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The Dilemma of Hudud and International Human Rights: Proposing a Benevolent Mechanism

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Ever since the emergence of the international regime of human rights, the irresolvable dilemma has always been to draw an effective reconciliation between the theocentric essentials of Islamic law and the demands of International Human Rights Law. This problem is further exacerbated in the case of Islamic criminal punishments, especially Hudud^[1] because unlike Ta'zir^[2], where the offences are not prescribed and the punishments are neither fixed nor quantified by the Quran and Sunna, the Hudud punishments are clearly laid down for offences which have been explicitly stated by the two highest sources of Islamic criminal law, namely the Quran and Sunna.^[3] And different from Qisas,^[4] where punishments though clearly prescribed, aims purely to secure the rights of man, (which consequently allows the victim or his legal heirs to alter or remit the punishments), Hudud penalties were formulated to secure the rights of God hence it is often argued that no one but God, himself may "forgive the crime or change the law" The fact that it involves the right of God signifies that it is meant to be mandatory punishment, a demand from God that requires fulfillment and no one, including the victim, judge or the head of state has authority to alter or modify, what more to pardon or suspend it. Due to these reasons, Muslim countries are usually of the view that the enforcement of such punishments is a non-negotiable religious obligation. Human rights activists on the other hand, argued that the implementation of the Hudud laws contravenes multiple norms and values of international human rights law. Ever since then, there have been many attempts to stop the aforesaid violations by stopping altogether the implementation of Hudud punishments in numerous Muslim countries.

The writer contends that the current, typical approaches adopted in international human rights law in attempting to prevent further violations of human rights in this respect, is ineffective, insensitive and had contributed even further in worsening the problem of human rights violation in relation to the implementation of Hudud punishments in Muslim countries. This paper aims to analyze critically, the weaknesses inbuilt in the typical approaches adopted by human rights advocates in dealing with the issue of human rights violations relating to Hudud law.

Hudud Punishments and Violations of International Human Rights Law

Before moving further into the crux of the discussion, we need to firstly understand the type of punishments prescribed under Hudud laws and how they are usually argued to be in violation of human rights by advocates of International Human Rights Law.

The Hudud punishments prescribed for the offence of Zina are 100 lashes of whipping for unmarried offender^[5] and stoning to death for those who are married.^[6] To ensure that innocent individuals will not abusively inflicted with this harsh punishment, Islam prescribes the punishment of 80 lashes of whipping for the offence of Qadhaf, i.e. wrongfully accusing someone for Zina^[7] Sariqah on the other hand is punishable by amputation of the hand of the convict,^[8] while the punishments for Hirabah is stated to be any one of the following methods, namely death, crucifixion, cross amputation of limbs or banishment, depending on the severity of the crime committed.^[9] The Quran did not specifically explain the exact punishment for the offence of al-Khamr. However, based on certain traditions of the prophet's companions, the Muslims jurists concur that the punishment for this type of offence is flogging. Except for the Shafie school of law, other jurists agree that an offender of this crime may be flogged up to 80 stripes.^[10] Finally for the offence of al-Baghy the punishment is death penalty,^[11] and as for the offence of Riddah, the punishments is the death penalty of the Muslim offender who remains apostate after being given the opportunity to repent and return to Islam.

The above mentioned punishments of Hudud violate the norms of international human rights in many ways. However, due to the limited scope of this paper, the writer will be discussing only the most obvious and most quoted violations of Human Rights in relation to Hudud Punishments, and focus will be only on those violations that are relevant to the writer's analysis and proposal contained in this paper.

Firstly, the international human rights law prohibits the implementation of torture and any forms of cruel, inhuman and degrading punishment upon any criminal convicts regardless of the offence that may have been committed^[12] Article 1 of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) while defining the meaning of torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes (of)...punishing him for an act...", has excluded from its definition "any pain or suffering arising from, inherent in or incidental to lawful sanctions".^[13] The Human Rights Committee (HRC) however noted in its General Comment 20 to Article 7 of the International Covenant on Civil & Political Rights (ICCPR) that the said prohibition extends to "corporal punishment, including excessive chastisement ordered for a crime,"^[14] This means that even though Hudud punishments implemented by Muslim states may not fall within the prohibition due the exclusionary clause in CAT, they could still be declared by the HRC as amounting to "cruel, inhuman or degrading punishment" under the ICCPR, since Hudud punishments may still fall within the ambit of "corporal punishments and excessive chastisement" as stated in the said General Comment. While there have been disputes as to the actual scope and definition of the phrase 'torture, cruel, inhuman and degrading punishments' since it mainly depends on many sociological factors, the Hudud punishments of flogging, stoning, amputating limbs, cross amputating, crucifying and death have been repeatedly declared by Human Rights writers to be falling within the domain of the said phrase.^[15]

The International Human Rights Law is of course silent on the question of

fornication; however, the concept of “privacy” is inherent in much of international human rights.^[16] The illegality of consensual relations between two unmarried people is hard to reconcile with the right to privacy guaranteed in the ICCPR. Neither flogging for fornication nor a stoning to death sentence for adultery can be countenanced.^[17]

Another area of violations of human rights relates to the offence of apostasy and the freedom of religious belief. The ICCPR under Article 18 further provides that “no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of choice.” Hence punishing a person for the act of converting to another religion and renouncing his or her former faith is not acceptable under human rights law.^[18]

With regard to the death penalty punishment prescribed for the offence of adultery, robbery, rebellion and apostasy: technically speaking the International Human Rights law confines the implementation of death penalty to only the “most serious crimes.” But it is actually at the same time, promotes abolition of the said punishment. For example, the UN Second Optional Protocol to ICCPR was formulated with the purpose to abolish the death penalty.^[19]

Other forms of violations of Human Rights in relation to Hudud punishments mostly relate to issues, unrelated to the nature and quantum of the punishments. For example, it centres around issues such as: the punishments were recklessly inflicted upon the accused, violating his right to a defense, right against retroactive criminal law, right to appeal and many more. These violations are not caused by the original nature and quantum of the punishments but are due to procedural abuses and errors in implementing the said punishments.

