sake only; we seek of you neither recompense nor thanks; for we fear from Him a day of anguish and of woe," (Qur'an 76 ; 8)

The Sunnah confirms too those principles laid down by the Prophet as this Hadith confirms the rules pertaining to the prisoners of war:

"They are your brothers, Allah has put them in your hands; so whosoever has his brother in his hands,let him give food to eat out of what he himself eats and let him give him clothes to wear out of what he himself wears, and do not impose on them a work they are not able to do themselves, If at all you give them such work, help them to carry it out."[23]

22, Shariah the Islamic law,,Abdur Rahman I,Doi,,1984,p,446
23, Hadith of the Prophet, Non-Muslims under Shari'a A, Rahman I Doi 1983, p96

The sanctity of corpses is protected, for example, it is said in the Hadith (Bukhari, Abu Dawud) that "The Prophet has prohibited us from mutilating the corpses of the enemies".[24]

Islamic principles also distinguish combatants and non-combatants, considering the combatant as he who participates physically, and forbidding the killing of religious people, children, old men, disabled, women and labourers, as we saw in the advice of Abubakr.

As the teaching of Islam considers the human being as Allah's Khalifa on earth, and hence the centre of the universe, the contents of Shariah are binding on every Muslim state and individual. As we saw in Chapter One, Islam proclaims equality, therefore, those principles and concepts apply to the relationship between Muslims and others with the same status as well as between Muslims themselves, regardless of colour, race or sex.[25] *Such a concept can only be supportive to the general conceptions of international law as well as to humanitarian international law.*

24, Human rights in Islam Abul A'la Mawdudi, 1980, p37
25, The Qur'an says; "And people are but a single nation" (10 ; 19),

Earlier I distinguished the Islamic State divisions of Dar al-Islam and Dar al-Harb. The third division, Dar al-Ahd, falling between these two, represents states of agreement between Muslim and other communities, by pledges, treaties and other peaceful agreements, known in the Muslim state as al-Muwadah, or temporary peaceful arrangements.

Two principles dominate the notion of treaties between Muslims and non-Muslims : firstly, that they may not be permanent; secondly, that treaties and other pledges of faith should not be breached, that is, the principle, pacta sunt servanda. Treaty provisions are to be strictly observed, and should not be affected by the strength or weakness of states. The Qur'an instructs Muslims :

"O you who believe, fulfil all obligations," (Qur'an 2 ; 283)

and the Prophet has instructed, in the Qur'an and the Hadith :

"Do not be guilty of breach of faith",

The best example of the Muslim being bound by a treaty, even when against his own interests, can be seen in the incident of Hudaibiyah, when the Prophet entered into a treaty relation with non-Muslims even though the terms of the treaty were unfavourable to Muslims. It was agreed that a Muslim should not aid another Muslim against a non-Muslim who enjoyed the protection of a pledge, even for a religious reason.[26]

The Qur'an says :

"But if they seek your aid in religion, it is your duty to help them, except against a people with whom you have a treaty," (Qur'an 8 ; 72)

26, Non-Muslims under Shari'a A Rahman I Doi, 1979, pp28-29

This is a very brief examination of Muslim treaty relations, and we can see that Islamic law requires Muslims to honour and fulfil their obligations under treaties and agreements under any circumstances, even when detrimental to their own interests. In the field of international relations, the Muslim state is thus doubly bound by accession to international instruments.

The Qur'an and the Sunnah, as well as secondary sources of Islamic law, such as the practice of Kalifas, contain numerous references to the protection and immunity of diplomats and their staff, and accompanying persons. The Qur'an contains several references to the concept of Aman (safe conduct). Freedom from prosecution, protection from arbitrary arrest and detention, as well as proper treatment are all provided for diplomatic persons in these sources. For example, the incident of the exchange of envoys between Bilqis, Queen of Sheba and the Prophet Sulaiman (Solomon) (Qur'an 27 : 23f) shows that the use of emissaries was a recognised means of communication between heads of state. The incident also shows that envoys were not held resonsible for acts or messages from their states, and protection was granted to envoys.

In the Sunnah, the negotiations before the treaty of Hudaibiya demonstrate the sanctity of envoys. It also shows that violation of a diplomat's immunity was regarded as a reason for war, as when it was believed that Othman had been killed, the Prophet prepared his forces for war.

After the treaty , when the Prophet attacked Mecca, the Islamic principle of sanctuary, a fore-runner of modern embassies, was established, when the Prophet announced :

"O Quraish! This is Muhammad, who has come to you with a force you cannot resist. He who enters Abu-Sufyan's house is safe and he who locks himself up is safe and he who enters the mosque is safe."

The concept of Aman or safe conduct is guaranteed in the Qur'an for non-Muslims. Aman may limit the rights of Musta'min, but nothing in the Qur'an or Sunnah limits the immunity of diplomats. Hence, even envoys who commit crimes are inviolable, as the incident of the envoys from Bani-Hanifa shows. Their leader was Musailima bin Habib ("the liar") but the Prophet ordered that he be treated as an equal during the negotiations. Musailima sent the Prophet a message through two envoys to the effect that he, and not Muhammad, was the true Prophet of God. Upon its receipt, the Prophet asked the envoys whether they agreed with the content. They replied that they did, and the Prophet responded :

"By God, were it not that messengers are not to be killed, I would behead the both of you."[27]

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27. "Protection of diplomats under Islamic law" M. Cherif Bassiouni in American Journal of International Law , Vol 74, 1980

With respect to the Islamic law of nations, I have briefly examined the similarities with modern international law, in several fields, specifically humanitarian issues and the protection of diplomats and envoys. Of particular interest to the research is the Islamic concept of treaty relations. One can say that there is a double obligation on Muslims to honour treaty obligations. In a letter dispatched to Abu Mousa al-Asha'ari, the Kalifa Umar ibn al-Khattab wrote :

"Understand what is presented to you, reach your judgement, and make sure to carry it out, for what is the use of a right that remains unimplemented."[28]

28, Address delivered by Dr Al-Touhami Nagrah, Representative of the Secretary-General of the Arab League in Human Rights in Islam ; report of a seminar held in Kuwait, December 1980, 1982, p39

SECTION TWO

HUMAN RIGHTS IN ISLAMIC THEORY

(a) in general

(b) in respect of life, liberty and physical integrity

As we saw in Chapter One, Islamic law is a divine one, based on God's will, transmitted through the Prophet to mankind. It covers all aspects of life, including the organisation of the Muslim state, and particularly important for the idea of human rights, the relationship between state and individual.[29]

The basis of individual rights in Islam rests on the foundation that man is the Kalifa of Allah on earth. Loyalty and devotion are owed firstly to God, and then since the Qur'an teaches that man is worthy of reverence :

"When I have shaped him and breathed My spirit in him, fall you down, bowing before him!"
(Qur'an 15 ; 29)

to every human being. Islam's human message can be seen in this verse from the Qur'an :

"I have honoured the sons of Adam, and supported them on land and sea, and given them an abundance of good things, because I have ranked them over many of my other creatures."

The equality of individuals is also provided in Islamic teaching, and that all humanity constitutes one family, as pointed out by verses of the Quran :

"And the people are but a single nation" (Qur'an 10 ; 19)

and by the Prophet when He said:

"A coloured person has no preference over a white man nor a white person over a coloured one, nor an Arab over a non-Arab, except through righteousness"

and

"All men are God's children and the most beloved by Him are those who are the most useful to his children."

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29. Islamic council ; what it stands for, 1982, p15

Thus one can say that individuals are equal in rights and duties in the frame work of the Islamic State and the fundamental principles of Islam. If any law is drafted in conflict with one or other of these fundamental principles, many other laws will require fundamental amendments.

Thus I refer the reader to my brief discussion of the Islamic notion of equality[30] and to the limitation of it. Nevertheless one can say for example, that equality before the law, equality in rights and duties, irrespective of colour, race, sex or religion is fully recognized. Equality between the sexes in Islamic teaching is confirmed by the words of the Qur'an :

"All believers, male and female are responsible for each other ; they preach what is right and forbid what is evil."

The responsibility of women can be seen in the early history of the Islamic nation, when women took an active role in public life.[31]

While each individual participates in the Caliphate of God (Khilafa), from the time of the Prophet, a representative or group has taken the role of Kalifa, as leader of the community. The authority of this individual or group is derived from the Khilafa of the whole community : whoever gains its confidence shall undertake the running of the state on its behalf.

Thus, the Qur'an instructs :

"O you who believe, obey Allah and obey the Apostle of Allah and those who are placed in authority among you, (Qur'an 4 ; 59)

30, Chapter One, p13f
31, Human rights in Islam ; report of a seminar held in Kuwait, December 1980, 1982 pp34-35

The purpose of the Islamic state is to enforce the principles of Shari'a. The government undertake to fulfil the will of God, and if they fail in their duty, they lose their legitimacy as leaders. Several verses of the Qur'an warn those who fail to apply the Shari'a, for example,

"And if any fail to judge by the light of what Allah has revealed, they are not better than those who rebel," (Qur'an 5 ; 50)
"And if any fail to judge by the light of what Allah has revealed, they are no better than the wrong-doers,"
"And if any fail to judge by the light of what Allah has revealed, they are no better than unbelievers," (Qur'an 5 ; 47, 48)

The government is empowered to enact positive law on condition that it does not contradict Qur'anic injunctions. Obedience due to leaders is connected to their implementation of the Shari'a, according to the Prophet, who says :

"There is no obedience due to any creature [no matter who they are] if they order to sin against Allah,"

"He who commands you to sin, has no authority over you,"

One can say that the state is bound to recognise the rights conferred on the individual by God. Human rights are not granted by president, king or legislative assembly, but by God, therefore they cannot be withdrawn because they are not given by man. No one has the right to abrogate or withdraw them under any circumstances.

