Abdullahi Ahmed An-Naᶜim [1]

1. Toward a Cross-Cultural Approach to Defining International Standards of Human Rights

The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment

An intelligent strategy to protect and promote human rights must address the underlying causes of violations of these rights. These violations are caused by a wide and complex variety of factors and forces, including economic conditions, structural social factors, and political expediency. For the most part, however, human rights violations are due to human action or inaction—they occur because individual persons act or fail to act in certain ways. They can be the overlapping and interacting, intended or unintended, consequences of action. People may be driven by selfish motives of greed for wealth and power, or by a misguided perception of the public good. Even when motivated by selfish ends, human rights violators normally seek to rationalize their behavior as consistent with, or conducive to, some morally sanctioned purpose. Although their bid to gain or maintain public support may be purely cynical, such an attempt is unlikely unless they have reason to believe that their claim of moral sanction is plausible to their constituency.

It is not possible in this limited space to discuss the multitude of factors and forces that contribute to the underlying causes of human rights violations in general. I maintain that the lack or insufficiency of cultural legitimacy of human rights standards is one of the main underlying causes of violations of those standards. In this chapter, I argue that internal and cross-cultural legitimacy for human rights standards needs to be developed, while I advance some tentative ideas to implement this approach. The focus of my supporting examples will be the right not to be subjected to cruel, inhuman, or degrading treatment or punishment. Insiders may

perceive certain types of punishment, for example, as dictated or at least sanctioned by the norms of a particular cultural tradition, whereas to outsiders to that culture, such measures constitute cruel, inhuman, or degrading treatment. Which position should be taken as setting the standards for this human right? How can the cooperation of the proponents of the counter-position be secured in implementing the chosen standards?

My thesis does not assume that all individuals or groups within a society hold identical views on the meaning and implications of cultural values and norms, or that they would therefore share the same evaluation of the legitimacy of human rights standards. On the contrary, I assume and rely on the fact that there are either actual or potential differences in perceptions and interpretations of cultural values and norms. Dominant groups or classes within a society normally maintain perceptions and interpretations of cultural values and norms that are supportive of their own interests, proclaiming them to be the only valid view of that culture. Dominated groups or classes may hold, or at least be open to, different perceptions and interpretations that are helpful to their struggle to achieve justice for themselves. This, however, is an *internal* struggle for control over the cultural sources and symbols of power within that society. Even though outsiders may sympathize with and wish to support the dominated and oppressed groups or classes, their claiming to know what is the valid view of the culture of that society will not accomplish this effectively. Such a claim would not help the groups the outsiders wish to support because it portrays them as agents of an alien culture, thereby frustrating their efforts to attain legitimacy for their view of the values and norms of their society.

Cross-Cultural Perspectives on Human Rights

The general thesis of my approach is that, since people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions, observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards.[2] The claim that all the existing human rights standards already enjoy universal cultural legitimacy may be weak from a historical point of view in the sense that many cultural traditions in the world have had little say in the formulation of those standards. Nevertheless, I believe not only

that universal cultural legitimacy is necessary, but also that it is possible to develop it retrospectively in relation to fundamental human rights through enlightened interpretations of cultural norms.

Given the extreme cultural diversity of the world community, it can be argued that human rights should be founded on the existing least common denominator among these cultural traditions. On the other hand, restricting international human rights to those accepted by prevailing perceptions of the values and norms of the major cultural traditions of the world would not only limit these rights and reduce their scope, but also exclude extremely vital rights. Therefore, expanding the area and quality of agreement among the cultural traditions of the world may be necessary to provide the foundation for the widest possible range and scope of human rights. I believe that this can be accomplished through the proposed approach to universal cultural legitimacy of human rights.

The cultural legitimacy thesis accepts the existing international standards while seeking to enhance their cultural legitimacy within the major traditions of the world through internal dialogue and struggle to establish enlightened perceptions and interpretations of cultural values and norms. Having achieved an adequate level of legitimacy *within* each tradition, through this internal stage, human rights scholars and advocates should work for *cross-cultural* legitimacy, so that peoples of diverse cultural traditions can agree on the meaning, scope, and methods of implementing these rights. Instead of being content with the existing least common denominator, I propose to broaden and deepen universal consensus on the formulation and implementation of human rights through internal reinterpretation of, and cross-cultural dialogue about, the meaning and implications of basic human values and norms.

This approach is based on the belief that, despite their apparent peculiarities and diversity, human beings and societies share certain fundamental interests, concerns, qualities, traits, and values that can be identified and articulated as the framework for a common "culture" of universal human rights. It would be premature in this exploratory essay to attempt to identify and articulate these interests, concerns, and so on, with certainty. Major theoretical and methodological issues must first be discussed and resolved so that the common culture of universal human rights may be founded on solid conceptual and empirical grounds. At this stage, I am concerned with making the case for internal and cross-cultural discourse on the subject, raising some of the questions and difficulties that

must be faced and generally describing the process that should be undertaken. Neither concrete results nor guarantees of success can be offered here, only a promising approach to resolving a real and serious issue.

Concern with the implications of cultural diversity has been present since the earliest stages of the modern international human rights movement. In 1947, UNESCO carried out an inquiry into the theoretical problems raised by the Universal Declaration of Human Rights. This was accomplished by inviting the views of various thinkers and writers from member states,[3] and organizing subsequent conferences and seminars on this theme. Other organizations have also taken the initiative in drawing attention to the dangers of ethnocentricity and the need for sensitivity to cultural diversity in the drafting of international human rights instruments.[4] Individual authors, too, have addressed these concerns.

