



**INTERNATIONAL JOURNAL OF CIVIL SOCIETY LAW**

**VOLUME IX ISSUE II**

**APRIL 2011**

# IJCSL EDITORIAL BOARD

**PROF. KARLA W. SIMON**  
**CATHOLIC UNIVERSITY OF AMERICA**  
**EDITOR-IN-CHIEF**

**PAUL BATER**  
INT'L BUREAU OF  
FISCAL  
DOCUMENTATION  
**SENIOR EDITOR**

**DR. LEON E. IRISH**  
VISITING PROF. OF LAW  
CATHOLIC UNIV. OF  
AMERICA  
**SENIOR EDITOR**

**JASON STIENER**  
**MANAGING EDITOR**

**DONNA M. SNYDER**  
**EDITORIAL ASSISTANT**

**STEPHEN YOUNG**  
**REFERENCE LIBRARIAN**

**JESSICA SWEENEY**  
**ASSOCIATE EDITOR**

## Contributing Editors & Contributors

**Prof. Myles McGregor-**  
**Lowndes**  
**AUSTRALIA**

**Paul Opoku-Mensah**  
**GHANA**

**Nasira Razvi**  
**PAKISTAN**

**Deniela País Costa**  
**BRAZIL**

**Noshir Dadrawala**  
**INDIA**

**Roselle Ramsay**  
**PHILIPPINES**

**Terrance Carter**  
**CANADA**

**Renata Arianingtyas**  
**INDONESIA**

**Ricardo Wyngaard**  
**Peter Hendricks**  
**SOUTH AFRICA**

**Prof. Debra Morris**  
**ENGLAND & WALES**

**Dr. Kerry O'Halloran**  
**IRELAND/NO.**  
**IRELAND**

**Marcel Katemba**  
**TANZANIA**

**Prof. Ge Yunsong**  
**Huang Haoming**  
**CHINA**

**Dr. Hadara Bar-Mor**  
**ISRAEL**

**Dr. Christine Barker**  
**UNITED KINGDOM**

**Dr. Petr Pajas**  
**CZECH REPUBLIC**

**Dr. Alceste Santuari**  
**Prof. Giuliana Gemelli**  
**ITALY**

**Arthur Larok**  
**UGANDA**

**Daniel Bekele**  
**ETHIOPIA**

**Tatsuo Ohta**  
**Morihisa Miyakawa**  
**JAPAN**

**Dr. Antonio Itriago**  
**VENEZUELA**

**Caroline Newman**  
**FRANCE**

**Henry Ochido**  
**KENYA**

**Paul Bater**  
**WESTERN EUROPE**

**Michael Ernst-Pörksen**  
**GERMANY**

**Bayarseteg, J.**  
**MONGOLIA**

**Tamuka Muzondo**  
**ZIMBABWE**

April 30, 2011

Dear Readers,

For those in the Northern Hemisphere, Happy Spring! It was indeed a long, cold, and snowy winter, and we welcome the chance to help thaw you out by providing a large helping of interesting articles to read. These range from a discussion of civil society in Lebanon, and Internet censorship in Saudi Arabia to a survey of the treatment of the rights of LGBT people around the world, UN mechanisms for peace and security, and a Case Comment on an important recent decision in Australia. All of these are enlightening and worth the attention of our readers.

Dr. Eugène Mrad's paper **Some Legal and Political Factors Affecting the Civil Society and Democratization in Lebanon** exposes the restrictive political environment and the main legal and political factors that hinder the process of democratization in Lebanon and that impede the civil society in general, and non-profit organizations in particular, to play an effective role. It provides a comprehensive, though concise, analysis of the democratic deficit and the deteriorating state of human rights in the country. It includes two major parts and concluding remarks. The first part provides a general overview of the democratic deficit in Lebanon and elaborates on some of its main indicators. The second part sheds the light on the deteriorating state of human rights in the country as well as the Lebanese government neglect of its obligations to abide by the provisions of the international human rights treaties it has ratified.

In her article **To Seek, Receive, and Impart Information: Internet Restrictions in Saudi Arabia**, Crystal Ostrum looks first at restrictions on the Internet first in the Kingdom of Saudi Arabia, as the focus of the paper. She then discusses the positions taken by those who think that access to an open uncensored Internet is a human right. The final section of the article looks at practices of Internet censorship and restrictions around the world and how they compare to the practices carried out by the Saudi government.

Nicole Ruzinski's article addresses the very important questions – in the context of the “Arab Spring” and protections of democracy movements currently underway – of the powers of the UN Security Council to carry out sanctions against countries that violate human rights norms. In **When the Use of Force Under Chapter VII is a Necessary U.N. Enforcement Measure**, Ms Ruzinski explores the enforcement measures of the U.N. and discusses the circumstances that prompt a stronger response from the U.N. Security Council. Part One of the article examines the enforcement procedures found within the U.N. Charter. Part Two looks at two case studies, South Africa and Libya, and examines the measures taken by the U.N. in each circumstance. Finally, the paper concludes with a discussion of the different criteria that can be used by the Security Council to determine when use of force, rather than sanctions, is a required response from the Security Council. While sanctions may be effective in attempting to change the policies of a government, their slow effect does little to stop governments that are engaging in violence.

In his paper on gay and lesbian rights protection around the world, Jason Stienen addresses an important aspect of civil society – creating a legal environment in which all people can have rights protection. Mr. Stienen's article, **A Survey of the Protections Afforded to the Rights of**

**Gay and Lesbian Individuals** discusses the “rich and complicated historical background” of the protection of gay and lesbian rights. According to Mr. Stiner, this background has framed the debate between those who would seek to advance these rights under domestic and international legal frameworks, and those who do not acknowledge the legitimacy or importance of these aims. The paper traces the history of laws criminalizing the relationships of same-sex couples and relates this context to current attempts by human rights advocates, NGO’s, and international institutions to eliminate these discriminatory statutes and to ensure that gay and lesbian people are entitled to the full and equal protection of the law.

Finally, Matthew Tunour’s Case Comment on the *Aid/Watch* case rounds out an impressive line-up of readings in this issue. Titled **Some Thoughts on the Broader Theoretical Basis for Including Political Purposes Within the Scope of Charitable Purposes: The Aid/Watch Case**, Dr. Turnour’s highly useful discussion of the case will be of great use to lawyers in all common law countries, because he provides comparative analysis of the issues. In essence the case considered whether pursuing political purposes could be charitable, and a majority in the High Court of Australia found that it could be. The decision was based broadly on the notion that political purposes could fall within the fourth catch-all provision – purposes beneficial to the community, and the decision is likely to be discussed more broadly in other jurisdictions in the course of the next several years.

Enjoy this issue and have a great read!