Even the rights of non-Muslims in the Muslim state are protected, since they are the subject of Shari'a. One can say that the distinction is one of political administration.[32]

32, Non-Muslims under Shari'a A, Rahman I, Doi, 1983 p23

The fundamental rights of non-Muslims in an Islamic state are to be protected from external threats as well as internal tyranny and persecution. In this they share the rights of Muslims, and they have special protection from injustice, as the Prophet states :

"Whosoever persecuted a Dhimmi[33] or usurps his right or took work from him beyond his capacity, or took something from him with evil intentions, I shall be a complainant against him on the Day of Resurrection."
"Whosoever hurts a Dhimmi, I shall be his complainant, and for whosoever I am a complainant, I shall ask for his right on the Day of Resurrection"
"One who hurts a Dhimmi, he hurts me; and one who hurts me, hurts Allah."[34]

A non-Muslim enjoys equal justice before the law under Shari'a, unless he breaks the terms of a pledge. As the Muslim is punished if he violates the Shari'a, so the Dhimmi is punished for breaking his pledge.

Non-Muslims have special prerogatives in personal law, with respect to, for example, marriage. While their right to seek justice under Shari'a is safeguarded, their cases may be decided in accordance with the personal law of their own choice.

Islam's provisions on human rights are to be found in the Shari'a, and in basic principles derived from the Qur'an and the Sunnah, and other secondary sources, which focus on the value of the human being without distinction as to race, sex, or colour. I will begin with a brief summary of civil and political rights safeguarded by Islamic teaching, then pass to the three rights of concern to this research, the rights of life, liberty and physical security.

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33. "People of the Book" ie., Jews, Christians or others possessing holy scriptures.
34. Non-Muslims under Shari'a A. Rahman I Doi, 1983, p27

Certain political rights in the modern sense as represented by the articles of the Universal Declaration of Human Rights, can be found in the teachings of Islam. Thus, protection of the right of freedom of thought, conscience and religion, freedoms of opinion and of expression, freedom of association and assembly and the right of everyone to participate in the affairs of state are to be found in Islamic teaching.

Freedom of conscience and religious expression are safeguarded in Islamic law. Everyone within the territory of the Muslim state is free to follow the religion of his choice. The Qur'an says :

"Let there be no compulsion in religion, Truth stands out clear from error."
(Qur'an 2 ; 256)

and asks :

"Had your Lord pleased, all the people of the earth would have believed in Him, Would you then force faith upon men? None can have faith except by the will of Allah."
(Qur'an 10 ; 99)

Even though Islamic law does not permit the Muslim to change his religion,[35] the religion of Islam, as others, depends upon faith and will, and so it would be meaningless if it was enforced. In any case, the Islamic faith considers that the protection of Allah of religion is continuous. To paraphrase the Qur'an : God brought the religion to mankind and He will protect it.

35, The Prophet said ; "He who changes his religion, kill him," and "A Muslim's blood shall not be lawfully shed except for three causes ; atheism after belief; adultery after marriage; or killing a person otherwise than in retaliation for another person" First Egyptian Seminar on International Humanitarian Law, 1982, p51

Freedom of thought and expression are guaranteed to citizens of the Muslim state. In a way, it may be regarded as an obligation as well as a right, since the Muslim is instructed to speak out against evil, whether of an individual or group, or even of the government. Thus, the Qur'an says :

"They enjoin what is proper and forbid what is improper," (Qur'an 9 ; 71)

With regard to the government it says :

"If we give authority to these men on earth they will keep up prayers, and offer welfare due, bid what is proper and forbid what is improper," (Qur'an 22 ; 41)

With regard to freedom of expression the Prophet has said :

"If any one of you comes across an evil, he should try to stop it with his hand; if he is not in a position to stop it with his hand then he should try to stop it by means of his tongue, If he is not even able to use his tongue then he should at least condemn it in his heart, This is the weakest degree of faith,"

According to Mawdudi, and confirmed by Islamic teaching on a variety of occasions, any government which deprives its citizens of freedom of thought and expression is "in direct conflict with divine injunction. Such governments is then not in conflict with its people but with God : it is trying to usurp that right of its people which God has conferred not merely as a right but as an obligation."[36]

Freedom of expression is also encouraged in this ideology. An example was provided by one of the Caliphs who said :

"Power has been given to me, though I am not better than any of you, If I act rightly, support me; and if I act wrongly give me your help,"

Another saying is :

"They shall reach their decisions after deliberation and advice" (Qur'an 42 ; 38)

These examples show that decisions in affairs of state are taken

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36, Human rights in Islam Abu A'la Mawdudi, 1983 pp28-29

after democratic consultations between the ruled and the rulers. Respect for the expression of opinion is shown by the practice of accepting criticism and advice from any individual in regard to issues concerning the nation, for example, the practice of the kalifa, Umar bin al-Khattab, especially in his debate with the lady in the mosque when the kalifa tried to limit the amount of Mahr (dowry). The lady reminded him of the teaching of the Qur'an on this point, saying that he had no right to limit what God had given to women.

The rights of freedom of association and the formation of parties are also safeguarded in Islamic teaching. Like freedom of expression, it is regarded as a duty for Muslims to cooperate to spread virtue. The Qur'an says :

"You are the noblest nation that has been raised up for mankind, You enjoin justice and forbid evil, You believe in Allah," (Qur'an 3 ; 110)

and :

"Let there become of you a nation that shall speak for righteousness, enjoin justice and forbid what is evil, Such men shall truely triumph," (Qur'an 3 ; 104)

As for the right of everyone to participate in the affairs of state, according to Islam, the Caliphate is not entrusted to any individual or group, but to all Muslims fit to fulfil the conditions of the Khilafa. The Qur'an says :

"Allah has promised those of you who believe and do good works to make them masters in the land as He had made their ancestors before them, to strengthen the Faith He chose for them,,," (Qur'an 24 ; 55)

After surveying Islamic law, Mawdudi has summarised the principles of Shura, (consultation), as follows :

1. the head of the government and the assembly members should be elected by free and independent choice of the people;

2. the people and their representatives should have the right to criticise and freely express their opinions;

3. the real conditions of the country should be made known to the people so that they are able to evaluate the work of the government;

4. there should be adequate guarantees that only those who have popular support should rule, and those who lose this support should be removed. [37]

Islam does not prescribe a specific form of government but explained the goal of the state as implementation of Shari'a, saying that the government should be based on Shura. Early attempts to develop the institution of Shura were not able to endure political setbacks, but Muslim thinkers remain true to the teaching of Abu Bakr al-Sidiq and Umar bin al-Khattab that the government should be democratic, and decisions of state should be a result of consultation and cooperation between all organs in the Islamic state.[38]

37, Human rights in Islam Abu A'la Mawdudi, 1983, p34
38, "The concept of human rights in Islamic jurisprudence" Maqbul Ilahi Malik in Human Rights Quarterly 3,3 Summer 1981

Protection of certain civil rights is also to be found in Islamic teaching. Thus, the right to life, liberty and security of person, the right to individual freedom, the prohibition of torture and inhuman treatment, the right to equality before the law, seeking a remedy and right to a fair trial, the prohibition of arbitrary arrest and detention, the right to privacy, and the right to freedom of movement and seeking asylum, are all to be found in Islamic teaching.

Absolute human freedom in Islam must be viewed in the context of the divine basis of Islamic teaching. It is seen as a surrender to the Divine Will rather than an individual right. Human rights and freedoms are gained by fulfilling obligations imposed by the divine law, Shar'ia.[39]

Human freedom in the technical sense of freedom from slavery is also protected in Islamic teaching, as the Prophet has said :

"There are three categories against whom I shall myself be a plaintiff on the Day of Judgement. Of these three, one is he who enslaves a free man, then sells him and eats this money" (Bukhari and Ibn Maja)

Equality before the law is provided is Islam. For Muslims there are provisions stating their equality in the Qur'an :

" The believers are brothers " (Qur'an 49 ; 10)

and the Prophet said :

"The life and blood of Muslims are equally precious," (Abu Dawud, Ibn Maja) and

"The protection given by all Muslims are equal. Even an ordinary man of them can grant protection to any man, (Bukhari Muslim, Abu Dawud)

39, "The concept and reality of freedom in Islam and Islamic civilization" Seyyed Hossein Nasr in The foundations of human rights

Equality is also provided for converts and unbelievers, as the Qur'an says :

"If they (disbelievers) repent and keep up prayer and pay the welfare due they are your brothers in faith," (Qur'an 9 ; 11)

and, in another tradition, the Prophet says that those who accept the Oneness of God, the Prophethood of His Messenger and join the Muslim community and Brotherhood, "then they have the same rights and obligations as other Muslims have." (Bukhari, Nasa'i)

Freedom of movement and the right of asylum are granted in Islamic teaching.

In Shari'a the right to movement is unlimited. The Qur'an states :

"Between them and the cities on which we have poured our blessings, we had blessed cities in prominent positions, and between them, we had appointed stages of journey in due proportion, Travel therein, secure by night and day. (Qur'an 34 ; 18)

The right to seek asylum is provided to Muslims and non-Muslims. Muslims are encouraged to migrate rather than suffer oppression. The Qur'an says :

"The angels will ask the men whom they carry off while steeped in sin ; 'What were you doing?' 'We were oppressed in our land,' they will reply, the angels will say ; 'Was not the earth of Allah spacious enough for you to fly for refuge in it?' (Qur'an 4 ; 99)

Non-Muslims' right to seek asylum in the Islamic state is also provided in the Qur'an, which says :

"And if anyone of the pagans seeks asylum then give him asylum so that he may hear the word of Allah, and afterwards convey him to his place of safety" (Qur'an 9 ; 6)

The right to privacy is safeguarded to every human being in Shar'ia, as the Qur'an prevents the Muslim from entering any house without seeking permission, saying :

"Believers, do not enter the dwellings of other men until you have asked their owners' permission and wished them peace, That will be best for you, Perchance you will take heed, If you find no one in them, do not go in till you are given leave, If you are refused admission, it is but right that you should go away, Allah has knowledge of all your actions," (Qur'an 24 ; 27)

This is a brief survey of some of the rights protected by Islamic teaching. One can say that the protection of the political and civil rights of Muslims is broadly comparable to that found in the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights. As I have briefly demonstrated, the fundamental human rights protected in modern human rights instruments are protected in the words of the Qur'an and the other sources of Shar'ia. Of course, the protection of these rights in the contemporary practice of so-called Islamic states is quite another matter. However, as we have seen, their protection in the basic teachings of Islam cannot be denied.