My approach draws upon these earlier efforts and supplements them with insights from non-Western perspectives. Some Western writers have highlighted conflicts between international human rights standards and certain non-Western cultural traditions, without suggesting ways of reconciling them.[5] Despite their claims or wishes to present a cross-cultural approach, other Western writers have tended to confine their analysis to Western perspectives. For example, one author emphasizes the challenge of cultural diversity, saying that it would "be useful to try to rethink the normative foundations of human rights and consider which rights have the strongest normative support."[6] Yet, the philosophical perspectives he actually covers in his discussion are exclusively Western. Another author calls for taking cultural diversity seriously, yet presents arguments based exclusively on Western philosophy and political theory.[7]

Alison Renteln is one of the few human rights scholars sensitive to issues of cultural legitimacy. She suggests a cross-cultural understanding that will shed light on a common core of acceptable rights.[8] Her approach seems to be content with the existing least common denominator, however, a standard I find inadequate to assure sufficient human rights throughout the world. In my view, a constructive element is needed to broaden and deepen cross-cultural consensus on a "common core of human rights." I believe that this can be accomplished through the internal discourse and cross-cultural dialogue advocated here.

Cultural Relativity and Human Rights

Culture is defined in a variety of ways in different contexts.[9] A wide array of definitions is available in the social sciences.[10] In this chapter, culture is

taken in its widest meaning—that of the "totality of values, institutions and forms of behavior transmitted within a society, as well as the material goods produced by man [and woman] . . . this wide concept of culture covers *Weltanschauung* [world view], ideologies and cognitive behavior."[11] It can also be defined as "an historically transmitted pattern of meanings in symbols, a system of inherited conceptions expressed in symbolic form by means of which men [and women] communicate, perpetuate and develop their knowledge and attitudes towards life."[12]

Culture is therefore the source of the individual and communal world view: it provides both the individual and the community with the values and interests to be pursued in life, as well as the legitimate means for pursuing them. It stipulates the norms and values that contribute to people's perception of their self-interest and the goals and methods of individual and collective struggles for power within a society and between societies. As such, culture is a primary force in the socialization of individuals and a major determinant of the consciousness and experience of the community. The impact of culture on human behavior is often underestimated precisely because it is so powerful and deeply embedded in our self-identity and consciousness.

Our culture is so much a part of our personality that we normally take for granted that our behavior patterns and relationships to other persons and to society become the ideal norm. The subtlety of the impact of culture on personality and character may be explained by the analogy of the eye: we tend to take the world to be what our eyes convey to us without "seeing" the eye and appreciating its role.[13] In this case, the information conveyed by the eye is filtered and interpreted by the mind without the individual's conscious awareness of this fact. Culture influences, first, the way we see the world and, further, how we interpret and react to the information we receive.

This analogy may also explain our ethnocentricity, the tendency to regard one's own race or social group as the model of human experience. Ethnocentricity does not mean there is no conflict and tension between a person and his or her own culture, or between various classes and groups within a society. It rather incorporates such conflict and tension in the ideal model, leading us to perceive the conflict and tension we have within our own culture as part of the norm. For example, some feminists in one cultural tradition may assume that women in other cultures have (or ought to have) the same conflicts and tensions with their societies and are seeking (or ought to seek) the same answers.

A degree of ethnocentricity is unavoidable, indeed indispensable. It is the basis of our acceptance of the validity of the norms and institutions of our culture, an acceptance that ultimately is a matter of material and psychological survival.[14] Even the most radical "dissidents" rely on their culture for survival. In fact, their dissent itself is meaningful to them only as the antithesis of existing cultural norms and institutions. Rigid ethnocentricity, however, breeds intolerance and hostility to societies and persons that do not conform to our models and expectations. Whether operating as initial justification or as subsequent rationalization, the tendency to dehumanize "different" societies and persons underlies much of the exploitation and oppression of one society by another, or of other classes within a society by one class of persons in the same society.

The appreciation of our own ethnocentricity should lead us to respect the ethnocentricity of others. Enlightened ethnocentricity would therefore concede the right of others to be "different," whether as members of another society or as individuals within the same society. This perspective would uphold the equal human value and dignity of members of other societies and of dissidents within society. In sociological terms, this orientation is commonly known as cultural relativism, that is to say, the acknowledgment of equal validity of diverse patterns of life.[15] It stresses "the dignity inherent in every body of custom, and . . . the need for tolerance of conventions though they may differ from one's own."[16]

Cultural relativism has been charged with neutralizing moral judgment and thereby impairing action against injustice.[17] According to one author, "[It] has these objectionable consequences: namely, that by limiting critical assessment of human works it disarms us, dehumanises us, leaves us unable to enter into communicative interaction; that is to say, unable to criticize cross-culturally, cross-sub-culturally; intimately, relativism leaves no room for criticism at all . . . behind relativism nihilism looms."[18] Some writers on human rights are suspicious of a cultural relativism that denies to individuals the moral right to make comparisons and to insist on universal standards of right and wrong.[19]

As John Ladd notes, however, relativism is identified with nihilism because it is defined by its opponents in absolute terms.[20] I tend to agree with Clifford Geertz that the relativism/antirelativism discourse in anthropology should be seen as an exchange of warnings rather than as an analytical debate. Whereas the relativists maintain that "the world being so full of a number of things, rushing to judgment is more than a mistake, it's a crime," the antirelativists are concerned "that if something isn't an-

chored everywhere nothing can be anchored anywhere."[21] I also agree with Geertz's conclusion:

> The objection to anti-relativism is not that it rejects an it's-all-how-you-look-at-it approach to knowledge or a when-in-Rome approach to morality, but that it imagines that they [these approaches] can only be defeated by placing morality beyond culture and knowledge beyond both. This . . . is no longer possible. If we wanted home truths, we should have stayed at home.[22]

In my view, the merits of a reasonable degree of cultural relativism are obvious, especially when compared to claims of universalism that are in fact based on the claimant's rigid and exclusive ethnocentricity. The charge that it may breed tolerance of injustice is a serious one, however. Melville J. Herskovits, one of the main proponents of cultural relativism, has sought to answer this charge by distinguishing between absolutes and universals:

> To say that there is no absolute [not admitted to have variations] criterion of value or morals . . . does not mean that such criteria, in differing *forms,* do not comprise universals [least common denominators to be extracted from the range of variations] in human culture. Morality is a universal, and so is enjoyment of beauty, and some standard of truth. The many forms these concepts take are but products of the particular historical experience of the societies that manifest them. In each, criteria are subject to continuous questioning, continuous change. But the basic conceptions remain, to channel thought and direct conduct, to give purpose to living.[23]

Although this statement is true, it does not fully answer the charge. Morality may be universal in the sense that all cultures have it, but that does not in any way indicate the *content* of that morality, or provide criteria for judgment or for action by members of that culture or other cultures. The least common denominator of the universality of morality must include some of its basic precepts and not be confined to the mere existence of some form of morality. Moreover, in accordance with the logic of cultural relativism, the shared moral values must be authentic and not imposed from the outside. As indicated earlier, the existing least common denominator may not be enough to accommodate certain vital human rights. This fact would suggest the need to broaden and deepen common values to support these human rights. This process, however, must be culturally legitimate with reference to the norms and mechanisms of change within a particular culture.