As always,

Karla

Karla W. Simon  
Editor-in-Chief

## TABLE OF CONTENTS

<b>IJCSL EDITORIAL BOARD</b>	ii	
<b>LETTER FROM THE EDITOR</b>	iii	
<b>TABLE OF CONTENTS</b>	v	
<b>IJCSL EDITORIAL POLICY</b>	vi	
<b>ARTICLES</b>		
<i>Some Legal and Political Factors Affecting the Civil Society and Democratization in Lebanon</i>	7	Eugène Mrad
<i>To Seek, Receive, and Impart Information: Internet Restrictions in Saudi Arabia</i>	33	Crystal Ostrum
<i>When the Use of Force Under Chapter VII is a Necessary U.N. Enforcement Measure</i>	51	Nicole Ruzinski
<i>A Survey of the Protections Afforded to the Rights of Gay and Lesbian Individuals</i>	74	Jason Stiener
<i>Case Comment: Some Thoughts on the Broader Theoretical Basis for Including Political Purposes Within the Scope of Charitable Purposes: The Aid/Watch Case</i>	85	Matthew Turnour

## **IJCSL EDITORIAL POLICY**

April 2011

Dear Reader,

**CONTENT – IJCSL publishes articles on a variety of topics**, seeking to provide a venue for an international readership to learn about and express opinions on developments in law affecting civil society. These topics and the array of opinions on them are complex and sometimes controversial. The opinions expressed herein do not necessarily reflect the views of the IJCSL or its editorial staff.

**STYLE – IJCSL publishes articles by contributors from around the world.** Therefore, IJCSL uses a flexible editorial policy regarding questions of style. Articles submitted by persons for whom the English language is native are edited based on the author's original syntax and spelling. Articles submitted by persons for whom the English language is not native are edited according to American English style.

Occasionally, IJCSL publishes articles in languages other than English. In those instances, articles are published as submitted and the IJCSL provides an English-language summary.

**QUESTIONS & COMMENTS – IJCSL welcomes readers' questions and comments** on items it publishes. If you have a question or comment, please contact:

Karla W. Simon, Editor-in-Chief  
Jason Stiener, Managing Editor

[simon@cua.edu](mailto:simon@cua.edu)  
[jstiener@gmail.com](mailto:jstiener@gmail.com)

**IJCSL RETAINS FINAL EDITORIAL CONTROL** of all aspects of publication and will share copyright with the authors of the works published.

We look forward to hearing from you, and thank you for your interest in the IJCSL.

Sincerely,

The IJCSL Editorial Staff and Editorial Board

PLEASE CITE AS

9 INT'L J. CIV. SOC. L. 2 at [http://www.iccsl.org/pubs/9\\_02\\_IJCSL.pdf](http://www.iccsl.org/pubs/9_02_IJCSL.pdf)

**SOME LEGAL AND POLITICAL FACTORS AFFECTING  
THE CIVIL SOCIETY AND DEMOCRATIZATION  
IN LEBANON**

BY EUGÈNE MRAD<sup>1</sup>

PH.D. IN POLITICS AND HUMAN RIGHTS, SCUOLA SUPERIORE SANT'ANNA

(PISA, ITALY).

**ABSTRACT**

The paper exposes the restrictive political environment and the main legal and political factors that hinder the process of democratization in Lebanon and that impede the civil society in general, and non-profit organizations in particular, to play an effective role.

It provides a comprehensive, though concise, analysis of the democratic deficit and the deteriorating state of human rights in the country.

It entails two major parts and concluding remarks. The first part provides a general overview of the democratic deficit in Lebanon and elaborates on some of its main indicators.

The second part sheds the light on the deteriorating state of human rights in the country as well as the Lebanese government neglect of its obligations to abide by the provisions of the international human rights treaties it has ratified.

**DEMOCRATIC DEFICIT IN LEBANON**

Lebanon has a very delicate population structure. Its population is made up of eighteen religious communities (Sunnites, shi'ites, Druzes, Alawites, Isma'ilis, Maronites, Greek Catholics, Greek Orthodox, Evangelicals, Armenian Orthodox, Armenian Catholics, Latins, Syriac Orthodox, Syriac Catholics, Chaldeans, Assyrians, Copts and Jews).<sup>2</sup> The country has three branches of government: legislative, executive and judiciary. The Parliament (legislative power) is composed of 128 members divided equally between the two major religions (Muslims and Christians). Each sub-group or religious affiliation has a certain quota of parliamentary seats.<sup>3</sup>

---

<sup>1</sup> Eugene Mrad completed a Ph.D. in Politics and Human Rights (100/100 cum laude) at Scuola Superiore Sant'Anna in Pisa, Italy. He participated in the Leaders for Democracy Fellowship (LDF - 2008) at Maxwell School of Citizenship and Public Affairs, Syracuse University – NY, and was a Visiting Scholar at the United States Institute of Peace (USIP) in Washington, D.C. in 2008.

<sup>2</sup> Committee on the Elimination of Racial Discrimination, Report submitted by Lebanon under Article 9 of the Convention, CERD/C/383/Add.2, 18 November 2003

The Council of Ministers (executive power) is composed of thirty ministers according to the Taif Agreement which ended a fifteen year civil war (1975-1990). The appointment of the members of the Council of Ministers in Lebanon is often conducted according to undemocratic criteria, i.e. personal loyalties to political figures and traditional leadership.<sup>4</sup>

Dividing the power between Muslims and Christians in Lebanon is always ‘the rule of the game’. The President of the Republic is always Maronite Christian, the Prime Minister is Sunni, and the Speaker of the parliament is Muslim Shi’ite.<sup>5</sup> All the positions of the Public Administration follow the same ‘logic’ of sharing the ‘pie’.

The public offices are distributed according to a quota for keeping communitarian equilibrium and not according to the competence and expertise. This contradicts with the principle of “*democratic participation for the public interest*”<sup>6</sup>.

As for the political system in Lebanon, it illustrates a relatively failed power-sharing arrangement.<sup>7</sup> Politics in Lebanon can be classified as “pork barrel politics”<sup>8</sup>. The country still suffers from, but not limited to, the following deficiencies: The government is characterized by a weak internal cohesion, and the political system is governed along confessional lines and controlled by foreign interference, both international and regional.<sup>9</sup> The Syrian-Lebanese relations used to be an imposed cooperation.<sup>10</sup>

In Lebanon, there are a lot of indicators about a serious democratic deficit. These are, but not limited to:

Public corruption is widespread; Confessionalism; inherent problems of the Public Administration; lack of transparency, information and statistical data; the malfunctioning and serious flaws of the judicial system (the judicial system suffers from several problems as delays in cases, political interference mainly from the incumbent government); unsatisfactory performance of the military and security apparatuses; absence of civilian oversight over the military; lack of security and negligence of the security services in performing their duties; impartiality of elections; political parties and movements in Lebanon are organized along confessional lines; the ruling elites are often former militia leaders who committed war crimes,

---

<sup>3</sup> Lebanon Country Strategy Paper 2002-2006 and National Indicative Programme 2002-2004, Euro-Med Partnership. And see also <http://www.lp.gov.lb/Version%20Francaise/deputes.htm> for a complete list of the Lebanese deputies.