Now, I will pass to the teaching of the Islamic religion in regard to the three rights of particular concern to this research : the rights of liberty, physical integrity and life.

1. Liberty and security of person

According to Shari'a, no one should be arrested or detained save on specified grounds, such as a valid accusation made in the presence of the defendant. The grounds for detention according to Shari'a were deduced from the Sunnah by Imam Khattabi and Imam Abu Yusuf. According to a tradition related by Abu Dawud, some people were arrested in the Prophet's time in Medina. The Prophet was asked by a companion on what grounds the persons were arrested, but He did not reply, instead giving an opportunity to the Prosecutor, who was present, to explain. When the question was repeated for the third time without reply, the Prophet ordered the release of the detainees. From this tradition it was deduced that Islam recognises only two grounds for detention : under court order, and for the purpose of investigation. It was further deduced that no one can be imprisoned on false and unproved charges.[40] This is comparable to the modern human rights provisions stating that no one should be arrested or detained save on grounds or by procedures established by law.

Further, in support of this view, Caliph Umar[41] once stated, in deciding a case : "In Islam, no one can be imprisoned without due course of justice".[42]

39, "The concept of human rights in Islamic jurisprudence" by Maqbul Ilahi Malik in Human Rights Quarterly Vol 3,3 Summer 1981, p62
40, Islam : a cultural perspective, Richard Martin, 1982, p40
41, Non-Muslims under Shari'a A Rahman I Doi, 1983, p100

The right to a public hearing in front of a court, whatever the seriousness of the crime, including crimes which really threaten the security of the state, is confirmed by the case of the letter sent by Hatib bin Abi Balta'a to the authorities at Mecca, informing them of the impending attack by the Prophet's forces. Though this was undoubtedly a very serious crime, amounting to the crime of espionage[42] in time of war, the Prophet summoned Hatib to the open court of the Mosque, and gave him the chance to explain his actions. Although Umar called for the death penalty for Hatib, the Prophet considered his defence, namely that his wife and children were in Mecca. The Prophet also took into consideration the fact that Hatib had taken part in the Battle of Badr, and acquitted him on these grounds.[43]

The case shows : firstly, that a fair and public trial should be guaranteed to the accused, whatever the crime, and whatever the circumstances of the state. The example shows that even in time of war the rights of the accused are to be observed. Secondly, it shows that the accused person has the right to speak in his own defence. These two aspects of Islamic law correspond most directly to the provisions of Article 14 of the International Covenant on Civil and Political Rights, but they are also obviously important for the prevention of arbitrary arrest, detention and punishment as they illustrate the importance Islam lays on the due process in criminal proceedings.

42, The Qur'an prohibits spying in 49 ;12
43, Human rights in Islam Abul A'la Mawdudi 1983, pp26-27

Mawdudi points out that the proceedings in the incidents mentioned were carried out publicly, and contrasts this with the widespread later practice of conducting trials in camera.

The presumption of innocence is also an important principle of Islamic law, and this means by implication that no one should be held without strong grounds, for example the Prophet said that the use of circumstantial evidence when the penalty was Hadd should be avoided. The Prophet's wife also reported that He said :

"Avoid condemning a Muslim to Hadd whenever you can, and when you can find a way out for the Muslim then release him for it, If the Imam errs it is better that he errs in favour of innocence than in favour of guilt."

The conclusion that arbitrary arrest and detention are prohibited by Islamic law, was confirmed by Muslim scholars at the First International Conference on the Protection of Human Rights in the Islamic Criminal Justice System, when they unanimously adopted a resolution stating, inter alia, that "the basic human rights reflected in the spirit and principles of Islamic Law include the following rights of the criminally accused :

(1) the right of freedom from arbitrary arrest and detention...;
(2) the right to be presumed innocent until proved guilty by a competent and impartial tribunal in accordance with the Rule of Law;
(3) the application of the principle of legality which calls for the right of the accused to be tried for crimes specified in the Qur'an or other crimes whose clear and well-established meaning and content are determined by Shari'a law (Islamic law)...;
(4) the right to appear before an appropriate tribunal previously established by law;
(5) the right to a fair and public trial;
...
(7) the right to present evidence ... in one's defence..".

The participants stated that they considered that "the rights of due process of law contained in Islamic Law are in complete harmony with the prescriptions of the International Covenant on Civil and Political Rights...which reflect generally accepted principles of international law contained in the Universal Declaration of Human Rights..."[44]

Also, the "Islamic Declaration of Human Rights" confirms the right to freedom, in Article 2, as follows :

" (a) Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the law."

This includes all other sorts of freedom :

(b)Every individual and every people has the inalienable right to freedom in all its forms - physical, cultural, economic and political - and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle."[45]

Another Article which supports this right is Article 6 which states:

*"Every person has the right to protection against harrassment by official agencies..."**

and Article 4 which mentions the right to justice, saying :

"Every person has the right to be treated in accordanec with the Law, and only in accordance with the Law."[46]

44, The Islamic Criminal Justice System First International conference on the Protection of Human Rights in the Islamic Criminal Justice System, ed. C. Bassiouni, 1982
45, Islamic Declaration of Human rights in Islamic council ; what it stands for, 1982, p33
46, ibid

2. The right to life and physical integrity

That the worth and dignity of the human individual is considered a fundamental doctrine of Islam is confirmed by verses of the Qur'an, for example :

"When I have shaped him and breathed My spirit in him, fall you down, bowing before him!" (Qur'an 15 ; 29)

There is no difference between a Muslim and a non-Muslim citizen in respect of civil or criminal law, bearing in mind that the Islamic state shall not interfere with the personal rights of non-Muslims, as this Hadith of the Prophet confirms :

"Beware! Whosoever is cruel and hard on such people or curtails their rights or burdens them more than they can endure, or realise anything from them against their free will, I shall myself be a complainant against him on the Day of Judgement." [47]

The right to life is protected in Islamic theory, as the Qur'an lays down :

"Whoever killed a human being, except as a punishment for murder or other wicked crimes, should be looked upon as though he had killed all mankind; and that whoever saved a human life should be regarded as though he had saved all mankind" (Qur'an 5 ; 32)

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47. Abu Dawud, Non-Muslims under Shari'a A. Rahman I Doi, 1983, p106

This verse shows respect for the life of the human being and the exception that the deprivation of life should only be practised as a punishment for limited and very serious crimes, Hadd. The Hadith confirms the seriousness of the crime of murder, referring to it as follows :

"The greatest sins are ,,, to kill human beings."

The Qur'an states :

"Anyone who kills a believer deliberately will receive as his reward to live in Hell forever, God will be angry with him and curse him, and prepare dreadful torment for him."
(Qur'an 4 ; 93)

The Qur'an makes clear that the deprivation of life as a punishment should only be carried out through the legal process :

"Do not kill a soul which Allah has made sacred except through the due process of law."
(Qur'an 6 ; 151)

Pardons in the case of a crime where the sentence is death, as well as amnesties, are also to be found in the Islamic tradition.

The life of the Prophet is full of examples of his forgiveness. One example is the pardon of an enemy who attacked Him with the Prophet's own sword as He rested beneath a tree. He cried to the Prophet "Who will save you from me?" The Prophet replied : "Allah, Allah, Allah," and the sword fell from the man's hand. The Prophet forgave the man, (Bukhari Babal-Jihad). According to Amir Ali, a woman poisoned the Prophet. Muhammad forgave the woman and allowed her to remain among her people. In certain homicide cases where the death penalty is prescribed, pardon is possible, with the killer being given one hundred lashes, and imprisoned for a year.[48]

48, Shari'ah ; the Islamic law Abul Rahman I Doi, 1984, p236

After the conquest of Mecca, the Prophet proclaimed a general amnesty for unbelievers and forgave his personal enemies, saying :

"There is no reproof against you today, May Allah forgive you and He is the most merciful of the merciful," (Qur'an 12 ; 92)

The attitude of the Prophet toward a defeated enemy is shown by his treatment of the inhabitants of Mecca after its surrender, when he granted a general amnesty. The Prophet freed them all and they are known in Islamic history as al-Tulaqa "the released".[49]

Even in time of war, killing by Muslims of non-combatatants, as we saw in the discussion of humanitarian law, is strictly prohibited. As the Prophet said :

"Do not kill any old person, any child or woman," (Abu Dawud)

On the same basis, the life of non-Muslims is protected, according to the following Hadith. Abdallah bin Amr reported the Prophet as saying :

"If anyone kills a covenanted man (a non-Muslim protected by treaty agreement) he will not experience the fragrance of paradise,"

An example of this protection of non-Muslims can be seen in the time of Ali, the fourth Caliph. Ali ordered the execution of a Muslim who was found guilty of killing a Dhimmi. The brother of the Dhimmi received Diyah (blood money) and forgave the Muslim. (The relative or heir of the victim is entitled to satisfaction according to the Qur'an. However, the relative can abandon this right and ask for Diyah, or blood-money, instead. Blood-money can also replace a death sentence in the case of an accidental killing.)

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49. First Egyptian Seminar on International Humanitarian Law, 1982, pp68-69

Ali was not satisfied that the brother had not been intimidated, but when he learned that blood-money had really been accepted, he was satisfied, and stated :

"Whosoever is our Dhimmi, his blood is as sacred as our own and his property is as inviolable as our own property." [50]

The Qur'an prescribes moderation in seeking retribution for murder, saying :

"If a man is slain unjustly, his heir is entitled to satisfaction. But let him not carry his vengeance too far, for his victim will in turn be assisted and avenged." (Qur'an 17 : 33)

As we saw in Chapter 2, the international legal provision in the International Covenant on Civil and Political Rights modifies its general provision calling for the right to life to be respected, in order to take account of the use of the death penalty in many countries of the world. It recommends that the death penalty as a legal sanction should be limited to the most serious crimes, and there should be legal provision for pardon, comutation of sentence and amnesty. Such provisions, as we have seen, are also present in Islamic law.