The Typical Approaches of International Human Rights Law ‘Enforcers’

In summary, the methodologies adopted by many human rights advocates in dealing with the issues of Hudud punishments are typically shadowed by the following pattern of actions: First, publicly judging the legitimacy of these punishments by the yardstick of international human rights law.^[20] Second, excessively emphasizing on the severity of the said punishments, and denouncing them to be in contravention with the universal norms of human rights.^[21] Third, demanding obedience from states practicing Hudud by abolishing the punishments or repealing the laws which prescribe them, usually on the basis of the states’ ratification of the international treaties which prohibit the implementation of the said punishments^[22] or customary international law. The Sudan Human Rights Organization for example, in issuing its “Memorandum of Urgent Appeal to Stop the Killing of a Christian woman by Sharia law and Government Political Abuse”, had demanded from the Chief Justice of Sudan, the Governor of Darfur and the Sudan Government in Khartoum to abolish altogether the Hudud penalties by repealing the Sudan Penal Code 1991:

“The Sudan Human Rights Organization has repeatedly asked the Government of Sudan to abolish the Sudan Penal Code 1991 because it contradicts international human rights standards and applicable norms. For the majority Muslims of Sudan, the Sudan Penal Code 1991 is a primitive law...”^[23]

Julie Chadbourne similarly made an interesting point when commenting the

reaction of human rights organizations, activists and women's groups in relation to the Pakistani Hudood Ordinance:

“...the majority activists and writers on the topic of the Zina Ordinance *focus on either the severity or unjust “application” of Hadd...Consequently, almost twenty years after the inception of the Zina Ordinance, little has been said other than “they are bad-repeal, repeal, repeal”*^[24]

And usually, when these states predictably resist from abiding by their treaty obligations to repeal the laws, human rights activists and organizations would exert pressure to compel them to comply, through multiple mechanisms such as lobbying with the media to provoke widespread international attention,^[25] urging other states (especially influential Western states) to condemn the Hudud conviction of the offending state^[26], labeling the offending state as cruel, brutal, tyrant etc^[27], organizing a coalition or movement to demonstrate anger and outrage and stimulating debates and public protests against the implementation of the punishments.^[28] The following report by the international non-governmental organization, the Human Rights Watch on Islamic Law in Northern Nigeria, best illustrates the aforementioned facts:

“At the international level, the introduction of Sharia in 2000 suddenly threw Nigeria into the spotlight. The sentences of death by stoning imposed on Safiya Hussein and Amina Lawal were at the *centre of an unprecedented level of public attention and provoked reactions of outrage* among women's organizations, human rights organizations, parliamentarians, Christian organizations, and members of the general public in many countries. *Their cases were the object of massive public protests, appeals and petitions from around the world.* Some of these interventions focused specifically on the cases of Safiya Hussein and Amina Lawal, urging the government to ensure that their lives were spared. Others also called for an end to discrimination against women and *an abolition of the death penalty.*”^[29]

Similarly in Pakistan, it was reported that “in reaction to the Hudood Ordinance, human rights organizations as well as activists and women's groups from within Pakistan *gathered in revolt* to battle against the institution of the Pakistani Zina Ordinance”^[30]

Besides that, in pressuring these states to obey the international instruments, human rights approach is constantly marked with the argument that “there is nothing in the human rights law which justifies the violation of human rights based on an alleged divine revelation.”^[31] In other words, “cultural justification is not a sanction for disregarding basic human rights” and “making allowances for cultural pluralism will deny the universality of claims of all human beings to dignity.”^[32] The Human Rights Watch for instance, in its report with regards to international reactions to Sharia in Nigeria states:

“*Whatever personal beliefs may prevail in different social and religious circles in Nigeria, the Nigerian government both at*

federal and state level, remains bound by international obligations and conventions. These are not conventions imposed by Western, Christian or secular countries, but international and regional instruments which have been willingly ratified by Nigeria as well as other countries with large Muslim populations.”^[33]

The Drawbacks of the Typical Human Rights Approach

The writer contends that the classical human rights approaches mentioned above are ineffective since it neglects, significantly, a number of decisive realities of Islam and Muslims in general.

To begin with, the very goal of the human rights movement “to formulate a jurisprudence of rights valid for all of humanity has always been considered laudable by some,^[34] and offensive to others”^[35] While the human rights organizations and activists should be commended for the aforementioned efforts in bringing this issue into the public sphere and vigorously struggling to put an end to what is believed by them to be an indisputably an egregious human rights violation, the writer maintains that, by ignoring the inherent realities attached to the customary lifestyle and way of thinking of the Muslims, these methodologies will not in the long term, be useful in reconciling the gap between Islam and International Human Rights.