Another author has sought to respond to the charge that cultural relativism impairs moral judgment and action by saying that, although it is appropriate to distinguish between criticism corresponding to standards internal to the culture and that corresponding to external ones, the theory of cultural relativism does not block either.[24] This observation holds true of a reasonable degree of cultural relativism but not of its extreme form.[25] Moreover, we should not only distinguish between criticism corresponding to standards internal to a culture and that corresponding to external ones, but also stress that the former is likely to be more effective than the latter.

I would emphasize that, in this age of self-determination, sensitivity to cultural relativity is vital for the international protection and promotion of human rights. This point does not preclude cross-cultural moral judgment and action, but it prescribes the best ways of formulating and expressing judgment and of undertaking action. As Geertz states, morality and knowledge cannot be placed beyond culture. In intercultural relations, morality and knowledge cannot be the exclusive product of some cultures but not of others. The validity of cross-cultural moral judgment increases with the degree of universality of the values upon which it is based; further, the efficacy of action increases with the degree of the actor's sensitivity to the internal logic and frame of reference of other cultures.

Cultural Universality and Human Rights

Although human rights require action within each country for their implementation, the present international human rights regime has been conceived and is intended to operate within the framework of international relations. The implications of culture for international relations have long been recognized. For example, as Edmund Burke has said:

> In the intercourse between two nations, we are apt to rely too much on the instrumental part. We lay too much weight on the formality of treaties and compacts. . . . Men [and women] are not tied to one another by paper and seals. They are led to associate by resemblances, by conformities, by sympathies. It is with nations as with individuals. Nothing is so strong a tie of amity between nation and nation as correspondence in laws, customs, manners and habits of life. They are obligations written in the heart. They approximate men [and women] to one another without their knowledge and sometimes against their intentions. The secret, unseen, but irrefragable bond of habitual intercourse holds them together even when their perverse and litigious nature sets them to equivocate, scuffle, and fight about the terms of their written obligations.[26]

This bonding through similarities does not mean, in my view, that international peace and cooperation are not possible without total global cultural unity. It does mean that they are more easily achieved if there is a certain minimum cultural consensus on goals and methods. As applied to cooperation in the protection and promotion of human rights, this view means that developing cross-cultural consensus in support of treaties and compacts is desirable Cultural diversity, however, is unavoidable as the product of significant past and present economic, social, and environmental differences. It is also desirable as the expression of the right to self-determination and as the manifestation of distinctive self-identity. Nevertheless, I believe that a sufficient degree of cultural consensus regarding the goals and methods of cooperation in the protection and promotion of human rights can be achieved through internal cultural discourse and cross-cultural dialogue. Internal discourse relates to the struggle to establish enlightened perceptions and interpretations of cultural values and norms. Cross-cultural dialogue should be aimed at broadening and deepening international (or rather intercultural) consensus. This direction may include support for the proponents of enlightened perceptions and interpretations within a culture. This effort, however, must be sensitive to the internal nature of the struggle, endeavoring to emphasize internal values and norms rather than external ones.

One of the apparent paradoxes of culture is the way it combines stability with dynamic continuous change.[27] Change is induced by internal adjustments as well as external influences. Both types of change, however, must be justified through culturally approved mechanisms and adapted to preexisting norms and institutions. Otherwise, the culture would lose the coherence and stability that are vital for its socializing and other functions.

Another feature of the dynamism of culture is that it normally offers its members a range of options or is willing to accommodate varying individual responses to its norms. As Herskovits observes, "culture is flexible and holds many possibilities of choice within its framework . . . to recognize the values held by a given people in no wise implies that these values are a constant factor in the lives of succeeding generations of the same group."[28] Nevertheless, the degree of flexibility permitted by a culture, and the possibilities of choice it offers its members, are controlled by the culture's internal criteria of legitimacy.

A third and more significant feature of cultural dynamism is the ambivalence of cultural norms and their susceptibility to different interpretations. In the normal course of events, powerful individuals and groups

tend to monopolize the interpretation of cultural norms and manipulate them to their own advantage. Given the extreme importance of cultural legitimacy, it is vital for disadvantaged individuals and groups to challenge this monopoly and manipulation. They should use internal cultural discourse to offer alternative interpretations in support of their own interests. This internal discourse can utilize intellectual, artistic, and scholarly work as well as various available forms of political action.

Internal cultural discourse should also support cross-cultural dialogue and set its terms of reference. It should encourage good will, mutual respect, and equality with other cultural traditions. This positive relationship can be fostered, for example, by enlisting the support of what I would call the principle of reciprocity, that is to say, the rule that one should treat others in the same way that he or she would like to be treated. Although this is a universal rule, most traditions tend to restrict its applications to "others" from the same or selected traditions rather than all human beings and societies. Internal discourse should propagate a broader and more enlightened interpretation of the principle of reciprocity to include all human beings.

It is vital for cross-cultural dialogue that internal cultural discourse along these lines be undertaken simultaneously in all cultural traditions. As a matter of principle, it should be admitted that every cultural tradition has problems with some human rights and needs to enhance the internal cultural legitimacy of those rights. From a tactical point of view, undertaking internal cultural discourse in relation to the problems one tradition has with certain human rights is necessary for encouraging other traditions to undertake similar discourse in relation to the problematic aspects of their own culture.