This is confirmed by the "Islamic Declaration of Human Rights" in Article 1, which states :

" (a) Human life is sacred and inviolable and every effort shall be made to protect it, in particular, no one shall be exposed to injury or death, except under the authority of the Law." [51]

Respect for the individual's physical integrity in Islam even extends after death, as the sanctity of corpses has been protected

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50, Non-Muslims under Shari'a A, Rahman I Doi 1983, p86
51, The Universal Islamic Declaration of Human Rights, in The Islamic council ; what it stands for, 1982, p33

by verses of the teaching of the Prophet. In the Hadith it is said :

"The Prophet has prohibited us from mutilating the corpses of the enemies,"
(Bukhari, Abu Dawud)

The Prophet gave this instruction after the battle of Uhud, in which the disbelievers mutilated the bodies of the Muslims, including that of Hamza, the uncle of the Prophet.

Hisham ibn Hakim said :

"I testify that I have heard God's messenger say that God will torture those whose torture people on this earth,"

and the Prophet says :

"Cultivate the good-will of people and treat them gently,"[52]

With respect to the treatment of captives, Islam also teaches kindness, as the Prophet says :

"No prisoner should be put to the sword.",

and Abu Ayyub Ansari has related the Hadith of the Prophet prohibiting the killing of anyone who is tied or who is in captivity.[53]

As we saw in the discussion of humanitarian law and the treatment of prisoners of war, the Qur'an teaches that they should be released or ransomed, [54] and treated kindly while in captivity.

Thus, it could be said that Islamic law contains safeguards against torture and cruel or inhuman treatment, broadly

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52. "A General Review of Humanitarian International Law in Islam ; Humanitarian Law and Humanistic Law M. Al-Ghunaimi in First Egyptian Seminar on International Humanitarian Law, 1982, p65
53. Human Rights in Islam Abul A'la Mawdudi, 1983, p36
54. See Chapter 4, p13

corresponding to the prohibition of torture contained in the international instruments.

The prohibition is confirmed by the "Islamic Declaration of Human Rights", Article 7, which states :

"No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests."[55]

The question of cruel, inhuman or degrading punishment in Islam however, needs to be examined in more depth.

As aspects of Islamic punishment, particularly Hadd penalties, may seem harsh, it is worthwhile to examine some of these penalties and the conditions which surround their implementation. Some Hadd penalties may seem to constitute cruel, inhuman or degrading punishment in the sense of the international legal provisions, as we saw in Chapter 2.

Hadd penalties are the punishments ordained by God for certain crimes, and so no one, neither ruler nor judge may abandon them or change them. In spite of the status of the accused, once the crime is proved against him beyond any doubt punishment should be applied. The best example is that of Ubaid Allah, alias Abi Shamah, the second son of Caliph Umar who suffered the full punishment of flogging for adultery.[56]

Hadd are limited to punishments for crimes mentioned by the Qur'an or the Sunnah of the Prophet. Other punishments, Ta'azir, are at the

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55, The Universal Islamic Declaration of Human Rights in The Islamic council ; what it stands for, 1982, p35
56, Shari'ah ; the Islamic law Abdur Rahman I, Doi, 1984, p240

discretion of the judge. Hadd punishment is normally accorded in Islamic law only for crimes which affect other people or society. The Qur'an lists them as murder, highway robbery, theft, adultery and accusation of adultery. It lays down punishment as follows :

"And the recompense of injury is punishment equal thereto but whoever forgives and amends, his reward is due from Allah, For Allah loves not those who do wrong," (Qur'an 42 ; 40)

General conditions must be fulfilled for the execution of Hadd punishment. For example, many punishments carried out by the Prophet and the four Caliphas were based on confession rather than proof. An important principle is contained in the following Hadith :

"Prevent the application of Hadd punishment as much as you can, whenever any doubt persists,"

The death penalty and amputation, flogging and stoning, are the severest forms of punishment contained in Islamic law.

The Qur'an prescribes severe punishments for serious crimes :

"Those that make war against Allah and His apostle and spread disorders in the land shall be put to death or crucified or have their hands and feet cut off on alternate sides, or be banished from the country, they shall be held to shame in this world and sternly punished in the next ; except those that repent before you reduce them, For you must know that Allah is forgiving and merciful," (Qur'an 5 ; 33)

Amputation as a punishment for the crime of theft is prescribed by the Qur'an, which says :

"As for the man or woman who is guilty of theft, cut off their hands to punish them for their crimes, That is the punishment enjoined by Allah, He is mighty and wise, But whoever repents and mends his ways after committing evil shall be pardonned by Allah, Allah is forgiving and merciful," (Qur'an 5 ; 38)

As the severity of the punishments prescribed by Shar'ia for certain serious crimes is so great it is worthwhile to examine in some detail the circumstances in which such punishments may be lawfully applied.

First of all, it is important to stress that, as in the verses I have quoted, Shari'a encourages the pardon of anyone convicted of a crime carrying a Hadd penalty, where the criminal repents. The tendency to avoid Hadd penalty where possible can be seen elsewhere. The Prophet's wife reported that He said :

"Avoid condemning a Muslim to Hadd whenever you can, and when you can find a way out for the Muslim then release him for it, If the Imam errs it is better that he errs in favour of innocence than in favour of guilt."

As I commented very briefly in Chapter 2, the conditions applied to the lawful exercise of Hadd penalties are so strict as to imply that the severity of punishment was primarily intended to act as a deterrent to the criminal. The word Hadd means prevention, restraint and prohibition, and for this reason the aim of these punishments may be regarded as restrictive and preventive. For example, in the case of theft, a number of conditions must be fulfilled for Hadd punishment of amputation to be lawfully implemented. These conditions are specified in Islamic law.

An example of the requirements may be seen in the law of highway robbery and theft in Libya, 1972, where the law requires that :

(1) the accused should be of sound mind, over eighteen years of age;
(2) the property should be taken away secretly and with criminal intention;
(3) the property should be legally owned by the person from whom it is stolen;
(4) the property should have been taken out of the possession of its real owner;
(5) the stolen thing should have already come under the possession of the thief;
(6) the property should reach the value of Nisab[57] of theft;
(7) the thief should not be in need or under any pressure.

57, Nisab eg., the law of implementing hadd for highway robbery and theft No 148 of 1972, Libya, prescribes in Article 1, nisab that the value of the item stolen should not be less than ten Libyan dinars at the time of theft
Ahkam al-Sarica wal Haraba, Dr Muhammad Samy al-Nabrawi, 1975, p19

Article 3 of the same law specifies the circumstances in which Hadd punishment cannot be implemented. It should not be implemented in the following circumstances :

(1) if the crime is committed in a public place during working hours, or any other place the accused is permitted to enter, and the stolen property is not hirz;
(2) if the theft takes place between spouses or within the immediate family, mahram;
(3) if no one claims to own the property;
(4) if the owner of the property is in debt to the accused person and is postponing payment or denying the debt;
(5) if the stolen property is edible and the accused ate it on the spot;
(6) if the accused became the owner of the property after the theft and before the final judgement of the case;
(7) if there are several accusers and if the value of the property did not reach the value of Nisab for each;
(8) if the property stolen is Nisab, but cannot be stolen without cooperation;
(9) if there is any doubt as to ownership of the property, by partnership, from the public treasury or from spoils of war.

In the case of a person who assists in the crime, whether by agreement, encouragement or helping, if the assistance does not reach the stage of real participation in the crime, the punishment should not be implemented.

This list shows the conditions in regard to the accused, the act, the object stolen, and the criminal intention. If any one of these is lacking, the Hadd punishment will not apply. Punishment by Ta'azir will then apply.

I have listed the conditions which apply for the lawful application of Hadd punishment for the crime of theft at some length, in order to show that even though Islamic law prescribes severe and harsh penalties for serious crimes, the application of such punishment is surrounded by strict conditions which safeguard the individual.

It must be said that in certain countries where some aspects of Shari'a have been adopted, the conditions for lawful application of Hadd punishments are not strictly observed. Often aspects of Islamic law, (usually the harsh Islamic punishments) are adopted piecemeal as, for example, in the Sudan for political reasons.[58] *Thus, in the Sudan, a country where there is virtually continual famine, we see the application of the Islamic law of amputation of the hand for theft.*

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58. "Islam and politics in the Sudan" by Alexander S. Cudsi in Islam in the Political Process (ed) James P. Piscatori, p36f

SECTION THREE

ISLAMIC LAW IN THE ARAB COUNTRIES

Recent developments in the Middle East - the Iranian revolution, the Lebanese civil war, the rise of fundamentalist groups in Saudi Arabia and Egypt, and religious opposition to the Ba'ath in Syria and Iraq - show how the religious factor in Muslim countries affects internal and external relations.[60]

Everywhere the call for Islamic revival has arisen it has taken the form of popular movements demanding the re-instatement of Islamic law, or governmental measures aiming at the re-establishment of Islamic legislation. The relationship between Islam and the state that has the most far-reaching implications for Islamic revival lies in the legal sphere, involving the issue of whether and in what manner Islamic law is to be revived as the law of the land.

Present day Arab countries show the compromise between opposing tendencies present in all Muslim countries, with the fundamentalist viewpoint, taken to its extreme in a country like Iran, and the modernising secular stance, seen at its logical extreme in Turkey.