The most influencing reality that may render the abovementioned efforts futile, relates to the divine weight of the Hudud punishments.^[36] Muslims perceived Hudud punishments as divine, evolved from Godly wisdom, which they believed to be beyond mortal intelligence of the limited human mind. El-Awa pointed out that “while the considerations of social utility form the basis of the theories of punishment in Western penal system, in Islamic law, the theory of punishment is based on the belief in the divine revelation contained in the Quran and the Sunna of Prophet Muhammad”^[37] Robert Powstako further substantiates this point saying that “the Islamic community...insists that the essence of Islamic law is unchanging and knowable...to the extent that Islam was revealed in the Qur'an, a ‘communication from God to the Prophet Muhammad, conveyed by the angel Gabriel, in the very words of God,’ and was exemplified in the life of the Prophet, hence its essence is by definition complete and unchanging.”^[38]

Based on the above reasons Muslim jurists hold that the harshness of the Hadd penalties can never be questioned. Hence any attempt to abolish them directly, apart from being highly offensive, could easily be translated into trying to eliminate a part of the religion altogether. Heiner Bielefeldt explains that conservative Muslims always have the tendency to view the human rights movement as a new Western ‘crusade’. They fear that human rights are part and parcel of an all-encompassing ideology or way of life that is intended to eventually replace Islamic faith and practice.^[39]

Abdullahi Ahmed al-Naim correctly stated that “religion has a strong influence on human belief systems and behavior, regardless of the formal characterization of the relationship between religion and the state in any society.”^[40] This is especially true with Islam, being a religion that governs almost every aspect of life of its followers. An Naim further explained that while it is true that the behavior of believers is not always motivated by total fidelity to their faith, religious

considerations have always been perceived too important for the majority of people for human rights scholars and advocates to continue to dismiss them simply as irrelevant, insignificant, or problematic.^[41] Thus, the idea that human judgment alone could determine the appropriateness or cruelty of a punishment decreed by God is simply out of the question. Questioning the Hudud punishments is considered as questioning the divine wisdom underlying them and impugning the divinity of the Quran and the theocentric nature of Islamic law.^[42] Abu-I Ala Mawdudi argued that, “where an explicit command of God or His Prophet already exists, not even all the Muslims of the world put together have any right to make the least alteration in it.”^[43] Thus, neither Islamic re-interpretation nor cross cultural dialogue is likely to lead to their total abolition as a matter of Islamic law.^[44] The steadfastness of Muslims in adhering to this belief is especially reflected in the provisions of the Universal Islamic Declaration of Human Rights (UIDHR), which states that “the basis of all law is the Shari’a, and divine revelation has priority over human reason in determining human rights limitations in an Islamic state.”^[45]

Based on the above discussion, it is obvious that human rights advocates have a very limited prospect of success in “pressuring the governments of offending countries to put an end to the practice of Hudud laws, by solely relying on the so-called universal norms of International Human Rights Laws, which have little influence among the Muslims, especially in conservative Muslim countries where Hudud punishments are widely mostly practiced”^[46] Reza Aslan was right when he said:

“Human rights organizations around the world have documented case after case in which Zina laws have been purposely and incorrectly applied for misogynistic ends. And while, as mentioned, these groups should be applauded for their tireless struggle to put an end to what is unquestionably an egregious human rights violation, *the very international human rights laws they employ to combat offending countries have often hindered their work.*”^[47]

Another reason why an approach purely based on international human rights law will fail is because Muslims have extremely high confidence in the deterrent impact of the Hudud punishments. They believe that although the punishments are harsh and violate the norms of international human rights, the implementation of such punishments is mainly necessary to deter future crimes from occurring.^[48] This contention is very much related to the first reason i.e. divine weight attached by the Muslims to Hudud punishments. The simple, but unshakeable understanding that these punishments were originally derived from divine wisdom had cultivated an even soaring faith among the Muslims, in the deterrent influence that the penalties may have on any potential perpetrator of the crime.

For example, during a Conference in Riyadh, Saudi Arabia in 1972 on “Moslem Doctrine and Human Rights”, where the delegates were from Ministry of Justice of Saudi Arabia and the Council of Europe, a Saudi Arabian delegate by the name of Dr Dawalibi had confidently said

“I have been in this country (Saudi Arabia) for seven years...

and I have never saw, or heard of any amputation of the hand for stealing. This is because crime is extremely rare. So, all that remains of that punishment is its harshness, which has made it possible for all to live in perfect security and tranquility, and for those who are tempted to steal, to keep their hands whole. Formerly, when these regions were ruled by the French inspired Penal Code, under the Ottoman Empire, pilgrims traveling between the two Holy Cities of Mecca and Medina, could not feel secure for their purse or life, unless they had a strong escort. But when this country became the Saudi Kingdom, the Koranic law was enforced, crime immediately disappeared. A traveler then, could journey, not only between the Holy criticism but even from Al Dahran on the Gulf of Jeddah on the Red Sea, and traverse a distance of more than one thousand and five hundred kilometers across the desert all alone in his private car, without harboring any fear or worry about his life or property, be it worth millions of dollars, and be he a complete a stranger.”^[49]