The object of internal discourse and cross-cultural dialogue is to agree on a body of beliefs to guide action in support of human rights in spite of disagreement on the justification of those beliefs. Jacques Maritain, a French philosopher, explained this idea more than forty years ago:

> To understand this, it is only necessary to make the appropriate distinction between the rational justifications involved in the spiritual dynamism of philosophic doctrine or religious faith [that is to say, in culture], and the practical conclusions which, although justified in different ways by different persons, are principles of action with a common ground of similarity for everyone. I am quite certain that my way of justifying belief in the rights of man and the ideal of liberty, equality and fraternity is the only way with a

> firm foundation in truth. This does not prevent me from being in agreement on these practical convictions with people who are certain that their way of justifying them, entirely different from mine or opposed to mine, in its theoretical dynamism, is equally the only way founded upon truth.[29]

Total agreement on the interpretation and application of those practical conclusions may not be possible, however, because disagreement about their justification will probably be reflected in the way they are interpreted and applied. We should therefore be realistic in our expectations and pursue the maximum possible degree of agreement at whatever level it can be achieved. This approach can be illustrated by the following case study of the meaning of the human right "not to be subjected to cruel, inhuman or degrading treatment or punishment."

Cruel, Inhuman, or Degrading Treatment or Punishment

Some international human rights instruments stipulate that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[30] There is obvious overlap between the two main parts of this right, that is to say, between protection against torture and protection against inhuman or degrading treatment or punishment. For example, torture has been described as constituting "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."[31] Nevertheless, there are differences between the two parts of the right. According to the definition of torture adopted in United Nations instruments, it "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[32] As explained below, this qualification is not supposed to apply to the second part of the right. In other words, lawful sanctions can constitute "cruel, inhuman or degrading treatment or punishment."

The following discussion will focus on the meaning of the second part of the right, that is to say, the meaning of the right not to be subjected to cruel, inhuman or degrading treatment or punishment. In particular, I will address the question of how to identify the criteria by which lawful sanctions can be held to violate the prohibition of cruel, inhuman or degrading treatment or punishment. The case of the Islamic punishments will be used to illustrate the application of the cross-cultural perspective to this question.

The Meaning of the Clause in United Nations Sources

Cruel or inhuman treatment or punishment is prohibited by regional instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as under the international system of the United Nations. While regional jurisprudence is applicable in the regional context, and may be persuasive in some other parts of the world, it may not be useful in all parts of the world. For example, the jurisprudence developed by the European Commission and Court of Human Rights under Article 3 of the European Convention would be directly applicable in defining this clause from a European point of view, and may be persuasive in North America. It may not be useful, however, when discussing non-Western perspectives on cruel, inhuman, or degrading treatment or punishment. The following survey will therefore focus on U.N. sources because they are at least supposed to reflect international perspectives.

The early history of what is now Article 7 of the Covenant on Civil and Political Rights indicates that drafters and delegates were particularly concerned with preventing the recurrence of atrocities such as those committed in concentration camps during World War II.[33] Thus, the Commission on Human Rights proposed in 1952 that the Article should read: "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 involving risk, where such is not required by his state of physical or mental health."[34] At the 13th Session of the Third Committee in 1958, however, most discussion centered on the second sentence. Some delegates felt that the sentence was unnecessary and also weakened the Article in that it directed attention to only one of the many forms of cruel, inhuman, or degrading treatment, thereby lessening the importance of the general prohibition laid down in the first sentence. Others insisted on retaining the second sentence as complementing the first sentence rather than being superfluous.[35] Although several suggestions were made to meet the objection that the second part of the Article was emphasized at the expense of the first, the second sentence was retained and eventually adopted, as amended, by the General Assembly.[36]

Whether because of preoccupation with this issue or due to the belief that the first sentence of the Article was self-explanatory, there is little guidance from the history of the Article on the meaning of "cruel, inhuman or degrading treatment or punishment." It was generally agreed early

in the drafting process that the word "treatment" was broader in scope than the word "punishment." It was also observed that the word "treatment" should not apply to degrading situations that might be due to general economic and social factors.[37] In 1952, the Philippines suggested before the Third Committee that the word "unusual" should be inserted between the words "inhuman" and "or degrading." Some delegates supported the addition of the word "unusual" because it might apply to certain actual practices that, although not intentionally cruel, inhuman, or degrading, nevertheless affected the physical or moral integrity of the human person. Others opposed the term "unusual" as being vague: what was "unusual" in one country, it was said, might not be so in other countries. The proposal was withdrawn.[38]

It is remarkable that the criticism of vagueness should be seen as applying to the word "unusual" and not as applying to the words "cruel, inhuman or degrading." Surely, what may be seen as "cruel, inhuman or degrading" in one culture may not be seen in the same light in another culture. Do other U.N. sources provide guidance on the meaning of this clause and criteria for resolving possible conflicts between one culture and another regarding what is "cruel, inhuman or degrading treatment or punishment?"

A commentary on Article 5 of the U.N. Code of Conduct for Law Enforcement Officials of 1979 states: "The term 'cruel, inhuman or degrading treatment or punishment' has not been defined by the General Assembly, but it should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental."[39] Decisions of the Human Rights Committee under the Optional Protocol provide examples of treatment or punishment held to be in violation of Article 7 of the covenant by an official organ of the U.N.[40] Although these examples may be useful in indicating the sort of treatment or punishment that is likely to be held in violation of this human right, they do not provide an authoritative criteria of general application.[41]

When the Human Rights Committee attempted to provide some general criteria, the result was both controversial and not particularly helpful. For example, the committee said of the scope of the protection against cruel, inhuman, or degrading treatment or punishment:

> [It] goes far beyond torture as normally understood. It may not be necessary to make sharp distinctions between various forms of treatment and punishment. These distinctions depend on the kind, purpose and severity of the

> particular treatment . . . the prohibition must extend to corporal punishment, including excessive chastisement as an educational and disciplinary measure.[42]

This statement is not particularly helpful in determining whether a certain treatment or punishment is cruel, inhuman, or degrading; and the example it cites is controversial. In the majority of human societies today, corporal punishment is not regarded as necessarily cruel, inhuman, or degrading. It may be even more debatable whether this characterization applies to what might be considered by some as excessive chastisement but which is routinely used for educational and disciplinary purposes in many parts of the world. This example clearly shows the dangers and difficulty of providing generally accepted criteria for defining the concept. Nevertheless, such criteria are necessary to implement this human right. Would a cross-cultural approach be helpful in this regard?