<sup>4</sup> Human rights and democracy situation in Lebanon: Synthesis of events in 2003, (Quebec: Rassemblement Canadien pour le Liban, 2004), p.12

<sup>5</sup> Lebanon Country Strategy Paper 2002-2006, op. cit.

<sup>6</sup> Antoine Messara, The Mobilization of Civil Society, The Increase of Consciousness and Awareness to Fight Corruption. Available from <http://www.lcps-lebanon.org/resc/democ/97/corruption/antoine.html>

<sup>7</sup> Henry J. Steiner, Philip Alston, “International Human Rights in Context: Law, Politics, Morals”, second edition, (Oxford: Oxford University Press, 2000), p.492

<sup>8</sup> Percy S. Mistry, “Financing for Development: Perspectives and Issues”, (London: Economic Affairs Division of the Commonwealth Secretariat, 2002), p. 14

Pork barrel refers to government funds, jobs, or favors distributed by politicians to gain political advantage

<sup>9</sup> Postwar Institutional Development in Lebanon: an Assessment for Foreign Assistance, 1992. accessed from <http://www.lcps-lebanon.org/resc/cstudies/9294/dev92exe.html>

<sup>10</sup> Stephen C. Calleya, “European Union Policy Towards the Mediterranean: The Euro-Med Partnership and Region Building, The Convergence of Civilizations? ”, Constructing a Mediterranean Region Conference, Lisbon, 6<sup>th</sup>-9<sup>th</sup> June 2002, p.13

confessional leaders and large capitalists. Most of them are corrupt and lack accountability; high government officials are using their power to involve in important real estate and large contracts to feed their own interests. This contradicts with the principle of separation of public from private interests; the funds of municipalities are controlled by the Central Government that allocates them according to a random way governed by the degree of loyalty to the government; activities of the civil society are limited by the governmental policies; the printed press is self-censored and high government officials own the majority of audio-visual media.<sup>11</sup>

## THE ISSUE OF CORRUPTION

As a matter of fact, one internal crucial factor in blocking the development in Lebanon is manifested by the corruption at all levels of government and constitutes the main obstacle to the good governance in the country.

There is a widespread corruption among the officials in the Lebanese public administration at all levels and grades. They are acting corruptly by “*putting personal gain before public or corporate interests in their professional decision-making capacity*”<sup>12</sup>.

This corruption infects the entire government hierarchy from the top governmental officials to the lowest grades employees in the public administration.

It is a straightforward result of the practices of former warlords and mafia chiefs who are at the top echelon of the Lebanese public administration and their cronies and followers who are well entrenched in all the state agencies and institutions at all grade levels.

Summarizing the issue of corruption in Lebanon, it can be said that it is manifested, among other aspects, under three main faces.

Greed is the first face of corruption in Lebanon. It is pervasive among Lebanese political elites. Clientalism is the second face of corruption. Politicians and ruling elites in Lebanon distribute services and jobs to their ‘clients’ in order to keep their loyalty and gain their support. The third face of corruption is foreign intervention, international and regional, which controls the decision makers and the main political institutions in the country.

What is more striking in Lebanon is that corruption is not confined to the public service sphere or the institutions of the State, but is widely diffused in the whole Lebanese society.

Fouad Saad, a former minister of state for administrative reform, blamed the Lebanese citizens for the corruption in the country.

He stated that corruption is a “malignant tumour” that infects the entire Lebanese population and “*even if we replace all government employees, it will not solve the problem because that is how the public is*”.<sup>13</sup>

---

<sup>11</sup> Paul Salem, Democracy in Lebanon: Between Political Science and the Elections of 1996, available from <http://www.lcps-lebanon.org/pub/books/98/elections96/summ2.html>

Conference on ‘The Challenges facing the Judicial Sector in Lebanon’, September 29, 1995, available on <http://www.lcps-lebanon.org/conf/95/index.html>

<sup>12</sup> Peter Jones, “Combating Fraud and Corruption in the Public Sector”, (London: Chapman and Hall, 1993), p.5

<sup>13</sup> Ziad Abdelnour, The Three faces of Corruption in Lebanon, MEIB, February 2001

- The Daily Star (Beirut), 7 December 2000
- The Daily Star (Beirut), 31 January 2001
- The Daily Star (Beirut), 24 January 2001
- The Daily Star (Beirut), 1 February 2001

Corruption in Lebanon is deeply entrenched in the public and private spheres and in the political, institutional, and societal structures. Even some ministers recognized the presence of corruption in the public administration. For instance, Fouad Saad summarized the mystery of corruption in Lebanon by:

*“We, and you, have heard during the last few months of national corruption that by themselves can overthrow a government- except that we are in Lebanon! Suddenly, all disappears as if by magic, and others, more flagrant and acute stories and narrations float to the surface ... Consequently, every time an issue is raised with financial implications, suspicions engulf it, opinions are widely disparate and wars are waged- all masking personal interests”*<sup>14</sup>.

Similarly, this corruption has also led to a devaluation of productive work and work ethics in Lebanese society in general.<sup>15</sup>

Furthermore, it is noteworthy to mention that corruption in Lebanon is exacerbated by the confessional system.<sup>16</sup>

### **CORRUPTION IN FACTS AND FIGURES**

Marwan Iskandar, a senior Lebanese economic expert, highlighted the fact that 50 percent of the Lebanese GDP is in the hands of, and controlled by, a corrupt government administration and this is the main obstacle hampering the growth of the Lebanese economy.<sup>17</sup>

A corruption assessment report on Lebanon released in January 2001 illustrates starkly the scandal of corruption in the Lebanese political system and its devastating impact on the Lebanese economy. This report, researched by Information International, and commissioned by the United Nations Centre for International Crime Prevention, estimated that the Lebanese State squanders over 1.5 billion U.S. dollars per year as a result of pervasive corruption at all levels of government.<sup>18</sup>

Perhaps one of the most intriguing findings mentioned in this report is the following: Only 2.4 % of the 6 billion U.S. dollars worth of projects contracted by various government bodies were formally awarded by the Administration of Tenders. The rest of these contracts were awarded not to the most qualified applicant, but to the company willing to pay the highest bribe to the minister in charge of the project.