Another delegate was also reported to have said, “In this manner, in the Kingdom of Saudi Arabia, where Islamic law is enforced, state money is transferred from one town to another, from one bank to another, in an ordinary car, without any escort or protection, but the car driver. Tell me, Gentleman: in any of your Western states, would you be ready to transfer money from one bank to another, in any of your capitals, without the protection of a strong police force and the necessary number of armored cars?” This confidence in the deterrent nature of the Hudud punishments is just one its influencing factors within Muslim societies.^[50] Powstako, in commenting the high level confidence among the Muslims in Islamic criminal punishments had said that when a society is so utterly and unreservedly sure of itself, as the Muslim society is, and has always been, goes only to confirm the unshakable confidence that the Muslims have in pristine Islam. And in respect of Islamic criminal punishments, the general body of Muslim believers has not, even in its darkest hour, lost faith and confidence either in its general destiny or in the efficacy and unimpeachability of Islamic punishments.^[51]

The third possible reason why the typical approach of human rights will be highly inappropriate and ineffective in dealing with violations of human rights that may have been caused by the implementation of Hudud laws, arises from Muslims’ basic perception towards International Human Rights Law. This is because Muslims, (especially conservative Muslims) always have the perception that the international instruments and movement of human rights are biased mechanisms employed by the Western countries to indirectly oppress and subjugate the Muslim states to Western domination. Thus, any attempt of trying to *directly* compel obedience towards these international instruments are easily seen by the Muslim states as an indirect act of subjugation and oppression. It is argued that the problem with the human rights argument is that the appeal to the UDHR is so often viewed as biased and hypocritical that it has little hope of affecting permanent change in offending countries.^[52] In many instances when Muslim states are declared to have violated any norms of human rights and are called to comply with the international instruments prescribing the standard for such rights, most conservative Muslim countries will just as easily cite the relatively

poor human rights record of the United States and European nations to argue that the west applies the UDHR selectively and only when it serves its own interests.^[53]

In fact, even certain Muslim writers who are in favor of human rights have been charged as being internationally biased. Foster gave the example of An-Na'im, whose approach is to try and "reach common ground with international norms on some issues by a plausible reading of local texts i.e. a theory based on international norms". Due to his slightly liberal approach in dealing with the issues of Islamic law and human rights, he is at times claimed by many conservative Muslims as offending local culture, and labeled as dangerous neo-colonialist.^[54] This is because according to Schooley "although An-Na'im advocates a cross-cultural dialogue to define rights,' he actually adopts as 'rights' those already considered the norm in international law and advocates that the Shari'a be reformed to meet these standards."^[55] If a distinguished Muslim writer such as An Naim could easily be labeled as a deviant Muslim and a neo-colonialist simply because he tries to fit Islam into the framework of human rights, imagine the conservative Muslims' reactions towards any human rights activists or organizations (especially the non-Muslim activists), directly advocating to abolish the Hudud punishments simply because it contradicts the International Human Rights Law

Another reason why conservative Muslim countries would find the argument of human rights groups unpersuasive relates to the issue of universalism in international human rights law. By exclusively relying on *international* human rights law as the universal standards that offending Muslim countries have to abide with, human rights advocates will unnecessarily provoke the problematical dispute of whether human rights are universal in the first place. This debate has for so long been one of the most obstructive barriers to any attempts of reconciling Islam (in general) and the international human rights law.

As much as human rights advocates would like to think that the rights prescribed by international human instruments are the universal norms, unanimously recognized by the global community as a whole, regardless of the diverse origins and backgrounds of people, the reality is very much to the contrary. Muslims, (especially the conservative Muslims) are not entirely receptive to this philosophy. Instead, many Muslims, especially those living in the conservative Muslim states where Islamic criminal punishments are more inclined to be practiced, believe that the international human rights law today has sorely neglected a substantial fraction of the Islamic perspectives on human rights, when formulating the core ideals of International Human Rights law. Hence, Muslim states tend to view international human rights instruments as "unapologetically Western documents that reflect neither Islamic culture nor Islamic notions of human rights."^[56]

In fact, it is reported that the main reason why Saudi Arabia and a few other Muslim states had abstained from voting for the UDHR when it was ratified by the UN was because they sensed a palpable lack of Islamic ingredients and aspirations in the "western legal traditions that permeated these international documents."^[57] Aziz Bari is right when he said, "developing world has always been very critical of what they perceive as attempts by the West to impose their (Western) standards on them."^[58] Abu I-A'la Mawdudi, a well-known Pakistani author for example, writes: "The people in the west have the habit of attributing

every good thing to themselves and try to prove that it is because of them that the world got this blessing, otherwise the world was steeped in ignorance and completely unaware of all these benefits.”^[59] This sort of negative way of thinking in the mind of the Muslims will prevent genuine compliance towards the universal provisions of International Human Rights Law.

Majority Muslim writers who subscribe to this premise argued that the very principle of human rights today was originally derived from the West, its legislative instruments “firmly rooted in Western fundamental principle, with its cradle in the early British and French philosophers like Locke and Rousseau.”^[60] It is argued that the concept of individual rights, which forms the root to the overall idea of human rights, had expanded most rapidly from the era of European Renaissance where the initial emphasis had been on rationalism and humanism, to Enlightenment, when these theories developed into the political arena, and becomes the central theme of Western civilization.^[61] Based on this belief, many leaders of conservative Muslims counties reject not only the notion of international human rights law, but any forms of Western influences which in their view run counter to Islamic viewpoint on any particular issues.