Again, this discussion focuses on the question of how lawful sanctions can be held to violate the prohibition of cruel, inhuman, or degrading treatment or punishment. It is important to address this question because such sanctions have been excluded from the definition of torture under Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. Does this give the state a free hand to enforce whatever treatment or punishment it deems fit, so long as it is enacted as the lawful sanction for any conduct the state chooses to penalize? Does the international community have the right to object to any lawful sanction as amounting to cruel, inhuman, or degrading treatment or punishment?

Article 16 of the 1984 Convention provides for the obligation to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." Unlike Article 1, however, which defines torture in detail, Article 16 neither defines the clause "cruel, inhuman or degrading treatment or punishment," nor excludes pain or suffering arising only from, inherent in, or incidental to lawful sanctions. This phrasing means that States Parties to the Convention may not enforce lawful sanctions which constitute cruel, inhuman, or degrading treatment or punishment. But this obligation cannot be implemented or enforced in accordance with provisions of the Convention unless there is agreement on the definition of this clause.

Cross-Cultural Perspectives on the Concept

Some predominantly Muslim countries, such as Afghanistan and Egypt, have already ratified the 1984 Convention; others may wish to do so in the

future. The meaning of cruel, inhuman, or degrading treatment or punishment in Islamic cultures, however, may be significantly, if not radically, different from perceptions of the meaning of this clause in other parts of the world.

Islamic law, commonly know as Shari'a, is based on the Qur'an, which Muslims believe to be the literal and final word of God, and on Sunna, or traditions of the Prophet Muhammad. Using these sources, as well as pre-Islamic customary practices of the Middle East which were not explicitly repudiated by Qur'an and Sunna, Muslim jurists developed Shari'a as a comprehensive ethical and legal system between the seventh and ninth centuries A.D. To Muslim communities, however, the Qur'an and Sunna were always believed to be absolutely binding as a matter of faith and were applied in individual and communal practice from the very beginning. Shari'a codes were never formally enacted, but the jurists systematized and rationalized what was already accepted as the will of God, and developed techniques for interpreting divine sources and for supplementing their provisions where they were silent.[43]

Due to the religious nature of Shari'a, Muslim jurists did not distinguish among devotional, ethical, social, and legal aspects of the law, let alone among various types of legal norms. The equivalent of penal or criminal law would therefore have to be extracted from a wide range of primary sources. For the purposes of this discussion, Islamic criminal law may be briefly explained as follows.[44] Criminal offenses are classified into three main categories: *hudud, jinayat,* and *ta'zir. Hudud* are a very limited group of offenses which are strictly defined and punished by the express terms of the Qur'an and/or Sunna. These include *sariqa,* or theft, which is punishable by the amputation of the right hand, and *zina,* or fornication, which is punishable by whipping of one hundred lashes for an unmarried offender and stoning to death for a married offender. *Jinayat* are homicide and causing bodily harm, which are punishable by *qisas,* or exact retribution (an eye for an eye) or payment of monetary compensation. The term *ta'zir* means to reform and rectify. *Ta'zir* offenses are those created and punished by the ruler in exercising his power to protect private and public interests.

It is important to emphasize that the following discussion addresses this question in a purely theoretical sense and should not be taken to condone the application of these punishments by any government in the Muslim world today. The question being raised is: Are Muslims likely to accept the repudiation of these punishments *as a matter of Islamic law* on the

ground that they are cruel, inhuman, or degrading? This question should not be confused with the very important but distinct issue of whether these punishments have been or are being applied legitimately and in accordance with all the general and specific requirements of Islamic law.

Islamic law requires the state to fulfill its obligation to secure social and economic justice and to ensure decent standards of living for all its citizens *before* it can enforce these punishments. The law also provides for very narrow definitions of these offenses, makes an extensive range of defenses against the charge available to the accused person, and requires strict standards of proof. Moreover, Islamic law demands total fairness and equality in law enforcement. In my view, the prerequisite conditions for the enforcement of these punishments are extremely difficult to satisfy in practice and are certainly unlikely to materialize in any Muslim country in the foreseeable future. Nevertheless, the question remains, can these punishments be abolished as a matter of Islamic law?

Shariʿa criminal law has been displaced by secular criminal law in most Muslim countries. Countries like Saudi Arabia, however, have always maintained Shariʿa as their official criminal law. Other countries, such as Iran, Pakistan, and the Sudan, have recently reintroduced Shariʿa criminal law. There is much controversy over many aspects of the criminal law of Shariʿa that raise human rights concerns, including issues of religious discrimination in the application of Shariʿa criminal law to non-Muslims.[45] To the vast majority of Muslims, however, Shariʿa criminal law is binding and should be enforced today. Muslim political leaders and scholars may debate whether general social, economic, and political conditions are appropriate for the immediate application of Shariʿa, or whether there should be a preparatory stage before the reintroduction of Shariʿa where it has been displaced by secular law. None of them would dispute, at least openly and publicly, that the application of Shariʿa criminal law should be a high priority, if not an immediate reality.

Although these are important matters, they should not be confused with what is being discussed here. For the sake of argument, the issue should be isolated from other possible sources of controversy. In particular, I wish to emphasize that I believe that the Qurʾanic punishments should *not* apply to non-Muslims because they are essentially religious in nature. In the following discussion, I will use the example of amputation of the right hand for theft when committed by a Muslim who does not need to steal in order to survive, and who has been properly tried and convicted by a competent court of law. This punishment is prescribed by

the clear and definite text of verse 38 in chapter 5 of the Qur'an. Can this punishment, when imposed under these circumstances, be condemned as cruel, inhuman, or degrading?

The basic question here is one of interpretation and application of a universally accepted human right. In terms of the principle Maritain suggests—agreement on "practical conclusions" in spite of disagreement on their justification—Muslims would accept the human right not to be subjected to cruel, inhuman, or degrading treatment or punishment. Their Islamic culture may indicate to them a different interpretation of this human right, however.