Hence, it is not surprising that the report finds over 43 % of companies in Lebanon *“always or very frequently”* pay bribes and another 40 % *“sometimes”* do.<sup>19</sup>

Another study on corruption in Lebanon carried out in 2004 by “BML-ISTISHARAT” estimated the total accumulated losses with their interests resulting from corruption to be around thirty-eight billion U.S. dollars.<sup>20</sup>

---

<sup>14</sup> Fouad El Saad, “Corruption: Once under the Table... Now in the Open”, OMSAR Newsletter (Beirut: Office of the Minister of State for Administrative Reform, June 2002), p.11

<sup>15</sup> UNDP conference on Linking Economic Growth and Social Development in Lebanon, Synthesis Note, (Beirut, Jan 2000), p.33

<sup>16</sup> Ghassam Salameh, “The Confessional System in Lebanon punish the competent and give priority to the corrupt”, An-Nahar Newspaper (in Arabic), 24 April 2005, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 24/04/2005

<sup>17</sup> Marwan Iskandar, UNDP conference on Linking Economic Growth and Social Development in Lebanon, “Sustainable Development and Economic Initiatives in Lebanon”, (Beirut: UNDP, Jan 2000), p.77

<sup>18</sup> “Experts meeting national action for fighting corruption in Lebanon”, (Beirut: Information International, January 2001), p.2

<sup>19</sup> *ibid.*, p. 2

In 2005, Lebanon ranked 83 out of 159 ranked countries on the Transparency International's Corruption Perceptions Index (CPI - 2005) and ranked 97 amongst 146 countries in 2004 (CPI - 2004). The TI Corruption Perceptions Index uses criteria related to the existence of corruption among public officials and politicians of the countries under consideration.<sup>21</sup>

On another level, it is noteworthy to mention that Lebanon has not ratified the United Nations Convention against Corruption which was adopted by the General Assembly of the United Nations on the 31<sup>st</sup> of October 2003 and entered into force on the 14<sup>th</sup> of December 2005.<sup>22</sup>

## CONFESSIONALISM

Confessionalism in Lebanon serves as a protective shield for the corruption in the country. Most of the institutions of the Lebanese State are staffed according to the rule of "sharing the pie" between the different political and religious elites.

These institutions were during the Lebanese civil war - and are still to a lesser extent - reduced to "sectarian fiefdoms".<sup>23</sup>

Confessionalism is similarly deeply entrenched in the private sector in Lebanon. A customary arrangement between the ruling elites after the Taif Agreement of 1989 assigned the management of the main companies, that the Central Bank of Lebanon holds a sizeable amount of their shares, to certain confessions. For instance, Intra Investment Company, Middle East Airlines, and Casino of Lebanon are chaired respectively by a Shiite, Sunnite, and Maronite.<sup>24</sup>

Ghassan Salameh, a former Lebanese minister of culture, criticized the confessional system in Lebanon which "*punishes the competent persons and gives priority to the corrupt*". Salameh depicted this system that controls all aspects of political participation in Lebanon as a "*political system from the nineteenth century*" whereas "*the social life in Lebanon belongs to the twenty-first century*".<sup>25</sup>

## THE PERSONAL STATUS LAW

---

<sup>20</sup> Joe Faddoul, "Etude sur la corruption au Liban", Tribune Libanaise, 29 octobre 2004, available from [http://www.tribune-libanaise.com/tribune/www.metransparent.com/texts/joe\\_faddoul\\_etude\\_corruption\\_au\\_liban\\_arabic.htm](http://www.tribune-libanaise.com/tribune/www.metransparent.com/texts/joe_faddoul_etude_corruption_au_liban_arabic.htm)

<sup>21</sup> "Lebanon on the Transparency International's Corruption Perceptions Index", Press Release by The Lebanese Transparency Association on 18/10/2005 accessed from [http://www1.transparency.org/cpi/2005/nc\\_pressreleases/pr\\_lebanon\\_en.pdf](http://www1.transparency.org/cpi/2005/nc_pressreleases/pr_lebanon_en.pdf)  
<http://www.transparency-lebanon.org/>

Transparency International, "Global Corruption Report 2005", (London: TI, 2005), pp. 233-241

<sup>22</sup> <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

<sup>23</sup> Bassel F. Salloukh, "Opposition under Authoritarianism: The Case of Lebanon under Syria", (Florence: European University Institute, Robert Schuman Centre for Advanced Studies – Mediterranean Programme, March 2007), p. 35

<sup>24</sup> Marwan Iskandar, "The challenge of surpassing the sectarianism in employment", An-Nahar Newspaper (in Arabic), 12 March 2006, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 12/03/2006

<sup>25</sup> An-Nahar Staff, "Salameh: The Lebanese confessional system punishes the competent and gives priority to the corrupt", An-Nahar Newspaper (in Arabic), 24 April 2005, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 24/04/2005

Lebanese Legislator Edmond Naim mentioned clearly that personal status law in Lebanon is “*enhancing confessionalism, and that political confessionalism is a result of the religious one*”<sup>26</sup>.

The personal status code in Lebanon is not unified.<sup>27</sup> Each religious community has a different personal status code. For instance, according to Shari’a Law, a Lebanese Muslim man is allowed to marry a Lebanese Christian woman. However, the contrary is not applicable, i.e. a Lebanese Christian man is not allowed to marry a Lebanese Muslim woman. It is considered to be a “sin” according to this Law.<sup>28</sup>

## **INHERENT PROBLEMS OF THE PUBLIC ADMINISTRATION**

The Lebanese public administration suffers from a number of problems, namely but not limited to: political, confessional and militia leaders outright interference in the administrative structure and affairs; comparatively low wages since 1985; understaffing in middle and top-level management and professional posts and overstaffing in low-level positions; widespread corruption, outdated management practices; appointments and promotions based on political and confessional criteria and not on merit, professionalism and expertise.<sup>29</sup>

The so-called Lebanese Troika (President, Prime Minister, and Speaker of Parliament) used to allocate the significant positions and offices in the public administration to their cronies, friends, and supporters.<sup>30</sup>

Besides the above-mentioned problems, there are other traditional problems affecting the performance of this administration, such as: centralization; sectarianism; nepotism; favouritism; patronage; deficiency in the statistical data and absence of up-to-date information; and a bureaucracy that still adopts outdated legal practices which, in some cases, date back to the Ottoman Empire or the French mandate.<sup>31</sup>

## **LACK OF TRANSPARENCY, INFORMATION AND STATISTICAL DATA**

There is a systematic neglect of the crucial importance of statistics and data. The lack of precise statistics and accurate data constitutes a serious obstacle and prevents the policy and decision-makers from grasping the economic and social trends and developments in the country and consequently fail to devise the proper strategy that should be adopted to redress the imbalances. This can affect dramatically the growth of the economy and both the public and private sectors.<sup>32</sup>

---

<sup>26</sup> Hassan El Hasan, “The Lebanese Parliament is required to adopt a new law concerning personal status”, An-Nahar Newspaper (in Arabic), 05 June 2005, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 05/06/2005

<sup>27</sup> United Nations Development Programme, “The Arab Human Development Report 2005: Towards the Rise of Women in the Arab World”, (New York: UNDP, 2006), p. 19

<sup>28</sup> Interview with Sheikh Maher Hammoud, Imam of Jerusalem Mosque in Saida –Lebanon  
Hassan El Hasan, “The Lebanese Parliament is required to adopt a new law concerning personal status”, op. cit.