Iran's Ayatollah Ali Khamenei for instance, asserted that “when we want to find out what is right and what is wrong, we do not go to the United Nations; we go to the Holy Koran...For us the UDHR is nothing but a collection of mumbo-jumbo by disciples of Satan.”^[62]

In fact, the June 1992 assassination of Faraj Fouda, an Egyptian author who attempted to publicly propose an extreme adoption of secularist philosophy in Islam, demonstrates the harsher reality that even Muslim reformers, who are somewhat liberal and outspoken in their approach, are not well accepted by other Muslims.^[63]

Anthony Chase's observation is illuminative as this juncture:

“The real danger of the human rights movement's reliance on an ideology of universal rights is that it has a polarizing effect: *it raises mistrust and places local human rights activists in the politically uncomfortable position of siding with those “universal” values popularly identified with outside powers, rather than working with “indigenous,” local traditions.* However cliché and unfair the perception of such categories, it could well be that, tactically, universalizing language may have outlived its usefulness. At this point the universal vs. cultural particularities debate often obscures more than it illuminates.”^[64]

The fifth reason why the typical human rights approach, will not work as expected, relates to the frequent doubts in this area that would usually raise too many ‘faith-related’ questions such as, ‘is it really a religious obligation upon all Muslims to implement these punishments?’, ‘Is it a sin not to implement these punishments? If it is, should it then be enforced regardless of whatever circumstances prevailing in the community at present?’, ‘What are the actual rules of exercising these laws?’ and ‘Could the traditional rules be eliminated, altered or modified to suit the current needs of the society? In resolving these troubling thoughts in their minds, Muslims would definitely prefer the safer ‘more Islamic’ option of implementing the divine punishments rather than the abolishing

them.

Bielefeldt made an interesting observation at this point:

“...one should take into account that *many Muslims still might feel insecure about the relationship between traditional religious norms on the one hand and modern legal standards on the other*. This is why many Muslims assert the validity of the traditional Islamic Sha’ria in principle and, at the same time, seems prepared to accommodate pragmatically some political and legal reforms. For instance, even those who defend the legitimacy of Hadd punishments in theory, frequently prefer to avoid the actual implementation of these punishments, invoking practical obstacles to their reintroduction.”^[65]

The aforesaid argument is very much related to another reason why the above approach of human rights will be unsuccessful to coerce change in the area of Islamic criminal law. Recent events seem to indicate a steady trend of many Muslim countries to undergo some sort of reform process to transform fully or partially, their political, social or economic structures towards a more Islamic system. The upholding of divinely ordained punishments would obviously be in line with this Islamization movement. Although voices within the Muslim world itself have been critical of Islamization as both a concept and a practice, it is difficult for Muslim politicians to ignore the rhetorical appeal of promoting the establishment of an ‘authentically’ Islamic society.^[66] Even if the leaders in control of a Muslim government may want to succumb to some values of international human rights, it might not want to do so since such will go against the desires of its own populace, if the said norms contravene Islamic law. For such a local constituency to emerge and be effective in its advocacy of human rights, these rights must be seen by the general public as consistent with its own religious beliefs.^[67]

The following quotation from Chadbourne’s analysis of the Pakistani Zina Ordinance may illustrate the above discussion:

“The Zina debate is now more or less at a standstill. Pakistan is sensing world pressure after the nuclear bomb contest with India. Its populace desires a move toward security. In the traditional pattern, Prime Minister Nawaz Sharif is promising to further Islamizes Pakistan. Simultaneously, the Muslim world is invested in Pakistan surviving as an Islamic state. Removal of the Zina Ordinance, whether right or wrong, is highly unlikely to happen in the current political environment.”^[68]

With the current (and rapid) resurrections and re-establishments of Islamic law in many Muslim states today, certain writers argued that perhaps a more feasible approach would be to seek for a subtle method of prevention, indirectly through legal procedural shields under Islamic law as is currently in the practice of some Muslim States that apply Islamic law as State law.^[69]

Conclusion

In their struggle to stop violations of human rights based on cultural or religious practices of a certain community, human rights advocates tend to overemphasize

on the supreme status of International Human rights Law, as the only universal set of value principles which transcend all boundaries and state sovereignties. This unintentional maneuver frequently leads to inadvertently overstating the binding nature of these international instruments and how the international community must obey them, regardless of whatever differences in backgrounds and origins that may exist among the global population. Although *technically* speaking the aforesaid arguments are right and justified, this sort of approach suffers numerous disadvantages. By putting the emphasis on the universal and mandatory character of International Human Rights Law, human rights advocates complicates the issue by bringing into the picture, the irresolvable debates of universalism against cultural relativism, the western values against eastern morals, the foundation of theocentrism against ethnocentrism. As a result, the ultimate aim of human rights movement in this area is often diverted from upholding the values of human rights couched in these international instruments, to just upholding the binding legal provisions, apparent in these instruments.

Looking back into the Universal Declaration of Human Rights (UDHR), the writer opines that the actual reason behind the establishment of the UDHR is non other than to have a definitive set of guiding norms, which could act as the mechanism that upholds the dignity of a human being and preserve his/her inherent rights and freedoms as a human person, in whatever circumstances that may prevail. [\[70\]](#)

In finding the additional apparatus that could further strengthen the overall approach of human rights in handling this so-called human rights violations, the writer submits that it would be sufficient if the said mechanism, regardless of the label attached to it, upholds the same values and ideals of international human rights law. Perhaps the more effective approach would be to find an area of law where both Islamic and International Human Rights Law totally coincides. This area of similarity should not be one of those comparatively equivalent points of reconciliation between the two. It should be the rare spot where both Islamic and International Human Rights Law totally concurs with each other exactly similar. In other words, it is the area where labels such as Human Rights or Islam do not really matter since both systems of law share an entirely same set of value principles. Should this be possible, human rights activists may then uphold the values entrenched in the international human rights instruments under the less threatening banner of Islamic law, or a combination of Islamic and International Human Rights Law.