In 1924, Turkey abolished the Caliphate by decision of the national assembly, first separating the Sultanate from the Caliphate and secondly by replacing the Sultanate with a republican regime. This was inevitable in view of the constitutional provision which declared that sovereignty belongs unconditionally to the people, administration derives from the principle that the people control

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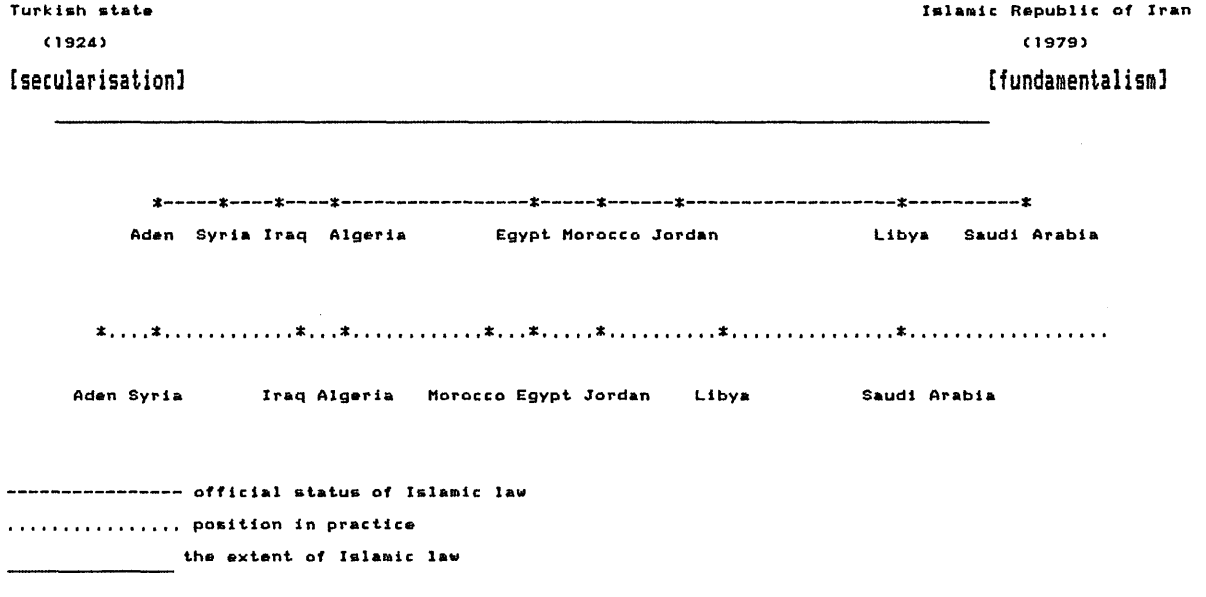
60, "The Islamic factor in Syrian and Iraqi politics" by M.C. Hudson in Islam in the Political Process (ed) James P. Piscatori

their destiny in person and in fact.[61]

One of the most important acts of secularization was the abandoning of the legal systems of the Millet, and their replacement by secular courts, which administered a Western-based legal code. The Seriat courts for Muslims were abolished in 1924.[62]

In Iran, the Shah's regime was overthrown in 1978 and an "Islamic republic" was declared. The Constitution of 1979 declares in Principles 4 and 107 that Islamic law prevails over all other systems of law. All secular laws contrary to Islamic law were abolished. Iran introduced the Islamic penal code in 1982.
A Council of Islamic Jurists, known as "Guardians", was set up to ensure that laws promulgated by the Parliament do not contradict Islamic legal principles.[63]

(The position of Islamic law in the Arab countries)



61, *Modern Islamic Political Thought, Hamid Enayat, 1982, p52f*
62, *"Politics, religion and ethnic identity in Turkey" by Jeffrey A. Ross in Religion and Politics in the Middle East (ed) Michael Curtis, 1981, pp323-347*
63, *Islamic law in the contemporary world Sayed Hassan Amin, 1985, p18, 149*

It is important to stress at this point in the research that there is, in the contemporary world, no truly Islamic state. Different states with Muslim populations have maintained or adopted varying degrees of Islamic or Shari'a-based legislation, mainly in the fields of personal status and within the scope of civil jurisdiction, Shari'a courts (i.e., courts that look into disputes of more or less family affairs and relations the nursing custody ,such as marriage dissolution, divorce, maintenance, inheritance...etc.).

The rough diagram on the previous page represents the position of the implementation of Islamic legislation in the contempoarary Arab world. The second line represents the official position of islamic law, as described by government statements, meanwhile the third line represents the status of Islamic law in the legislation of those countries. The countries are placed between the two extreme positions represented in the diagram by Iran and Turkey.

In fact, it seems, the Islamicizing process in modern Arab countries faces certain problems :

1. the lack of sincerity from the leaders of Islamic revival;

2. the theory cannot be limited to spiritual matters, restricted to morality and the after-life (as, for example, Christianity[64]).

64, Islam Human rights Index on Censorship 5/83, p6

The Shari'a should be considered supreme law by its concept of all Muslim communities and should be implemented entirely in all aspects of life as the Islamic Council confirms :

" a) ... Each and every Muslim country must explicitly make Shari'a the criterion by which to judge the public and private conduct of all, rulers and ruled alike, and the chief source of all legislation in the country.

b) Political power must be exercised within the framework of Shari'a. It is neither valid nor exercisable except by and on behalf of the community through the process of mutual consultation (Shura). No one is authorised to arrogate to himself the right to rule by personal discretion.

c) It is the obligation and right of every person to participate in the political process and political authority is to be entrusted to those who are worthy of it according to the Islamic criterion of knowledge, trustworthiness and capablility.

d) All political power, whether legislative, executive or judicial, is exercisable within the limits set out by Allah and His Prophet for the promotion and enforcement of the values prescribed by Islam.

e) Obedience to the legitimately constituted authority is obligatory on people so long as it is in conformity with the Shari'a."[65]

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65. The Islamic Council : what it stands for, 1982, p15

As we saw, Islamic theory is not concerned only with religious observance, but is also a defined community socially, economically, and indeed legally and politically. As the traditional goal of Islamic jurisprudence has been to enforce the religious, communal and political duties by Shari'a rules, those who do not accept these definitions and obligations have no right to claim the title of Islamic state. It seems that such a claim would lack justification in the recognised sources of Islamic law. No other authoritative sources of law could exist according to traditional Islamic views.

They are :

1. the scriptures of the Qur'an;

2. the Sunnah, derived from Hadith and traditions from the life of the Prophet, embracing what He said, did or agreed to;

3. the Ijma, or consensus of the Ulama (religious jurists of traditional Islam);

4. the process of Qiyas (analogical reasoning used by Ulama to construe the Qur'an and Sunnah and apply them to contemporary questions)[66]

Theoretically speaking, sovereignty does not exist in Islam, but as we said, the legitimacy of any government depends on its ability to implement Shari'a concerning all aspects of life, and elaborate a system of Shura (consultation) to hold the government accountable for its actions. If this ideal picture does not exist in any Islamic or Arab country in practice today, let us then examine the extent of the implementation of Islamic teaching in the Arab world to evaluate the practices in regard to the issues of concern to this research.

66, For other sources see Chapter One, p15

So, I will examine the extent to which contemporary states incorporate Islamic teaching, in the light of what they present in their constitutions and laws, in spite of how they identify themselves and their understanding of Islamic teaching. I will examine a few countries in detail, and others more generally.

Simultaneously with the independence of the Arab countries, the process began of abandoning divine law as the law of the land, replacing it by man-made laws in the form of codes, relying on the Latin system in regard to civil, criminal, administrative and constitutional matters, with consideration of a few Islamic principles in regard to personal affairs, certain crimes, and in the laws governing inheritance. Increasingly, strict adherence to Islamic laws began to be seen by ruling elites as an obstacle to modernization, the main exception being Saudi Arabia. Most other countries imported codes based on European legislation, whether directly or indirectly.[67]

The Islamic system of criminal justice was always strictly applied in Arabia, and it was retained, along with the principles of Islamic constitutional law by Ibn Saud in the foundation of the modern state of Saudi Arabia. The legitimacy of the ruling house of Sa'ud rests above all on religion and its association with the Wahhabi movement. According to the fundamentalist outlook, its legitimacy rests on its adherence to the Shari'a, which is regulated

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67. For example, the Libyan Civil code and Code of Criminal Procedures relies a great deal on Egyptian legislation, which in turn is affected by the French and Italian legal systems.

by the Ulama, the traditional interpreters of Shari'a. Though King Abd al-Aziz's Regulation on Commerce of 1931 set aside the commercial chapters of the Shari'a in response to the changed demands of the modern world, and Saudi Arabia's oil concessions are drawn up in terms of international Contract Law, Islamic teaching governs all aspects of the internal political and legal system, which is entirely based on the Shari'a as traditionally used. An attempt in 1927 by Abd al-Aziz to codify aspects of Shari'a most closely associated with the Qur'an and the Prophetic Sunnah was abandoned in the face of Ulama resistance who interpreted it as an unacceptable attempt by the government to interfere with God's law.[68]

Islamic civil, criminal and personal law is applied by Saudi Qadis (judges), and the Qur'anic penalties, including flogging, amputation and stoning are regularly imposed and carried out. Amnesty International has reported the imposition of the Islamic penalty of amputation of the hand as a punishment for repeated theft where there are no mitigating circumstances. They also report the imposition of the punishment of flogging. They report that public floggings are carried out with safeguards which minimise the physical suffering of the victim, but that floggings carried out in prison are not so regulated. Executions are generally carried out by hanging, but death by stoning is the prescribed penalty for certain crimes, for example, adultery.[69]

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68. "Islam and political values in Saudi Arabia, Egypt and Syria" by R. Stephen Humphreys in Religion and Politics in the Middle East, (ed) Michael Curtis, 1981, p295
69. Amnesty International Reports 1981-1985

On the surface, it would seem that the legal systems of Saudi Arabia and the "Libyan Arab Jamahiriya" should have much in common. After all, the Libyan regime claims that the 1950 constitution and the 1969 constitutional declaration have been abolished in favour of the Qur'an, and that the Libyan legal system is now based on Shari'a.[70] However, an examination of legal developments in Libya in the past twenty years will show that the similarities are less than might be expected.

When Gadafi came to power after the 1969 coup d'etat, he had no political or religious following.[71] Although Idris whom he overthrew, was the hereditary leader of the Sanussi religious order, the most powerful religious organisation in Libya, and a devout Muslim,[72] Gadafi, by his widely publicised committment to re-instating the Shari'a, was able to establish a reputation as a champion of Islam. This was of vital importance in a society like Libya, where religious feeling is intense.