<sup>29</sup> The Lebanese Center for Policy Studies (LCPS), “Postwar Institutional Development in Lebanon: An Assessment and Strategy for Foreign Assistance”, (Beirut: AMIDEAST and USAID, February 1992), p.4

<sup>30</sup> Oussama K. Safa, “The Official Campaign Against Corruption in Lebanon”, (Beirut: Lebanese Centre for Policy Studies, 1999), p. 5

<sup>31</sup> The Lebanese Center for Policy Studies (LCPS), “Postwar Institutional Development in Lebanon: An Assessment and Strategy for Foreign Assistance”, op. cit., pp.44-45

<sup>32</sup> *ibid.*, p. 41

Louis Hobeika, a Lebanese senior economic expert, mentioned that the lack of statistical data and economic indicators, coupled with an overall lack of economic transparency as it is the case in Lebanon, will definitely lead to inefficient economic policies.<sup>33</sup>

### THE MALFUNCTIONING OF THE JUDICIAL SYSTEM

Lebanon witnesses an outright and noticeable political intervention in the work of the Judiciary. Lebanese politicians have a lot of influence on the judiciary and the arbitrary judicial decisions.

Judiciary is used by politicians to curtail the freedoms of their opponents,<sup>34</sup> as well as to reward their proponents. Similarly, judges and prosecutors are appointed according to political criteria and political allegiances.<sup>35</sup>

The parliamentarians amend laws according to their whims and their narrow political, confessional and personal considerations. Everything is a matter of political compromise even the judiciary judgments.

### SERIOUS FLAWS IN THE LEBANESE JUDICIAL SYSTEM

The Lebanese State submitted the second periodic report to the Human Rights Committee on the 8<sup>th</sup> of June 1996 (more than 10 years after the due date on 21/03/1986). After examining the Lebanese report, the Human Rights Committee drafted its concluding observations in April 1997 in which the Committee expressed concern about the “*independence and impartiality*” of the Lebanese judiciary and the unsatisfactory procedures regarding the appointment of Lebanese judges. Similarly, the Committee aired its dissatisfaction about the lack of “*effective remedies and appeal procedures*” in the Lebanese judicial system.<sup>36</sup>

The Fact-finding Mission chaired by the Irish prosecutor Peter FitzGerald that inquired into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, released on the 24<sup>th</sup> of March 2005 a report that mentioned clearly the serious flawlessness of the Lebanese authorities’ inquiry into Hariri’s death and called for the establishment of an independent international investigation. The report exposed the responsibility of the security apparatuses of both Lebanon and Syria and their involvement in the assassination as well as the malfunctioning and the serious deficit in the Lebanese judicial system.<sup>37</sup>

The concluding remarks and recommendations of the report highlighted that:

---

<sup>33</sup> Louis Hobeika, “From financial maturity to economic growth”, An-Nahar Newspaper (in Arabic), 20 April 2005, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 20/04/2005

<sup>34</sup> European Parliament, Summary Record: “Exchange of views on human rights in Lebanon”, Human Rights Working Group, PE 284.670, Brussels, 05 November 2002

<sup>35</sup> U.S. Department of State, “Supporting Human Rights and Democracy: The U.S. Record 2005-2006”, Bureau of Democracy, Human Rights and Labour, Washington D.C., April 2006, available on <http://www.state.gov/g/drl/rls/shrd/2005>

<sup>36</sup> Concluding observations of the Human Rights Committee: Lebanon, 01/04/97, CCPR/C/79/Add.78. (Concluding Observations/Comments), available on <http://www.unhchr.ch/tbs/doc.nsf>

<sup>37</sup> Peter FitzGerald, “Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri”, United Nations Security Council document S/2005/203 of 24 March 2005, available from <http://domino.un.org/unispal.nsf>

*“It became clear to the Mission that the Lebanese investigation process suffered from serious flaws..... It is therefore the Mission’s view that an international independent investigation would be necessary to uncover the truth”*.<sup>38</sup>

Those recommendations were fully supported by Javier Solana, the High Representative for the CFSP of the EU, who issued a statement welcoming the work carried out by the Fact-finding Mission and expressing his full support to its recommendations. In a statement issued on 25 March 2005, Solana stated: *“I welcome the work carried out by the Fitzgerald Commission, and fully support the recommendations”*.<sup>39</sup>

Similarly, in June 2006, Serge Brammertz, the head of the UNIIC (United Nations International Investigation Commission) investigating into the Hariri murder, hinted to the deficiency affecting the judicial system in Lebanon which hinders the administration of justice. In the fourth report of the UNIIC, Brammertz mentioned explicitly *“the fragmented nature of the Lebanese law enforcement and judicial systems and the lack of expert capacity”*.<sup>40</sup>

## SOME ILLUSTRATIVE EXAMPLES

### THE CONTROVERSIAL AMNESTY LAW OF 1991

In August 1991, the Lebanese government headed by Prime Minister Karami passed an amnesty law for all the crimes committed during the period of the civil war (1975-1990). Murderers, kidnappers, torturers, and harassers, etc. were all pardoned.<sup>41</sup>

The UN Human Rights Committee criticized the 1991 Lebanese Amnesty Law stating that: *“The Committee notes with concern the amnesty granted to civilian and military personnel for human rights violations they may have committed against civilians during the civil war. Such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy.”*<sup>42</sup>

Similarly, the International Center for Transitional Justice (ICTJ) displayed its dissatisfaction from the promulgation of this law by the Lebanese Government. On the 4<sup>th</sup> of December 2005, Paul van Zyl, Executive Vice-President and country programs director at the ICTJ, mentioned that *“societies do not have the luxury of not*

---

<sup>38</sup> *ibid.*

<sup>39</sup> “Javier Solana, Haut Représentant de la PESC soutient le rapport de l’ONU sur le Liban”, Bruxelles, le 25 mars 2005, S130/05, available from [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressdata/EN/declarations/84405.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/declarations/84405.pdf)

<sup>40</sup> United Nations Security Council, “Letter dated 10 June 2006 from the Secretary-General addressed to the President of the Security Council”, S/2006/375, 10 June 2006, available from <http://daccessdds.un.org>

(includes an Annex with: Fourth report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005) and 1636 (2005), and 1644 (2005), Beirut, 10 June 2006, paragraph 130, p.27)

<sup>41</sup> Michael Young, “Resurrecting Lebanon’s Disappeared”, (Beirut: The Lebanese Center for Policy Studies, 1999), pp.1-9

<sup>42</sup> Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 11

*dealing with their past” and “if not dealt with proactively, the past will always haunt post-conflict societies”.*<sup>43</sup>

#### THE AMNESTY BILL OF 2005

A recent illustrating example is the promulgation of a “mercy law” or an “amnesty bill”<sup>44</sup> for the Chief of the “Lebanese Forces” Samir Geagea and his friends and another one for the Dinniyeh and Majdel Anjar suspects under the disguise of national reconciliation process and the consolidation of peace and national unity. An excerpt of the amnesty bill reads as follows:

*“A general amnesty is granted for all the crimes related to the judgements issued by the Judicial Council number 5/95 and 2/97 and 4/96 and the judgements issued by Beirut Criminal Court number 380/96. All the pursuits are stopped and all the orders of arrests related to the issues covered by this law are dropped. Also are dropped accordingly all the judgements issued in this respect and all the related punishments, ..., and all the arrested persons are to be liberated immediately”.*<sup>45</sup>

Samir Geagea, the Lebanese Forces leader, was acquitted on the 18<sup>th</sup> of July 2005 after being imprisoned for eleven years and three months for assassinating former Lebanese Prime Minister Rashid Karami and several other accusations. Geagea was released from his prison in the ministry of defence on 26 July 2005.<sup>46</sup>

Similarly, the detainees in Diniyeh case (26 Islamist militants involved in killing more than 40 persons, including 11 military personnel, during the clashes with the Lebanese Armed Forces in 1999) and Majdel Anjar suspects (who were involved in a plot to explode the Italian and Ukrainian embassies in Beirut) were also discharged completely from the accusations held against them on the same date (18 July 2005).<sup>47</sup>

#### THE CASE OF GENERAL MICHEL AOUN

The case of General Michel Aoun is another example that illustrates the influence of politicians on the work of the judiciary and the legal judgements in Lebanon.