Based on the above, the writer therefore submits that the violations of human rights (in relation to Islamic law such as Hudud), should actually be dealt with by diverting our emphasis from discussing the severity of the punishments to exploring the various procedural safeguards provided by Islamic criminal law for accused in Hudud trials. This is because by closer examination one would discover that some of them are basically the same, as those enshrined in the international human rights instruments. In fact, it is safe to say that some of these procedural safeguards are even more protective towards accused person in criminal trials. The typical approach of demanding conservative Muslim states to uncompromisingly stop the practice of Hudud punishments on the grounds of International Human Rights law, must be diverted to demanding from the Muslim states to adhere to strictly to procedural rules and evidentiary requirements required by Islam before Hudud penalties can be imposed.

[1] Hudud or Hadd penalties are unambiguously specified and prescribed for criminal actions which have been explicitly stated by the primary sources of Islamic Jurisprudence, namely the Quran and Sunnah of Prophet Muhammad, as offences against the right of God. Muslim jurists explained that the term 'right of God' implies the betterment of the society. (See Anwarullah, *Criminal Law of Islam*, Islamic Da'wah Centre, Ministry of Religious Affairs, Brunei) Ibn Abdin states that "the cause of describing Hudud as rights belonging to God is because they are promulgated for the protection of the whole society." (See Muhammad Amin, Ibn Abdin, *Hashiat Radd Al Mukhtar* (Arabic), Volume. 4., Bairut: Dar al-Fikr at p. 3) The kind and quantum of implementation for these punishments are clearly defined and fixed by the aforesaid sources of Islamic law, and cannot be increased or decreased unnecessarily. (See Abd. Al. Qadir Audah, *Al-Tashri'a Al-Jinai Al-Islami*, Vol. 2, Bairut: Dar al-Kitab at p. 343, and Mohammad Shabbir, *Outlines of Criminal Law and Justice in Islam*, International Law Book Services, (2002) at p. 11) Since, they are clearly enshrined in the holiest and most supreme source of Islamic law i.e. the Quran and Sunnah, many Muslims also unequivocally believe that they are utterly divine, unchangeable, eternal and immutable. (See "A Call for International Moratorium On Corporal Punishment, Stoning and the Death Penalty in The Islamic World", www.IslamOnline.net)

There are basically seven specific offences classified under Hudud, namely Zina (fornication and adultery), Qadhaf (false accusation of Zina), Sariqah (Theft), Hirabah (Robbery), Al-Baghy (Rebellion), Riddah (Apostasy) and Al-Khamr (Consuming Liquor).

[2] The third form of Islamic punishment is Ta'zir, denoting offences which neither the Quran nor Sunnah prescribe a penalty. (See Matthew Lipman, Sean McConville, and Mordechai Yerusalmi, *Islamic Criminal Law and Procedure: An Introduction*, Praeger at p. 50) These offences are neither covered by Hudud nor Qisas, but the commission of such acts threatens one of the five goals of Shari'a stated above. (See Osman abd-el-Malak al-Saleh, *The Right of the Individual to Personal Security in Islam*, in Bassiouni, *Islamic Criminal Justice System*, New York: Oceana Publications, (1982) at p. 60. Numerous offences are classified under this category, but in normal circumstances, Ta'zir punishments are frequently inflicted in the following instances: (1) When the act does not fulfill all the technical requirements of Hudud or Qisas, therefore neither Hudud nor Qisas punishments could be inflicted on the offender. For example the theft of an item that is not of sufficient value to qualify as a Hudud offense, or attempted adultery or assault. (2) When the acts amount to Hudud or Qisas, but these punishments could not be imposed upon the offender due to extenuating circumstances (such as theft among relatives) or doubt (a failure of proof at trial, such as insufficient witnesses). In these kinds of situations, the offence will fall into the realm of Ta'zir. This is because theoretically a judge in Hudud or Qisas cases must either convict the accused after being satisfied that the offence was performed exactly according to the description, legal conditions and evidentiary requirements of the offences or else, acquit him from those charges. (3) When the acts do not qualify as Hudud or Qisas but are condemned in the Quran and Sunnah or are contrary to public welfare. When the acts do not qualify as Hudud or Qisas, but violate prominent Islamic norms. Since the punishments for these offences are not clearly prescribed by the Quran and Sunnah, the ruler of Islamic states and judges (qazi) are endowed with the discretionary authority to inflict the suitable punishment of Ta'zir on the culprit in accordance with the circumstances of each particular case, after careful consideration of the public welfare.