From a secular or humanist point of view, inflicting such a severe permanent punishment for any offense, especially for theft, is obviously cruel and inhuman, and probably also degrading. This may well be the private intuitive reaction of many educated modernized Muslims. However, to the vast majority of Muslims, the matter is settled by the categorical will of God as expressed in the Qur'an and, as such, is not open to question by human beings. Even the educated modernized Muslim, who may be privately repelled by this punishment, cannot risk the consequences of openly questioning the will of God. In addition to the danger of losing his or her faith and the probability of severe social chastisement, a Muslim who disputes the binding authority of the Qur'an is liable to the death penalty for apostasy (heresy) under Shari'a.

Thus, in all Muslim societies, the possibility of human judgment regarding the appropriateness or cruelty of a punishment decreed by God is simply out of the question. Furthermore, this belief is supported by what Muslims accept as rational arguments.[46] From the religious point of view, human life does not end at death, but extends beyond that to the next life. In fact, religious sources strongly emphasize that the next life is the true and ultimate reality, to which this life is merely a prelude. In the next *eternal* life, every human being will stand judgment and suffer the consequences of his or her actions in this life. A religiously sanctioned punishment, however, will absolve an offender from punishment in the next life because God does not punish twice for the same offense. Accordingly, a thief who suffers the religiously sanctioned punishment of amputation of the right hand in this life will not be liable to the much harsher punishment in the next life. To people who hold this belief, however severe the Qur'anic punishment may appear to be, it is in fact extremely lenient and merciful in comparison to what the offender will suffer in the next life should the religious punishment not be enforced in this life.

Other arguments are advanced about the benefits of this punishment to both the individual offender and society. It is said that this seemingly harsh punishment is in fact necessary to reform and rehabilitate the thief, as well as to safeguard the interests of other persons and of society at large, by deterring other potential offenders.[47] The ultimately *religious* rationale of these arguments must always be emphasized, however. The punishment is believed to achieve these individual and social benefits because God said so. To the vast majority of Muslims, scientific research is welcome to confirm the empirical validity of these arguments, but it cannot be accepted as a basis for repudiating them, thereby challenging the appropriateness of the punishment. Moreover, the religious frame of reference is also integral to evaluating empirical data. Reform of the offender is not confined to his or her experience in this life, but includes the next life, too.

Neither internal Islamic reinterpretation nor cross-cultural dialogue is likely to lead to the total abolition of this punishment as a matter of Islamic law. Much can be done, however, to restrict its implementation in practice. For example, there is room for developing stronger general social and economic prerequisites and stricter procedural requirements for the enforcement of the punishment. Islamic religious texts emphasize extreme caution in inflicting any criminal punishment. The Prophet said that if there is any doubt (*shubha*), the Qur'anic punishments should not be imposed. He also said that it is better to err on the side of refraining from imposing the punishment than to err on the side of imposing it in a doubtful case. Although these directives have already been incorporated into definitions of the offenses and the applicable rules of evidence and procedure, it is still possible to develop a broader concept of *shubha* to include, for example, psychological disorders as a defense against criminal responsibility. For instance, kleptomania may be taken as *shubha* barring punishment for theft. Economic need may also be a defense against a charge of theft.

Cross-cultural dialogue may also be helpful in this regard. In the Jewish tradition, for instance, jurists have sought to restrict the practical application of equally harsh punishment by stipulating strict procedural and other requirements.[48] This theoretical Jewish jurisprudence may be useful to Muslim jurists and leaders seeking to restrict the practical application of Qur'anic punishments. It is difficult to assess its practical viability and impact, however, because it has not been applied for nearly two thousand years. Moreover, the current atmosphere of mutual Jewish-Muslim antagonism and mistrust does not make cross-cultural dialogue likely between

these two traditions. Still, this has not always been the case in the past and need not be so in the future. In fact, the jurisprudence of each tradition has borrowed heavily from the other in the past and may do so in the future once the present conflict is resolved.

I believe that in the final analysis, the interpretation and practical application of the protection against cruel, inhuman, or degrading treatment or punishment in the context of a particular society should be determined by the moral standards of that society. I also believe that there are many legitimate ways of influencing and informing the moral standards of a society. To dictate to a society is both unacceptable as a matter of principle and unlikely to succeed in practice. Cross-cultural dialogue and mutual influence, however, is acceptable in principle and continuously occurring in practice. To harness the power of cultural legitimacy in support of human rights, we need to develop techniques for internal cultural discourse and cross-cultural dialogue, and to work toward establishing general conditions conducive to constructive discourse and dialogue.

It should be recalled that this approach assumes and relies on the existence of internal struggle for cultural power within society. Certain dominant classes or groups would normally hold the cultural advantage and proclaim their view of the culture as valid, while others would challenge this view, or at least wish to be able to do so. In relation to Islamic punishments, questions about the legitimate application of these punishments—whether the state has fulfilled its obligations first and is acting in accordance with the general and specific conditions referred to earlier—are matters for internal struggle. This internal struggle cannot and should not be settled by outsiders; but they may support one side or the other, provided they do so with sufficient sensitivity and due consideration for the legitimacy of the objectives and methods of the struggle within the framework of the particular culture.

Conclusion: Toward a Cross-Cultural Approach

I have deliberately chosen the question of whether lawful sanctions can be condemned as cruel, inhuman, or degrading punishment or treatment in order to illustrate both the need for a cross-cultural approach to defining human rights standards and the difficulty of implementing this approach. The question presents human rights advocates with a serious dilemma. On the one hand, it is necessary to safeguard the personal integrity and human

dignity of the individual against excessive or harsh punishments. The fundamental objective of the modern human rights movement is to protect citizens from the brutality and excesses of their own governments. On the other hand, it is extremely important to be sensitive to the dangers of cultural imperialism, whether it is a product of colonialism, a tool of international economic exploitation and political subjugation, or simply a product of extreme ethnocentricity. Since we would not accept others' imposing their moral standards on us, we should not impose our own moral standards on them. In any case, external imposition is normally counterproductive and unlikely to succeed in changing the practice in question. External imposition is not the only option available to human rights advocates, however. Greater consensus on international standards for the protection of the individual against cruel, inhuman, or degrading treatment or punishment can be achieved through internal cultural discourse and cross-cultural dialogue.