On the 4<sup>th</sup> of May 2005, the public prosecutor’s office in Lebanon made an unprecedented decision and annulled the charges held against General Michel Aoun, a

---

<sup>43</sup> Raed El Rafei, “Lebanon’s post-conflict strategies debated. Conference looks at ways to come to terms with the past”, The Daily Star, 05 December 2005, accessed from [www.dailystar.com.lb](http://www.dailystar.com.lb) on 05/12/2005

<sup>44</sup> An-Nahar Newspaper (in Arabic), 18 July 2005, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 18/07/2005

Keesing’s Record of World Events (formerly Keesing’s Contemporary Archives), Volume 51, July, 2005 Lebanon, p. 46759

<sup>45</sup> “Two suggestions for amnesty for Geagea and the detainees in Diniyeh and Majdel Anjar”, An-Nahar Newspaper (in Arabic), 18 July 2005, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 18/07/2005

<sup>46</sup> “Geagea walk out to freedom: from the ministry of defence to the airport then to Paris to spend some weeks for medical examinations and to recover”, An-Nahar Newspaper (in Arabic), 26 July 2005, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 26/07/2005

<sup>47</sup> Majdoline Hatoum, “Geagea set for release as Lebanon approves amnesty bill”, The Daily Star, 19 July 2005, accessed from [www.dailystar.com.lb](http://www.dailystar.com.lb) on 19/07/2005

“Lebanese lawmakers pardon anti-Syrian warlord. 3 dozen Muslim militants also given amnesty”, CNN International, 19 July 2005, accessed from <http://www.cnn.com> on 19/07/2005

former Lebanese Armed Forces Commander who spent fifteen years of exile in France.<sup>48</sup>

### **POLITICAL PARTIES AND MOVEMENTS IN LEBANON**

The political parties and movements in Lebanon are purely organized along confessional lines i.e. composed mostly from the same religious affiliation. Furthermore, they are associated to external regional actors and countries from their same religious affiliation.

The “Future Bloc”, for instance, is upheld by the Sunni Saudi Arabia, while Hizbullah and Amal maintain close ties with the Shiite Iran and benefit from its support.<sup>49</sup>

The Lebanese political parties lack democracy in their internal decision-making which is exclusive and constrained to the whims of the “religious”, “charismatic” or “traditional” leader and his cronies. Besides, there is no internal election process for the leader who serves as a life-time leader and is replaced only in the case of a normal death or assassination.

Similarly, they are not disposed of clear programs or ideologies. Some have embryonic programs with no defined objectives, while others have programs associated with the priorities of some external powers, and sometimes fundamentalist ideologies saturated with the lack of tolerance and the neglect of the most basic human rights and fundamental freedoms.

### **THE DISTORTED CONCEPT OF POLITICAL OPPOSITION IN LEBANON**

The concept of “Lebanese opposition” is a continuously changing one. For instance, the components of the opposition in 2005 are different from those in 2006.

The so-called current opposition in Lebanon (Hizbullah-Amal alliance and the Free Patriotic Movement) is undoubtedly a temporary and illogical alliance and did not propose to the Lebanese any better alternative to what is being practiced by the current Hariri led government. This opposition is looking on how to get a bigger portion of the “pie” and is far away from the ambitions and aspirations of the youth and the new generation in Lebanon.

### **THE PERFORMANCE OF THE MILITARY AND SECURITY APPARATUSES**

The security apparatus in Lebanon, to a lesser degree than other Mashrek countries, is serving as “*an effective tool for the authoritarian control of society*”.<sup>50</sup>

In the period extending from 1995 to 2005, senior military commanders and security apparatuses chiefs were appointed by the pro-Syrians Lebanese President Lahoud and the Defense minister Michel El-Murr and their cronies.

---

<sup>48</sup> Karine Raad, “Lebanese judiciary has dropped charges against Aoun”, The Daily Star, 05 May 2005, accessed from [www.dailystar.com.lb](http://www.dailystar.com.lb) on 05/05/2005

<sup>49</sup> “Lebanon: Managing the Gathering Storm”, Middle East Report N°48, (Amman/Brussels: International Crisis Group, December 2005), p.15

<sup>50</sup> Amr Hamzawy, “Arab security services and the crisis in democratic change”, Carnegie Endowment for International Peace, The Arab Reform Bulletin, Vol.4, Issue 5, June 2006, available from [www.CarnegieEndowment.org/ArabReform](http://www.CarnegieEndowment.org/ArabReform)

The mistrust of the armed forces remains. The Lebanese Armed Forces Command cannot be freed from the old practices that do not tally with basic human rights and fundamental freedoms in an overnight.

A great deal of human rights violations are committed regularly by the different security agencies. These violations included, among others: torture and killing prisoners while in custody, arbitrary arrest, using secret prisons for incommunicado detention, harassing and intimidating the families of political detainees, etc.<sup>51</sup>

Similarly, the curriculum at the military and security forces in Lebanon does not include the disseminating and raising the awareness about Internal Human Rights and Internal Humanitarian Law (IHL).

This constitutes a breach of Lebanon obligations to disseminate the principles of IHL as required in the Four Geneva Conventions of 1949 and their Additional Protocols of 1977.<sup>52</sup>

Corruption is also widespread in the structure, organization and practices of the Lebanese armed and security forces. The officers of the Lebanese armed forces and the security apparatuses are provided with excessive benefits that are not commensurate with the financial resources of a country that is crippled with a debt burden of nearly 40 billion U.S. dollars.

These officers benefit from unnecessary allocations (ex: 1 driver for a major, 2 for a colonel, 3 or more for a Brigadier-General, etc. ; exemption from paying the gas, telephone, and electricity bills among others; a certain quota of gasoline per month starting from 20 coupons of 20 litres of gasoline per month; exemption from paying certain types of taxes, etc.)