[3] Since the focus of this paper is to specifically discuss on the nature of approaches taken by advocates of International Human Rights law in dealing with violations of Human Rights relating to the implementation of Hudud punishments, the writer will not be providing a detailed explanation as to the nature and types of Hudud offences. For a useful survey, please refer to Mohammad Shabbir, *supra*, note 1 at p. 11

[4] The second type of criminal punishment, which is also specifically prescribed and described in the primary sources of Islamic law, is Qisas. Crimes under this category can be divided into two i.e. offences against the person (murder) and body (bodily injury). In the first category, the offenders of these crimes are usually subjected to either the punishment of retaliation (Qisas), or the payment of blood money (Diyat). With regards to bodily injury, the infliction of any act which causes bodily harm is subjected to retaliation if it results in serious, permanent injury or disfigurement to the victim. (See Matthew Lipman, Sean McConville, and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction*, Praeger at p. 50) These punishments were designed merely to secure the rights of individuals in the society. Hence when a Qisas or Ta'zir has been committed, its punishments though clearly provided for by the Quran, may be altered or remitted by the victims or their legal heirs. They may for example, forgive the offender, waive their rights to retaliation and ask for the payment of blood money instead, as compensation to the harm that they have suffered. Qisas crimes include intentional murder, quasi-intentional murder, unintentional murder, intentionally causing physical injury or maiming, or unintentionally causing physical injury or maiming. (See Abdurrahman I. Doi, *Shariah: The Islamic Law*, (1996) A.S. Nordeen Publisher, at p. 233)

[5] This punishment is based on the Quranic verse, "The woman and the man guilty of adultery or fornication, flog each of them with hundred stripes. Let not compulsion move you in their case, in a matter prescribed by God, if you believe in God and the Last Day: And let a party of the believers witness their punishment." Verse 24: 2, *The Holy Quran* translated by Abdullah Yusuf Ali

[6] This punishment is based on the hadith of Prophet Muhammad, "Take from me, Allah has prescribed for them (guilties of Zina) the way, unmarried will be punished with hundred stripes and expulsion of one year and married will be punished with hundred stripes and stoning to death." reported in Muslim, Volume II at p. 176 quoted by Anwarullah, *supra*, note 1 at p. 145

[7] This punishment is based in the Quranic verse, "And those who accuse chaste women (of Zina) and produce not four witnesses (in support of their allegation), flog them with eighty stripes; and reject their evidence ever after; for such persons are wicked transgressors; unless they repent thereafter and mend (their conduct); for Allah is oft-forgiving most merciful." Verse 24:4, *The Holy Quran* translated by Abdullah Yusuf Ali

[8] This punishment is based on the Quranic verse, "And to the thief, male and female, cut off his or her hand." Verse 5:38, *The Holy Quran* translated by Abdullah Yusuf Ali

[9] "The Punishment of those who wage war against Allah and his messenger (in respect of endangering the security of the State established under the divine law) and strive with might and main for mischief through the land, is execution, or crucifixion, or the cutting of their hands and feet from the opposite sides, or exile

from the land; that is their disgrace of this world, and a heavy punishment is theirs in the hereafter; except those who repent before they fall into your power; in that Allah is oft-Forgiving and Most Merciful." Verse 5:33, 34, *The Holy Quran* translated by Abdullah Yusuf Ali

[10] Anwarullah, *Criminal Law of Islam*, Islamic Da'wah Centre, Ministry of Religious Affairs, Brunei at p. 214

[11] This punishment is derived by the Muslim jurists from the following verse of the Quran: "If two parties among the believers fall into a quarrel, make peace between them: but if one of them transgress until it complies with the command of God. But if it complies, then make peace between them with justice, and be fair; for God loves those who are fair (and just)" Verse 49:9, *The Holy Quran* translated by Abdullah Yusuf Ali

[12] See Article 5 of the Universal Declaration of Human Rights (UDHR) (1948); Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (1966) and Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984) 1465 UNTS 85. For a useful survey, See also P. Ghandi, *The Human Rights Committee and Articles 7 and 10 of the International Covenant on Civil and Political Rights* (1966), 13 Dalhousie L.J. (1990) 773-74, at p. 758; Peter Cumper, Freedom of Thought, Conscience, and Religion: The Three Freedoms in International Covenant on Civil and Political Rights and the United Kingdom 353, 355-89; .

[13] U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984)

[14] Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev. 7, 12 May 2004

[15] Edna Boyle, *Need Worlds Collide: The Hudud Crimes of Islamic Law and International Human Rights* 13 N.Y. Int'l L. Rev. 43

[16] Article 17 of the ICCPR states: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation ... Everyone has the right to the protection of the law against such interference or attacks."

[17] *Supra*, note 15

[18] *ibid* at p. 64 taken from the following sources: Moshe Hirsch, *The Fundamental Agreement Between the Holy Sea and the State of Israel: A Third Anniversary Perspective: The Freedom of Proselytism Under the Fundamental Agreement and International Law*, 47 Cath. U.I. Rev. 407, 424-25 (1998); See also Larry Cata Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755, 799 (1993); Makau wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, 5 Buff. Hum. Rts. L. Rev. 75, 85 n.15 (1999)

[19] G.A. Res. 217 A, U.N. GAOR, 3d. Sess., art. 2, Supp. No. 13, at 75, U.N. Doc. A/810 (1948).