It is unrealistic to expect this approach to achieve total agreement on the interpretation and application of standards, whether of treatment or punishment or any other human right. This expectation presupposes the existence of the interpretation to be agreed upon. If one reflects on the interpretation she or he would like to make the norm, it will probably be the one set by the person's culture. Further reflection on how one would feel about the interpretation set by another culture should illustrate the untenability of this position. For example, a North American may think that a short term of imprisonment is the appropriate punishment for theft, and wish that to be the universal punishment for this offense. A Muslim, on the other hand, may feel that the amputation of the hand is appropriate under certain conditions and after satisfying strict safeguards. It would be instructive for the North American to consider how she or he would feel if the Muslim punishment were made the norm. Most Western human rights advocates are likely to have a lingering feeling that there is simply no comparison between these two punishments because the Islamic punishment is "obviously" cruel and inhuman and should never compete with imprisonment as a possible punishment for this offense. A Muslim might respond by saying that this feeling is a product of Western ethnocentricity. I am not suggesting that we should make the Islamic or any other particular punishment the universal norm. I merely wish to point out that agreeing on a universal standard may not be as simple as we may think or wish it to be.

In accordance with the proposed approach, the standard itself should be the product of internal discourse and cross-cultural dialogue. Moreover, genuine total agreement requires equal commitment to internal discourse and equally effective participation in cross-cultural dialogue by the adherents or members of different cultural traditions of the world. In view of significant social and political differences and disparities in levels of economic development, some cultural traditions are unlikely to engage in internal discourse as much as other cultural traditions and are unable to participate in cross-cultural dialogue as effectively as others. These processes require a certain degree of political liberty, stability, and social maturity, as well as technological capabilities that are lacking in some parts of the world.

The cross-cultural approach, however, is not an all-or-nothing proposition. While total agreement on the standard and mechanisms for its implementation is unrealistic in some cases, significant agreement can be achieved and ought to be pursued as much as possible. For example, in relation to cruel, inhuman, or degrading treatment or punishment, there is room for agreement on a wide range of substantive and procedural matters even in relation to an apparently inflexible position, such as the Islamic position on Qur'anic punishments. Provided such agreement is sought with sufficient sensitivity, the general status of human rights will be improved, and wider agreement can be achieved in relation to other human rights. We must be clear, however, on what can be achieved and how to achieve it in any given case. An appreciation of the impossibility of the total abolition of the Qur'anic punishment for theft is necessary for restricting its practice in Muslim societies as well as for establishing common standards, for instance, in relation to punishments that are, from the Islamic point of view, the product of human legislation.

Notes

1. I am grateful to Prof. Wanda Wiegers and Dr. Tore Lindholm for their helpful comments and suggestions on an earlier draft of this chapter. I am also grateful to Shelley-Anne Cooper-Stephenson for editorial assistance with the final draft.

2. *See generally* Abdullahi Ahmed An-Naʿim, "Problems and Prospects of Universal Cultural Legitimacy for Human Rights," in *Human Rights in Africa: Cross-Cultural Perspectives,* ed. A. An-Naʿim and F. Deng (Washington, D.C.: Brookings Institution, 1990), 331–67.

3. For the results of this questionnaire *see* UNESCO, *Human Rights: Comments and Interpretations* (London: Allan Wingate, 1949), Appendix I.

4. *See, for example,* Executive Board of the American Anthropological Association, "Statement on Human Rights," *American Anthropologist* 49 (1947): 539.

5. *See, for example,* Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights," *American Political Science Review* 76 (1982): 303; Rhoda Howard and Jack Donnelly, "Human Dignity, Human Rights and Political Regimes," *American Political Science Review* 80 (1986): 801.

6. James W. Nickel, "Cultural Diversity and Human Rights," in *International Human Rights: Contemporary Issues,* ed. Jack L. Nelson and Vera M. Green (Stanfordville, N.Y.: Human Rights Publishing Group, 1980), 43.

7. A.J.M. Milne, *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights* (Albany, N.Y.: State University of New York Press, 1986).

8. Alison D. Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human Rights," *Human Rights Quarterly* 7 (1985): 514–40; and "A Cross-Cultural Approach to Validating International Human Rights: The Case of Retribution Tied to Proportionality," in *Human Rights Theory and Measurements,* ed. D. L. Cingranelli (Basingstoke, Hampshire, and London: Macmillan, 1988), 7. *See generally* her recent book, *International Human Rights: Universalism Versus Relativism* (Newbury Park, Calif., London, and New Delhi: Sage Publications, 1990).

9. *See, for example,* T. S. Eliot, *Notes Toward the Definition of Culture* (London: Faber and Faber, 1948); Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (New York: Oxford University Press, 1976), 76–82.

10. *See generally, for example,* A. L. Kroeber and C. Kluckhohn, eds., *Culture: A Critical Review of Concepts and Definitions* (New York: Vintage Books, 1963).

11. Roy Preiswerk, "The Place of Intercultural Relations in the Study of International Relations," *The Year Book of World Affairs* 32 (1978): 251.

12. Clifford Geertz, *Interpretation of Culture* (New York: Basic Books, 1973), 89.

13. I am grateful to Tore Lindholm for suggesting this useful analogy.

14. Melville J. Herskovits, *Cultural Dynamics* (New York: Knopf, 1964), 54.

15. *See generally,* Ruth Benedict, *Patterns of Culture* (Boston: Houghton Mifflin, 1959) and Herskovits, *Cultural Dynamics,* chap. 4.

16. Melville Herskovits, *Man and His Works* (New York: Knopf, 1950), 76.

17. Elvin Hatch, *Culture and Morality: The Relativity of Values in Anthropology* (New York: Columbia University Press, 1983), 12.

18. I. C. Jarvie, "Rationalism and Relativism," *British Journal of Sociology* 34 (1983): 46.

19. Rhoda E. Howard and Jack Donnelly, "Introduction," in *International Handbook of Human Rights,* ed. R.E. Howard and J. Donnelly (Westport, Conn. Greenwood Press, 1988), 20.