#### **ABSENCE OF CIVILIAN OVERSIGHT OF THE MILITARY**

---

<sup>51</sup> Amnesty International, Public Statement: "Lebanon: Detainees reportedly beaten and denied access to legal counsel", MDE 18/002/2006, News Service No. 041, 16 February 2006, available on <http://web.amnesty.org>

Amnesty International, Report: "Lebanon: A Human Rights Agenda for the Parliamentary Elections", MDE 18/005/2005, 18 May 2005, available on <http://web.amnesty.org>

Amnesty International, Report: "Lebanon: Samir Gea'gea and Jirjis al-Khour: Torture and unfair trial", MDE 18/003/2004, 23 November 2004, available on <http://web.amnesty.org>

Amnesty International, Public Statement: "Lebanon: Amnesty International demands independent investigation into death in custody and end to incommunicado detention", MDE 18/011/2004, News Service No. 241, 30 September 2004, available on <http://web.amnesty.org>

Amnesty International, Press Release: "Lebanon: Torture and unfair trial of the Dhinniyyah detainees", MDE 18/007/2003, News Service No. 109, 07 May 2003, available on <http://web.amnesty.org>

<sup>52</sup> International Committee of the Red Cross (ICRC), "International Humanitarian Law. Answers to your Questions", (Geneva: ICRC, October 2002), p.13.

(Article 47 of Geneva Convention I, Article 48 of Geneva Convention II, Article 127 of Geneva Convention III, Article 144 of Geneva Convention IV, Article 83 of Additional Protocol I, Article 19 of Additional Protocol II).

For instance, Article 47 of Geneva Convention I stipulates the following:

*"The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains"*

Full texts of these Conventions and additional protocols are available from the Webpage of the ICRC at [www.icrc.org/ihl](http://www.icrc.org/ihl)

It is noteworthy to mention that the dysfunctional, deformed system of governance in Lebanon is exacerbated by the lack of civilian-political oversight of the military-security institutions in the country.<sup>53</sup> The security apparatus in Lebanon suffers from a lack of accountability and a civilian-judicial oversight mechanism.<sup>54</sup> On the contrary, instead of a civilian control of the military, we witness a General in the Armed Forces, giving advices publicly to the politicians in the country. Moreover, there is no separation between the functions of military armed forces and internal security forces.<sup>55</sup> The Lebanese armed forces perform, very often, the functions of maintaining the internal security in the country.

### **PERFORMANCE OF THE MILITARY COURTS**

The military courts that operate in Lebanon “*fall short of international standards for fair trials*”.<sup>56</sup> The military judges lack the required legal training which tally with international standards.<sup>57</sup> These judges are military officers with inadequate legal background, insufficient judicial training, etc.

The Concluding Observations on Lebanon of the United Nations Human Rights Committee (HRC) of April 1997 exposed the deficiency of the military courts in Lebanon. Excerpts from these Observations read the following:

*“... It is also concerned about the procedures followed by these military courts, as well as the lack of supervision of the military courts’ procedures and verdicts by the ordinary courts. The State party should ... transfer the competence of military courts, in all trials concerning civilians and in all cases concerning the violation of human rights by members of the military, to the ordinary courts”.*<sup>58</sup>

### **LACK OF SECURITY AND NEGLIGENCE OF THE SECURITY SERVICES IN PERFORMING THEIR DUTIES: HARIRI ASSASSINATION AS AN ILLUSTRATIVE EXAMPLE: DIRECT INVOLVEMENT OF THE LEBANESE SECURITY APPARATUS**

The report of the UN Fact-finding Mission chaired by the Irish prosecutor Peter FitzGerald inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, released on the 24<sup>th</sup> of March 2005, exposed clearly the primary responsibility of the “Lebanese security services and the Syrian military intelligence” in the Hariri assassination.<sup>59</sup>

---

<sup>53</sup> Rami Khouri, “Arab security reforms: Lebanon’s rare opportunity”, The Daily Star, 02 July 2005, accessed from [www.dailystar.com.lb](http://www.dailystar.com.lb) on 02/07/2005

<sup>54</sup> Rami Khouri, “UN report on Hariri’s murder may open the way for Lebanese, Arab security sector reforms. Military-intelligence organizations need to be controlled by civilian, judicial, democratic institutions”, The Daily Star, 26 Mar 2005, accessed from [www.dailystar.com.lb](http://www.dailystar.com.lb) on 26/03/2005

<sup>55</sup> Heiner Hänggi and Fred Tanner, “Promoting security sector governance in the EU’s neighbourhood”, Chaillot Papers No 80, (Paris: Institute for Security Studies, July 2005), p. 67

<sup>56</sup> Amnesty International, Report: “Lebanon: A Human Rights Agenda for the Parliamentary Elections”, *ibid*.

<sup>57</sup> Human Rights Watch, Press Release: “Lebanon: Military Courts Used to Prosecute Dissent”, New York, 18 March 2006, available from <http://hrw.org>

<sup>58</sup> Concluding observations of the Human Rights Committee: Lebanon, 01/04/97, CCPR/C/79/Add.78. (Concluding Observations/Comments), available on <http://www.unhcr.ch/tbs/doc.nsf>

<sup>59</sup> Section 60 of FitzGerald Report reads as follows:

*“It is the Mission’s view that the Lebanese security services and the Syrian Military Intelligence bear the primary responsibility for the lack of security, protection, and law and order in Lebanon. The*

Similarly, the report of the UN International Independent Investigation Commission (UNIIC) established pursuant to United Nations Security Council Resolution 1595 (2005) released on the 19<sup>th</sup> of October 2005, known as the Detlev Melhis report, pointed clearly to the direct and indirect involvement of the Syrian and Lebanese security apparatuses in this terrorist attack.

The report exposed that the “*structure and organization of the Syrian and Lebanese intelligence services in Lebanon at the time of the blast, including protocols for reporting, shows a pervasive impact on everyday life in Lebanon*”.<sup>60</sup>

Mehlis mentioned clearly the “*negligence of the Lebanese authorities to undertake proper investigative measures and a full-scale professional crime scene examination immediately after the blast*”.<sup>61</sup> Furthermore, he concluded that the decision to assassinate Hariri “*could not have been taken without the approval of top Syrian security officials and further organized with the counterparts in the Lebanese security services*”.<sup>62</sup>

### **DETERIORATING STATE OF HUMAN RIGHTS**

Lebanon is a founding member of the United Nations and should abide by the principles of the Universal Declaration of Human Rights (UDHR) and the two covenants. This is well enshrined in the fundamental provisions of the preamble of the Lebanese Constitution. The preamble states:

*“...Lebanon is also a founding and active member of the United Nations Organization and abides by its covenants and by the Universal Declaration of Human Rights. The Government shall embody these principles in all fields and areas without exception....”*<sup>63</sup>

In this context, it is noteworthy to mention that Lebanon was actively involved in the formulation of the UDHR through Dr. Charles Malik (the Lebanese representative to the Commission on Human Rights in 1948).<sup>64</sup> Lebanon acceded to the “International Covenant on Civil and Political Rights” (ICCPR) of 16 December 1966 (entered into force on the 23<sup>rd</sup> of March 1976) on the 3<sup>rd</sup> of November 1972.<sup>65</sup>