Gadafi did not advocate the re-instatement of Shari'a in traditional form, but instead introduced Islamic elements which were to be interpreted by the courts just as any part of Libyan law. His first enactments, aimed at ending practices incompatible with Muslim beliefs, were enacted as standard legal measures. Soon after he came to power, Gadafi imposed bans on alcohol and public entertainment throughout Libya. The laws enacted by Gadafi were drawn

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70. See the Libyan report to the Human Rights Committee, Chapter 3
71. Oil ; the real story behind the world energy crisis Jack Anderson with James Boyd, 19??
72. Modern Libya ; a study in political development Majid Khadduri, 1963

up by experts from the civil and Islamic law fields. He established a commission to review existing laws and eliminate laws violating Islamic law, replacing them by laws embodying the basic principles of Shari'a. The outcome was a small number of Islamic laws. But they were enacted with enough publicity to create a widespread impression that Libya was reverting to Shari'a.[73]

The success of the illusion was largely due to the fact that the laws enacted included some of the Qur'anic criminal provisions that are regarded as differing most radically from generally accepted legal norms, in other words, the imposition of Hadd punishments. It was widely assumed that a government adopting such extreme measures would not hesitate to adopt the less controversial legal provisions into law, but in the event, the Islamicizing did not proceed far beyond the re-instatement of Islamic penalties.[74]

In fact, it seems that Gadafi did not reinstate Islamic law but merely reintroduced some Qur'anic rules. In public statements during 1978, Gadafi stated his view that the only Islamic law was that contained in the Qur'an, ("The Qur'an is the Shari'a of the society"[75]) dismissing the schools of Fiqh as being without legal force, and rejecting the Sunnah of the Prophet Muhammad as a source of law. Gadafi's selective use of the elements of Islamic law has meant the failure of any real attempt to Islamicize Libyan law, and

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73, See note 62 above,
74, "Islamic law and Islamic revival in Libya" by Ann Elizabeth Mayer in Islam in the contemporary world (ed) Cyriac K. Pullapilly, 1980, pp296-305
75, Quoted at the beginning of "Muammar Qadhafi's new Islamic scientific socialist society by Raymond N. Habiby in Religion and Politics in the Middle East (ed) Michael Curtis, 1981, pp247-259

he has now become bold enough to broadcast his own interpretation of the Qur'an in the three volumes of his "Green Book", not surprisingly, finding in this interpretation support for his own economic and social policies.[76] *He insists that the Qur'an provides guidance only on matters of personal ethics and does not cover the problems dealt with in the "Green Book", so that there is no possibility of conflict between the two. When the Ulama presented verses contradicting the philosophy of the "Green Book", Gadafi rejected their views, claiming that they were linked to the conditions of the seventh century Arab world, and so were irrelevant for contemporary Muslims.*

Gadafi claims that his institution, in 1977, of the Popular Committees, implements the Islamic concept of Shura.[77] *In the economic sphere, his elimination of the private sector and nationalisation of all economic activity is in contradiction with traditional Islamic beliefs, in which property is protected, and private income and commerce are seen as essential elements of Islamic society. Although Gadafi claims revival of Islam, in fact he has subordinated Islamic teaching to his own policies, undermining its role in Libyan society by interpreting it solely in terms of his own objectives and suppressing elements which contradict his own view.*

76, Green Book ; practice and commentary, (ed) Charles Bezzina, 1979
77, "Qadhafi's thoughts on true democracy" by Raymond N. Habiby in Religion and Politics in the Middle East (ed) Michael Curtis, 1981, pp261-285

A sharply different attitude to those of the governments of Saudi Arabia and Libya may be seen in states like Egypt and Syria, which have adopted a modernist standpoint. Again the role of religion is important in the political and legal systems, but the modernising socialist approaches of Nasser in Egypt and the Ba'th regime in Syria sought to reduce the prominence of Islamic teaching in pursuit of modernisation.

After the coup d'etat of 1952 in Egypt, in which Gamal Abdul Nasser came to power, the new Egyptian government believed that Egypt's future lay in modernisation of its social and political institutions, along the lines of Western development, considering that Islamic doctrines could no longer cope with the conditions of the modern world.[78]

In July 1961, Nasser's government, placed all important economic enterprises that had not already been nationalised under state control. It gradually began to proclaim "Arab socialism" as the official ideology of Egypt. From 1952 until his death in 1970, Nasser was the dominant force in Egyptian politics. After an attempt on his life carried out by the Muslim Brotherhood in 1954, the organisation was ruthlessly suppressed.

78, "Islamic revival in Egypt and Greater Syria" by Ibrahim Ibrahim in Islam in the Contemporary World, (ed) Cyriac K. Pullapilly, 1980, p163

Nasser's regime seemed to be determined to eliminate aspects of the autonomy of the country's religious institutions, as it took over hundreds of privately-endowed mosques, reduced the Islamic institution of al-Azhar, the focus of the Islamic world, to the status of a normal university, and finally consolidated the administration of personal status in Shari'a courts with national courts, thus removing the Ulama from their position of power in the judicial system.

During the seventies, under President Sadat, Nasser's successor, the continuing influence of modernisation could be seen in the debates in the drafting of the Constitution of 1971. All agreed that Islam should be named as the state religion and that Shari'a should be in some way a basis of legislation. The practical role of the Shari'a was debated, with some saying that legislation should be drafted simply in its spirit, while others argued that it should be strictly adhered to as the only source of legislation. In the event, the following provisions were adopted :

"...Islam is the religion of the state"

and :

"The principles of Islamic legislation (Shari'a) constitute a primary source of law."[79]

This represents a liberal compromise between the modernist and traditional positions. The comment of one of the drafting committee of the new constitution was that by the Shari'a :

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79. CCPR/C/SR.499 of 6th April 1984, p2

",,we should understand not the whole corpus of medieval jurisprudence but only the Qur'an and the authentic teaching of the Prophet,,,this approach was fully in accord with the best and most ancient practice, for if one examined the conduct of the first generation of Muslims, it was plain that they were guided not by blind adherence to fixed rules but by their sense of how best to serve the public welfare,"

It seems that the Egyptian legislation shared some of Gadafi's reluctance to adopt the full corpus of Islamic teaching as the source of legislation, but they did not go so far as to deny the Sunnah as a primary source of Islamic law.

In spite of his programme of modernisation in Egypt, Nasser was unable to bring about reform in Egyptian family and personal status codes (dating from 1921 and 1929, and very close to Shari'a rules). Any such reform would have substantially reduced the influence of Shari'a rules, and might have been regarded as a threat to the Muslim basis of the Egyptian state.[80]

Such reform did not come about until 1979, when very limited amendments to the law of personal status in Egypt were confirmed by the National Assembly. The changes were concerned with codifying the responsibilities of men with regard to their rights to marriage and divorce. They were designed not to provoke open opposition from conservative religious elements, but represent an important move towards securing a measure of sexual equality in the face of fundamentalist Islamic opposition. [81]

80, "Islam and political values in Saudi Arabia, Egypt, and Syria" R, Humphreys in Religion and Politics in the Middle East (ed) Michael Curtis, 1981, pp287-306
81, "Recently approved amendments to Egypt's law on personal status" by Aziza Hussein in Religion and Politics in the Middle East (ed) Michael Curtis, 1981, pp125-128

The modernist tendency which we have seen in Egypt can also be seen in the recent history of Syria, where the Ba'athist military government has held power since 1963. Asad's largely secular regime which claims to support policies of socialism and Arab nationalism, has avoided recognising Islam as the state religion, though it has not attempted to reform the Shari'a-based personal status code of 1953. The Constitution of 1973 merely identifies Shari'a as a principal source of legislation and provides that the head of state should be a Muslim. Some claimed that the riots which followed publication of the draft constitution of 1973 were directed against its "irreligiousness"[82], but they brought about no significant change in the secular Ba'athist constitution adopted by the Syrian government in that year.

President Asad himself is a member of a minority sect (Nusayri) which is regarded by some Muslims as heretical, and as we saw in the events of Tadmur (1980) and Hama (1981),[83] the Syrian regime has dealt harshly with religious-inspired opposition led by the Muslim Brotherhood. It seems that religious feeling in Syria is still strong, and this is likely to prevent the Syrian government from pursuing further secular reform.

82, "Islam and political values in Saudi Arabia, Egypt and Syria" by R. Humphreys in Religion and Politics in the Middle East, (ed) Michael Curtis, 1981, pp300-301
83, "The lawless regime of Hafez Asad" Arabia February 1984, 30 pp22-23

The kingdom of Morocco could be considered as falling between the traditional states like Saudi Arabia, and the modernising states like Egypt. In common with many Arab countries its legal system presents a comparatively modern interpretation of Islamic teaching alongside the legacy of European colonial rule.