20. John Ladd, "The Poverty of Absolutism," *Acta Philosophica Fennica* (Helsinki) 34 (1982): 158, 161.

21. Clifford Geertz, "Distinguished Lecture: Anti Anti-Relativism," *American Anthropologist* 86 (1984): 265.

22. *Ibid.* at 276.

23. Herskovits, *supra* note 14, at 62.

24. Alison D. Renteln, "Relativism and the Search for Human Rights," *American Anthropologist* 90 (1988): 64.

25. I find Jack Donnelly's classification of radical relativism and universalism as extreme positions in a continuum, with varying mixes of (strong or weak) relativism and universalism in between, useful in this connection. While a radical (extreme) relativist would hold that culture is the sole source of validity of a moral right or rule, a radical universalist would hold that culture is irrelevant to the validity of moral rights or rules that are universally valid. *See* his article "Cultural Relativism and Universal Human Rights," *Human Rights Quarterly* 6 (1984): 400–401. He argues that "weak" cultural relativism is acceptable and even necessary for the implementation of human rights.

For a critique of Donnelly's position *see* Renteln, "The Unanswered Challenge of Relativism," *supra* note 8, at 529–31.

26. Edmund Burke as quoted in R. J. Vincent, "The Factor of Culture in the Global International Order," *Year Book of World Affairs* 34 (1980): 256.

27. Herskovits, *supra* note 14, at 4 and 6.

28. *Ibid.* at 49–50.

29. In his Introduction to UNESCO, *supra* note 3, at 10–11.

30. Article 5 of the Universal Declaration of Human Rights of 1948 and Article 7 of the International Covenant on Civil and Political Rights of 1966. The latter adds that "In particular, no one shall be subjected without his free consent to medical or scientific experimentation." For the texts of these instruments *see Basic Documents on Human Rights,* ed. Ian Brownlie, 2nd ed. (Oxford: Clarendon Press, 1981), 21 and 128, respectively.

31. Article 1.2 of the Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1975. United Nations General Assembly Resolution 3452 (XXX), 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/100 (1975).

32. *Ibid.,* Article 1.1 and Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. United Nations General Assembly Resolution 3946 (1984). This convention came into force in June 1987. For the text of the convention, *see International Commission of Jurists Review* 39 (1987): 51.

It is interesting to note that whereas the 1975 Declaration requires such pain and suffering to be consistent with the United Nations Standard Minimum Rules for the Treatment of Prisoners, the 1984 Convention omitted this requirement. This was probably done in order to encourage countries that do not comply with the Minimum Rules for the Treatment of Prisoners to ratify the Convention.

33. M. J. Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* [hereinafter cited as Bossuyt, *Guide*] (Dordrecht: Martinus Nijhoff, 1987), 151. *See* the review of early work of the Drafting

Committee, 1947–48, *ibid.* at 147–49; and discussions at meetings of the Commission on Human Rights, 1949–52, *ibid.* at 151–54.

34. U.N. Doc. E/CN.4/SR.312, 13.

35. Bossuyt, *supra* note 33, at 155.

36. *Ibid.* at 155–58. In its final version, the sentence ends with the word "experimentation," and does not include the phrase "involving risk."

37. The 5th and 6th Sessions of the Commission on Human Rights, 1949 and 1950. *Ibid.* at 150.

38. *Ibid.* at 151.

39. United Nations General Assembly Resolution 3469 (1979), cited in Amnesty International, *Human Rights: Selected International Standards* (London: Amnesty International Publications, 1985), 27.

40. By virtue of Article 1 of the Optional Protocol to the International Covenant of Civil and Political Rights of 1966, a State Party to the Covenant may recognize the competence of the Human Rights Committee established under the Covenant to receive and consider communications from individuals subject to the state's jurisdiction who claim to be victims of a violation by that state. The protocol provides for the admissibility and processing of such communications, which may culminate in the communication of the committee's views to the state party concerned and to the individual and the inclusion of those views in the annual report of the committee. Thus this procedure may bring moral and political pressure to bear on a state which elected to ratify the Optional Protocol by publicizing its human rights violations, but it does not provide for direct enforcement.

For the text of the protocol *see* Brownlie, *Basic Documents on Human Rights, supra* note 30, at 146.

41. In the context of the Optional Protocol, the Human Rights Committee is restricted by its terms of reference to making specific findings on the case rather than stating general principles and guidelines. *See* CCPR/C/OP/1, *International Covenant on Civil and Political Rights: Human Rights Committee, Selected Decisions under the Optional Protocol (Second to Sixteenth Sessions)* (New York: United Nations, 1985), for examples of the sort of treatment which, according to the committee, constituted violations of Article 7 of the Covenant, *see* 40, 45, 49, 57, 72, 132, and 136. All the communications relating to Article 7 published in this report involve very similar situations in a single country, Uruguay, over a short period of time, between 1976 and 1980. It would have been more helpful if the report had covered a wider variety of situations from more countries.

42. U.N. Doc. A/3740, at 94–95 (1982).

43. On the sources and development of Shariʿa *see generally,* Abdullahi A. An-Naʿim, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse: Syracuse University Press, 1990), chap. 2.

44. For fuller explanations see, generally, *ibid.,* chapter 5; Mohamed S. El-Awa, *Punishment in Islamic Law* (Indianapolis: American Trust Publications, 1982); and Safia M. Safwat, "Offenses and Penalties in Islamic Law," *Islamic Quarterly,* 26 (1982): 149.

45. An-Naʿim, *supra* note 43, at 114–18 and 131–33.

46. Rationality is also relative to the belief system or frame of reference.

What may be accepted as rational to a believer may not be accepted as such by an unbeliever, and vice versa.

47. Mahmoud Mohamed Taha, *The Second Message of Islam*, trans. Abdullahi A. An-Naʿim (Syracuse: Syracuse University Press, 1987), 74–75.

48. *Encyclopedia Judaica* (Jerusalem: Keter 1971), vol. 5, 142–47; vol. 6, 991–93.