[20] *Supra*, note 61 at p. 98

[21] Natana J. DeLong-Bas, *Book Review of The Islamization of the Law in*

Pakistan, By Rubya Mehdi 590, 15 J.L. & Religion at p. 589

[22] See Human Rights Watch, *International Reactions to Shari'a in Nigeria*, at <http://www.hrw.org/reports/2004/>; See also Ann Elizabeth Mayer, *Reconsidering the Human Rights Framework for Applying Islamic Criminal Law*, The Wharton School, at <http://lgst.wharton.upenn.edu/mayera/writings.htm>

[23] http://www.shro-cairo.org/urgentaction/christian_woman.htm

[24] Julie Dror Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under The Pakistan Zina Ordinance*, 17 Wis. Int'l L.J. 179 at p. 186

[25] Denis J. Wiechman, Jerry D. Kendall, and Mohammad K. Azarian, *Islamic Law: Myths & Realities*, at http://muslim-canada.org/Islam_myths.htm

[26] A good example would be the case of Amina Lawal, a Nigerian woman, convicted for the hudud offence of zina (adultery), where both Amnesty International and Human Rights Watch had issued urgent bulletins to American and European Governments, urging them to condemn the convictions and demand her release., Reza Aslan, *The Problem of Stoning in the Islamic Penal Code: An Argument for Reform*, 3 UCLA J. Islamic & Near E. L. 91, at p. 98

[27] In 1990, Human Rights Watch / Africa, a non-governmental human rights group, branded Sudan's Islamic government, the most "brutal" to govern Sudan since independence. The report stated that the regime was guilty of human rights abuses "never seen before" in the country., See Judith Miller, *Book Reviews: Islamic Laws As Violations Of Human Rights In The Sudan: God Has Ninety-Nine Names*, New York: Simon & Schuster, (1996)

[28] *Supra*, note 24 at p. 185

[29] Reza Aslan, *The Problem of Stoning in the Islamic Penal Code: An Argument for Reform*, 3 UCLA J. Islamic & Near E. L. 91

[30] *Supra*, note 28

[31] Judith Miller, *Book Reviews: Islamic Laws As Violations Of Human Rights In The Sudan: God Has Ninety-Nine Names*, New York: Simon & Schuster, (1996)

[32] *ibid*

[33] *Supra*, note 22

[34] Henry J. Steiner & Philip Alston, *International Human Rights in Context* (2000) at p. 366

[35] Jason Morgan Foster, *A New Perspective on the Universality Debate: Reverse Moderate Relativism in The Islamic Context*, 10 Ilsa J. Int'l & Comp. L. 35 at p. 35 taken from Henry J. Steiner & Philip Alston, *ibid* at p.366

[36] Madhood Adebayo Baderin, *International Human Rights and Islamic Law*, OUP, (2003) at p.76

[37] *ibid*

[38] Robert Powstako, *Towards an Islamic Critique of Capital Punishment*, 1 UCLA J. Islamic & Near E. L. 269 at p. 277

[39] Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, at

http://caliope.jhu.edu/journals/human_rights_quarterly/v017/17.4bielefeldt.html

[40] Abdullahi Ahmed an-Naim, *Islam and Human Rights Beyond the Universality Debate*, 94 Am. Soc'y Int'l L. Proc. at p. 95

[41] *ibid*

[42] *Supra*, note 36

[43] *Supra*, note 29 at p. 102-103., taken from Abu-I 'Ala Mawdudi, *Islam: its Meaning and Message*, Khurshid Ahmad ed., (1976) at p. 159

[44] Matthew Lipman, Sean McConville, and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction*, Praeger.

[45] Ann Elizabeth Mayer, *Islam and Human Rights: Traditional & Politics*, Westview at pp. 54-55

[46] *Supra*, note 36 at p.92

[47] *ibid* at p. 98

[48] *ibid* at p. 75

[49] *ibid* at p. 75

[50] *ibid* at p. 76

[51] *Supra*, note 38 at p. 278 taken from Eateh M. Sandeela, *Ethics of Islamic Punishments*, 3 Islamic & Comp. L.Q. 233 (1983)

[52] *Supra*, note 29 at p. 98

[53] A good example would be the prohibition against the imposition of death penalty for minors as enshrined in article six of the ICCPR, where it is reported that at present, there are "six countries in the world that regularly impose capital punishment on minors", which include *inter alia*, the United States. The fact that the U.S being a signatory Nation of the UDHR and the most influential member of the U.N., is in violation of the ICCPR, a document that they themselves helped draft, cries hypocrisy in the eyes of many conservative Muslim governments, taken from Reza Aslan, *ibid*

[54] *Supra*, note 35 at p. 46

[55] *ibid*

[56] *Supra*, note 29 at p. 99-100

[57] *ibid*

[58] Abdul Aziz Bari, *Rethinking the Idea and Content of Human Rights: A Response*, [1997] 1 CLJ at p.xxxii

[59] Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, *supra* note 87, taken from Abu I-A'la Mawdudi, *Human Rights in Islam* 13 (1976).

[60] *Supra*, note 29 at p. 99

[61] *ibid*

[62] *Supra*, note 45 at p. 27

[63] See Human Rights Watch World Report 1993, at 296 (1993).

[64] Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, And The Salman Rushdie Affair*, www.wcl.american.edu/journal/ilr

[65] *Supra*, note 59

[66] *Supra*, note 38 at p. 271 taken from Seyyed Hossein Nasr, *Present Tendencies, Future Trends, in Islam: The Religious and Political Life of a World Community*, Marjorie Kelly ed., (1984) at p. 275 280 See also Sarvenaz Bahar, *Khomeinism, The Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology*, 33 Harv. Int'l L. J. 145, 159 (1992)

[67] Abdullahi Ahmed an-Naim, *Islam and Human Rights Beyond the Universality Debate*, 94 Am. Soc'y Int'l L. Proc at p. 96

[68] *Supra*, note 70 at p. 187

[69] *Supra*, note 36 at p. 79-80

[70] Preamble, Universal Declaration of Human Rights, 1948

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