As we saw at the very beginning of this Chapter, the Moroccan constitution names Islam as the religion of the state (Article 6), and says that basic principles of organisation are drawn from Islam. It could be said that the legitimacy of the monarchy is based on Islamic religious tradition, though Article 2 of the palace-drafted constitution of 1972, states that :

"Sovereignty is vested in the nation, which shall exercise it either directly, by way of referendum, or indirectly through constitutional institutions" [84]

Before 1912, it could be said that the Islamic character of Moroccan society had led to a clear distinction in the legal system. Religious jurisdiction governed land, personal status and succession, and judgements were given by a Qadi (judge), within the framework of Islamic law. Secular jurisdiction governed criminal, civil and commercial matters, which were administered by local officials. In the period of the European protectorates, law codes introduced courts including Islamic law courts, secular courts and courts with criminal jurisdiction. After 1956, the judicial system was reformed, with the unification of judicial organisation throughout Morocco.[85]

84, CCPR/C/10/Add.2 of 19th February 1981, p34
85, Report of an Amnesty International Mission to the Kingdom of Morocco 10-13 February 1981, 1982, p7

It seems that the Moroccan constitution incorporates rules of law based on Islamic jurisprudence. The Muslim Code of Personal Status grants a number rights based on Shari'a, and these are administered by Islamic law courts. Moroccans who are neither Muslims nor Jews are subject to the Moroccan personal Status Code, but the Moroccan Nationality Code provides for excluding them from the application of certain specific rules of Muslim law, particularly those concerning marriage and divorce. Aliens resident in Morocco remain subject to their own national laws in matters relating to their personal status and succession.[86]

It seems that the Moroccan legislator drew both upon the tradition of Islam and upon modern law.[87] *A body of texts drawing on these sources has been drawn up, for example, the Code of Personal Status regulates the rights of women in respect of inheritance, according to Muslim law, where a Muslim woman can inherit only half the share of the male.*

"Allah directed you as regards your children's (inheritance) ; to the male, a portion equal to that of two females,,,These are settled portions ordained by Allah, and Allah is all-Knowing, all-Wise" (Qur'an 4 ; 11)

According to the Moroccan legislator, Islamic jurisprudence holds that this is due to the duty of the male to provide a dowry (which becomes the personal and

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86, CCPR/C/10/Add,2 of 19th February 1981, p26
87, CCPR/C/SR,327 of 9th November 1981, p2

inalienable property of the woman). It is he who bears the costs of the household, and in the event of separation or divorce, he alone pays alimony. From modern legal instruments, Morocco has acceded to United Nations instruments seeking to safeguard the rights of women, including the Convention on the Political Rights of Women, and Convention No. 100 concerning Equal Renumeration for Men and Woman Workers for Work of Equal Value.[88]

88, CCPR/C/10/Add.2 of 19th February 1981, p2

By this brief examination, we should be able to draw certain conclusions about Islamic theory, whether it contradicts the general principles of international law or international human rights law. With respect to the Islamic law of nations, I briefly examined the similarities with modern international law, specifically in humanitarian law and the protection of diplomats. Of particular interest to the research is the Islamic view of treaties. From this examination, we can conclude that Islamic international law contains no real contradictions with the principles of modern international law but in contrast, Islamic theory imposes a a double obligation on Muslims to honour and fulfil treaty provisions, since the obligation is legal and imposed by God.

In regard to Islam and human rights, I examined Islam's recognition of human rights in general, and particularly the three rights of concern to the research. Again it seems that there is no contradiction in the major headlines between Islamic teaching and modern human rights protection. Differences in interpretation on certain issues, in my opinion, do not present serious obstacles to the Arab states in participating in modern international human rights protection.

Finally, I examined the position of aspects of Islamic teaching in a number of Arab countries. I concentrated on a few countries which seem to illustrate different degrees of acceptance or adoption of Islamic teaching, particularly Islamic law. As I showed at the beginning of this chapter, most Arab countries name Islam as the religion of the state, and say that legislative principles are drawn

from its teaching. Most countries, while not claiming to be Islamic states, with the special meaning of the term, administer the personal law of their largely Muslim populations according to Shari'a.

In many Arab countries laws and codes based on Islamic principles exist alongside laws dating from their colonial past. Some countries have acted to abolish laws from this period considered incompatible with Islamic teaching. Some states have maintained or introduced other aspects of Shari'a, particularly Islamic criminal law and penalties, though in countries like Libya and Sudan, this seems to have been done for political reasons. Other countries, notably Egypt, have attempted reform of Muslim personal codes, particularly in regard to sexual equality and the rights of women, while in a country like Morocco, as we saw, this issue is interpreted according to the traditions of Islam.

As Professor D'Amato says, "Human rights is not just a political and moral concept; it is a legal one as well."[1] For this reason, although I began my study with a survey of the moral bases of human rights theory, in Chapter One, I concentrated on the development of the international law of human rights. From the birth of the first human rights instruments, I surveyed the growth of international human rights law, ending by examining the United Nations instruments and organs concerned with human rights.

By analysing the contents and status of the principal human rights instruments, I outlined the obligations undertaken by states parties to those instruments. It seems that most of the Arab countries have participated to some degree in treaties, conventions, and United Nations resolutions which attempt to safeguard human rights, reflecting their official acceptance of human rights obligations.

Although no Arab state has yet signed the Optional Protocol to the International Covenant on Civil and Political Rights, no state which signed the Covenant has made a reservation to or derogation from this instrument which affects its legal obligations to take steps to "protect and ensure" the rights contained in the Covenant to their citizens.

1, "The concept of human rights in international law" Anthony D'Amato Columbia Law Review Vol 82 ; 1110, pp1110-1159

Although the ICCPR does not contain a provision which deals with reservations, a number of reservations have been made by states parties. Among the Arab states, Libya, Syria and Iraq have made reservations stating that their participation in the Covenant in no way signifies recognition of the state of Israel, nor entails any obligation toward that state.[2] In my opinion, these reservations are purely political, and they do not affect their human rights obligations under the Covenant. It is worthwhile to point out that if Arab states had felt serious difficulties about accepting certain provisions of the Covenant for ideological or other reasons, they could have made reservations to this effect.

In Chapter Two, I examined the international legal protection of the rights of life, liberty and physical integrity as expressed in the international instruments, the Universal Declaration, the Civil and Political Covenant, and the Convention against Torture. I also analysed the international legal understanding of these rights as expressed in the instruments themselves, and the findings of international legal organs.

By examining those instruments we confirm our understanding of the protection of those rights, and the acceptance of the Arab governments of those instruments. After my analysis of international protection of the three rights, I was in a position to examine the

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2, See Table in Appendix 2

national response to those legal instruments, up to what extent protection exists in the national legislations and in what degree they have been given legal weight. Therefore I examined national legislation in different Arab countries which I thought represented different angles of the legal systems, styles of government, and indeed political life of the Arab world. I found that those three rights and freedoms generally took position in national legislations, which all protect the rights of life, liberty and security of person to varying degrees in different positions in natinal legislation.

I tried to examine the effect of the international Covenant's position in the national legislation. I found that those provisions were accepted or recognised in one way or another. In fact some Arab states claim that those rights and freedoms are prior to their obligations under international law, in other words, the international instrument is compatible with their national legislation to a great extent, and therefore several nations expressed their satisfaction with existing legislation.

Another issue which I discussed in this Chapter was the state of emergency and derogation from obligations under the International Covenant. I examined the effect of state of emergency provisions on the protection of human rights, both internationally and nationally. I found that state of emergency legislation plays an enormous role in Arab political life, with grave effects on all the rights I examined.

Finally, I considered the practices of certain Arab governments as reported by national and international non-governmental organisations. This examination leaves us without any doubt that the practices of several Arab governments can be considered gross violations of human rights which breach national and international law. By examining the identity of the victims and nature of human rights violations in the Arab countries, it became clear that violations are practised as a state policy of suppression and intimidation to defend their imposed political views and maintain power - whether by violating national or international obligations through their practices, or by imposing unjust laws, using a wide range of exceptional legislative powers. My findings in the first part of the research raise questions about the Arab governments' attitude to their international obligations and indeed, their understanding of human rights themselves. In the second part of my study, therefore, I examined some aspects of the Arabs' response to human rights.

I began, in Chapter Three, by reviewing the governmental response of Arab states on human rights issues in the international forum of the United Nations. I concentrated on their communications with the Human Rights Committee, in respect of reporting obligations under the ICCPR, but included other statements within the UN. In general their response reflects understanding and broad theoretical acceptance of international human rights norms and the three rights of concern to the research. While the representatives of Arab states

were in general willing to discuss legislative provisions in respect of the three rights, they were less forthcoming on the implications of other, supposedly temporary, legislation suspending constitutional and other guarantees, where these exist. Such legislation normally undermines human rights protection to such an extent as to make it worthless, and although Arab governments describe this legislation as "temporary", some Arab countries have maintained state of emergency legislation for more than ten years. Again, representatives were often unwilling to answer questions in regard to effect of temporary legislation on the judicial system.

Questions of the Committee in respect of remedies available in cases of violation of the Covenant, and difficulties experienced by States Parties in implementing the provisions of the Covenant were not normally answered adequately by representatives, casting doubt on States' intentions and activities in this respect.

In the next part of Chapter Three, I examined communications between certain Arab countries and the non-governmental organisation, Amnesty International, in respect of alleged violations of the three rights. Responses to Amnesty International's concerns about human rights violations ranged from receiving missions and holding discussions at governmental level (for example, in Egypt and Morocco) to other countries, which failed to respond at all (for example, Syria and Libya).

Some activities of Arab non-governmental organisations concerned with human rights at the national level were also reviewed in this Chapter. These organisations, in Libya, Syria and Morocco, for example, seem to be under pressure from governments, nevertheless they indicate the growth of promotion of human rights among Arabs. One non-governmental organisation, in particular, the Arab Lawyers Union, seems to me to lead the promotion of human rights in the Arab world.

In the light of the statements by Muslims that I quoted in the introduction to the research, I thought it worthwhile to examine the Islamic concept of international law and human rights. Also, as the legislation in many Arab states draws on Islamic jurisprudence, and especially in the light of the communication with the UN Human Rights Committee, where many Arab countries expressed their fears in regard to the implementation of certain rights giving the reason that they contradict Islamic doctrine, I examined the Islamic concept of human rights, specifically the protection of individuals from arrest, torture and deprivation of life.

The outcome of this examination was to close the door on any claims which do not have any support in Islamic theory. The survey led to two conclusions : the first, that the Islamic law, shari'a, does not contradict international law and so cannot be considered an obstacle; second, Islamic law does not contradict human rights issues, whether in the sense of the general meaning of human rights nor in regard to the three rights I examined. If this is the case,

then why does the Arab population not enjoy the full recognition of their rights and freedoms since the Islamic concepts and international law concepts agree? Are there any effective organs in the Arab world where individuals could seek remedy in the case of violation of their rights and freedoms, especially by governments? The answer to these questions and others are being sought in debates taking place on all levels, international, regional and indeed national, to the extent that certain governments' practice (for example, South Africa) became almost a daily issue and imposed questions on the international community of the value and validity of the international law of human rights.

As we saw in this study, the protection of human rights has become the concern of the international community, which has expressed its hopes to protect human rights and fundamental freedoms through international effort represented not only by the creation of governmental and intergovernmental institutions and legal instruments, but also a growing number of non-governmental organisations, groups, institutions and individuals who devote themseleves to the cause, leading to more pressure on governments to safeguard those rights.

An early expression of this faith in human rights can be found in the Charter of the United Nations, which as we saw, imposes a legal obligation on member states to promote and encourage respect for human rights and fundamental freedoms. Since the adoption of the UN Charter, international legal protection of human rights has developed to the stage when it could be argued that the protection of basic human rights has become part of customary international law.

In the introduction, I mentioned two questions about the role and effectiveness of international legal protection of human rights. They were :

Can the present system of international law effectively prevent violations of human rights?

Can international law provide an effective remedy for violation of human rights in Arab countries?

In the light of my findings in this research, I intend to try to shed some light on answers to these questions.

The answer to the first question has not been found despite debate taking place on the international level. This debate is dominated by two poles of understanding. The first is represented by Professor J.S. Watson, the second by Professor Anthony D'Amato in the evaluation of the international human rights law with its instruments, and in regard to the effectiveness of implementation of those instruments. I reviewed the main aspects of this debate in

Chapter One. In spite of the validity of those rules and organs, human rights continue to be violated in different degrees around the world today. No doubt this debate will continue for generations as there are few clear-cut answers, and in any case, international law, and particularly international human rights law, is still new and comparatively undeveloped.

Doubts continue to be raised about the value of those international instruments if they are unable to achieve successful results, particularly when we read every day about neglect and ignoring of international law rules and judicial decisions, not only by certain developing countries but even by major countries. We see clearly the United States officially denying their obligation to take account of international court decisions on Nicaragua; Israel ignoring Security Council decision 242; the Soviet Union ignoring the UN Charter in invading Afghanistan. Those violations of international law give us an indication of the effectiveness of international norms as far as implementation is concerned, particularly with regard to the UN Charter.

On the level of human rights, violations take place day and night, with different degree. It is true that several issues interfere in the question of human rights, for which human rights instruments seem to pay the price. National interest and strategic considerations negatively affect human rights issues in one way or another. The events of the Philippines and the deposition of

President Marcos, the situation of Poland and the invasion of Grenada illustrate how strategic concerns can affect interest in human rights issues.

The situation of human rights violations in the Arab countries indicates the unsatisfactory degree of human rights protection in those countries. The Syrian regime's practices indicate to us the position of human rights in that country. The Libyan regime and other Arab countries indicated to the world that human rights instruments and organs are ignored time and again, but is the answer to abandon the hope for human rights protection through international law?

The international community, through its institutions has doubtless improved as a result of the development of the understanding of human rights, as populations managed to achieve regional developments in several parts of the world, for example, in Europe, the American continent, and Africa, as we saw in Chapter One.

Democratic governments of the European community cooperated to achieve regional protection of human rights which is considered by the international standard the most successful and effective experience in existence. The protection of human rights in Europe is undisputed as the Europeans were able to give spirit to those instruments and prove to the international community that international human rights law could achieve real protection of

human rights at the regional level. The world today witnesses implementation and effective results achieved by the European Commission and Court of Human Rights, as we hear every day of individuals pursuing their rights through the European organs, and governments accepting judgements and amending legislation in line with international human rights law.

This undisputed achievement stands as an example to other regions of the world, particularly the Arab world today. It seems to me that development on the regional level will prove to be the corner-stone firstly of more effective international human rights protection in the future. The common cultural and historical background, particularly the experience of two World Wars and the growth of dictatorship in Europe no doubt played an important role in the achievement and safeguarding it. The Arab world's common culture and historical background could form the background to a similar regional development.

Secondly, in overcoming certain problems due to the gap in between developed and developing nations, such as the nature of regimes and governments, especially when the participation in international treaties in general, and human rights in particular is meant to be only partially effective, as governments intend their obligation to go so far and no further, the Arab population has been left to struggle against violations of their very fundamental rights as we saw during this research. The governmental Arab Commission on Human Rights was ineffective in protecting the human rights of the majority of the Arab people.

As an inter-governmental organ dominated by government policies it could not overcome its political nature, and as we saw its main concern focussed on the violations of human rights in the occupied territories.

Even though Arab governments undertook international obligations as we saw during this study, for the promotion of human rights, it seemes that none of the Arab governments were prepared to go farther than the general obligations under the two Covenants as far as communications from individuals is concerned This means that individuals claiming to be victims of violations can not enjoy important rights under the Optional Protocol to the Covenant.

As we saw, the Arabs are calling today for regional human rights protection through non-governmental institutions as the very starting point of human rights protection in the Arab world today. Here I quote, in full agreement, from J.Cary's UN Protection of Civil and Political Rights, 1970 : "It is often said that the basic need for human rights protection is not at the international level but in each state, where government oppression must be curbed."

It seems to me that non-governmental agencies have an important role to play in attempting to curb this oppression, by putting pressure on governments to recognise and protect the rights of the individual Arab.

Even though governmental initiatives have so far come to no successful result, as we saw in the failure of the Arab League's Human Rights Commission, the will of the Arab population was

expressed through non-governmental channels, as we saw at the very beginning of the research. Non-governmental efforts prove every day the Arabs' determination to create and develop human rights institutions in the Arab world, able to provide a legal remedy to the victims of human rights violation. We witnessed the emergence of cooperation between the non-governmental organisations in Arab countries and international institutions, which led to resolutions drawing the attention of the world to the will and determination of the Arab population to join the international community's developments in this field despite the obstacles before them.

Non-governmental initiatives have ranged, as we saw, from educational steps to meet individuals' need for knowledge of their rights and freedoms an urgent demand like the use of human rights declarations, treaties, conventions through publications and seminars to calls for the suspension of obstacles to the development of human rights protection, such as the limitation of emergency powers, restoration of the rule of law, with the separation of powers and the restoration of the independence of the judiciary. There have also been calls for the drafting of an "Arab Covenant on Fundamental Freedoms and Rights" and the establishment of a regional "Arab Court of Human Rights" to deal with violations and illegal practices carried out by Arab states to the detriment of human rights. Initiatives focus on removing obstacles and creation of instruments, which express the common ground of the Arabs, and organs to implement them, taking in consideration the nature of the political circumstances of North Africa and the Middle East.

APPENDIX ONE

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APPENDIX TWO

TABLES

INTERNATIONAL

Charter of the United Nations = 1

Universal Declaration of Human Rights = 2

Geneva Conventions (1945) = 3

International Covenant on Civil and Political Rights = 4

Optional Protocol to the Covenant on Civil and Political Rights = 5

International Convention on the Elimination of Racial Discrimination = 6

Convention on Elimination of All Forms of Discrimination against Women = 7

Convention on the Prevention and Punishment of the Crime of Genocide = 8

Convention on the Political Rights of Women = 9

STATES	1	2	3	4	5	6	7	8	9
Algeria	x	x	?	x	-	x	-	x	-
Dem. Yemen	x	x	?	-	-	x	-	-	-
Egypt	x	x	x	x	-	x	x	x	x
Iran	x	x	?	x	-	x	-	x	-
Iraq	x	x	?	x	-	x	-	x	-
Israel	x	x	x	S	-	x	S	x	x
Jordan	x	x	?	x	-	x	S	x	-
Kuwait	x	x	?	-	-	x	-	-	-
Lebanon	x	x	x	x	-	x	-	x	x
Libyan Arab Jamahiriya	x	x	?	x	-	x	-	-	-
Morocco	x	x	?	x	-	x	-	x	x
Oman	x	x	?	-	-	-	-	-	-
Qatar	x	x	?	-	-	x	-	-	-
Saudi Arabia	x	-	?	-	-	-	-	x	-
Sudan	x	x	?	-	-	x	-	-	-
Syrian Arab Republic	x	x	x	x	-	x	-	x	-
Tunisia	x	x	?	x	-	x	S	x	x
United Arab Emirates	x	x	?	-	-	x	-	-	-

UNIVERSAL DECLARATION OF HUMAN RIGHTS'

STATE	*SIGNATURE*	*RATIFICATION*

All Arab states, except Saudi Arabia (abstained).

When the Universal Declaration was drafted in 1948, Jamil Baroody, the representative from Saudi Arabia, proposed deleting the reference to the freedom to change religion or belief, in Article 18, saying that this statement might be offensive to Moslems.[2]

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS[3]

STATE	*SIGNATURE*	*RATIFICATION*
Algeria	*10th December 1968*	
Egypt	*4th August 1967*	*14th January 1982*
Iran	*4th April 1968*	*24th June 1975*
Iraq	*18th February 1969*	*25th January 1971*
Israel	*19th December 1966*	
Jordan	*30th June 1972*	*28th May 1975*
Lebanon		*3rd November 1972*
Libyan Arab Jamahiriya		*15th May 1970*
Morocco	*19th January 1977*	*3rd May 1979*
Syrian Arab Republic	*21st April 1969*	
Tunisia	*30th April 1968*	*18th March 1969*

Reservations and interpretations[4] have been made by some of the Arab states, as follows:-

IRAQ

that their entry as a party to this treaty shall in no way signify recognition of Israel, nor shall it entail any obligations towards Israel. Further, that their entry shall not constitute entry as a party to the Optional Protocol.

This was reconfirmed on ratification.

LIBYAN ARAB JAMAHIRIYA

that acceptance and accession to this Covenant in no way signify recognition of Israel, nor lead to dealings with Israel connected with the Covenant.

SYRIAN ARAB REPUBLIC

that accession to the two Covenants shall in no way signify recognition of, or entry into a relationship with Israel

further, that they consider that Article 48, paragraph 1 of the Covenant to be incompatible with the purposes and objectives of the Covenant, as it does not allow all states, without discrimination, to become party to the Covenant.

OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS[5]

STATE	*SIGNATURE*	*RATIFICATION*

No Arab state has as yet signed or ratified the Protocol

1, SIEGHART, Paul - The international law of human rights (1983) p 24
2, UN Chronicle Vol 21,2 1984 p xiii
3, SIEGHART, Paul - The international law of human rights (1983) pp447-449 (Table A;ICPR)
4, ibid., pp458-9, 462
5, ibid., p467 (Table A;ICPR OP), and Human rights international instruments ; signatures, ratifications, accessions, etc., September 1983, pp4-15,