---

*Lebanese security services have demonstrated serious and systematic negligence in carrying out the duties usually performed by a professional national security apparatus. In doing so, they have severely failed to provide the citizens of Lebanon with an acceptable level of security and have therefore contributed to the propagation of a culture of intimidation and impunity. The Syrian Military Intelligence shares this responsibility to the extent of its involvement in running the security services in Lebanon”.*

Full text of the report available from:

Peter FitzGerald, “Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri”, United Nations Security Council document S/2005/203 of 24 March 2005 available from <http://domino.un.org/unispal.nsf>

<sup>60</sup> Detlev Mehlis, “Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005)”, United Nations Security Council, S/2005/662, Beirut, 19 October 2005, available on <http://www.un.org/news/dh/docs/mehlisreport/>

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> [http://www.hasanhaidar.com/lebanese\\_Constitution.htm](http://www.hasanhaidar.com/lebanese_Constitution.htm)

<sup>64</sup> <http://www.udhr.org/history/Biographies/biocm.htm>

<sup>65</sup> International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force

As of the end of 2009, the Lebanese State has not taken any action concerning the “First Optional Protocol to the International Covenant on Civil and Political Rights” of 16 December 1966 (entered into force on the 23rd of March 1976).<sup>66</sup> And hence did not recognize the competence of the “Human Rights Committee” to receive and consider “*communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant*” as stipulated by article 1 of this Protocol.<sup>67</sup>

Similarly, as of the end of 2009, the Lebanese State has not taken any action concerning the “Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty” (of 15 December 1989).<sup>68</sup>

Lebanon acceded to the “International Covenant on Economic, Social and Cultural Rights” (ICESCR) of 16 December 1966 (entered into force on the 23<sup>rd</sup> of March 1976) on the 3<sup>rd</sup> of November 1972.<sup>69</sup>

The Lebanese authorities have mainly ratified the basic international human rights instruments. However, the deteriorating state of human rights in Lebanon, as well as the Lebanese authorities’ practices and actions, and in some cases their intentional inactions, reflect the total neglect of the Lebanese government of its obligations to abide by the provisions of those human rights treaties. The following paragraphs will shed the light on and expose the state of human rights in the country.

First of all, the Lebanese State holds the prime legal responsibility for protecting human rights within its territory. Lebanon has disregarded both its moral and legal obligations to the respect of binding and non-binding human rights instruments. The problem in Lebanon is more connected to the lack of implementation of the existing human rights laws. Basil Fernando exposed the links “*between opinions, policies, laws, and implementation of laws*”.<sup>70</sup> The laws in Lebanon may seem liberal, however the practices and the implementation are still restrictive.

In an unprecedented initiative and in cooperation with the United Nations and the Lebanese civil society, a workshop was held at the Lebanese Parliament on the 10<sup>th</sup> of December 2005, in which the Parliament Human Rights Committee launched a

---

23 March 1976, in accordance with Article 49, available on

[http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)

<http://www2.ohchr.org/english/bodies/ratification/4.htm>

<http://www.unhcr.ch/tbs/doc.nsf>

<sup>66</sup><http://www2.ohchr.org/english/bodies/ratification/5.htm>

<sup>67</sup> Optional Protocol to the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 9, available on

[http://www.unhchr.ch/html/menu3/b/a\\_opt.htm](http://www.unhchr.ch/html/menu3/b/a_opt.htm)

<sup>68</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989, available on

[http://www.unhchr.ch/html/menu3/b/a\\_opt2.htm](http://www.unhchr.ch/html/menu3/b/a_opt2.htm)

<http://www2.ohchr.org/english/bodies/ratification/12.htm>

<sup>69</sup> International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on the 3<sup>rd</sup> of January 1976, in accordance with article 27, available on

[http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm)

<http://www2.ohchr.org/english/bodies/ratification/3.htm>

<sup>70</sup> Basil Fernando, “The Role of NGOs in Policy-Making: Campaigns against Torture as an Illustration”, in: Lis Dhundale, Erik André Andersen (eds.), “Revisiting the Role of Civil Society in the Promotion of Human Rights”, (Copenhagen: The Danish Institute for Human Rights, 2004), p. 165

National Plan for Human Rights.<sup>71</sup> Unfortunately, as it is the case with similar attempts in the past, the plan remains ink on paper.

### **THE LEBANESE STATE NON- RESPECT OF ITS REPORTING OBLIGATIONS TO THE UN TREATY BODIES**

As of December 2009, the Lebanese State owes the United Nations human rights treaty bodies 8 overdue reports (2 for CAT, 1 for CCPR, 1 for CERD, 3 for CESCR, 1 for CRC-OP-SC).<sup>72</sup>

Besides failing to fulfill its reporting obligations on time, the Lebanese State provided the UN treaty bodies with some reports that entailed “cosmetic accounts”<sup>73</sup> justifying the state of affairs in the country and putting a thick rug on the deteriorating state of human rights and the committed violations.

### **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (CCPR)**

The Lebanese Government, together with the Ministry of Foreign Affairs, did not fulfill their obligations to submit their due reports to the Human Rights Committee which is stipulated in article 40 of the ICCPR. Excerpts of Article 40 of the ICCPR read the following:

*“1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.”<sup>74</sup>*

Furthermore, Lebanon fell short from providing the Human Rights Committee with the subsequent “periodic reports” that are required to be submitted “every five years”.<sup>75</sup> Initial reporting round was due on 22/03/1977. The Lebanese State submitted the report on 06/04/1983 (more than 6 years after the due date).

Second periodic reporting round was due on 21/03/1986. The Lebanese state submitted the report on 08/06/1996 (more than 10 years after the due date)

After examining the Lebanese report, the Human Rights Committee drafted concluding observations in April 1997 including a series of recommendations calling upon the Lebanese government to abide by the provisions of the ICCPR by undertaking certain crucial legislative reforms and practices to align the Lebanese domestic laws with the ICCPR.<sup>76</sup> The Committee recommendations to the Lebanese

---

<sup>71</sup> Rita Charara, “A workshop in the Lebanese Parliament to set up a national plan for Human Rights”, An-Nahar Newspaper (in Arabic), 11 December 2005, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 11/12/2005

<sup>72</sup> <http://www.unhchr.ch/TBS/doc.nsf/newhvoverduebycountry>

<sup>73</sup> Hans-Joachim Heintze, “Getting Human Rights Enforced!”, (Bonn: Development and Peace Foundation, November 1998), p.6

<sup>74</sup> Office of the High Commissioner for Human Rights, “International Covenant on Civil and Political Rights”, op. cit.

<sup>75</sup> Fact Sheet No. 15 (Rev. 1), “Civil and Political Rights: The Human Rights Committee”, (Geneva: Office of the High Commissioner for Human Rights, May 2005), p. 15

<sup>76</sup> Concluding observations of the Human Rights Committee: Lebanon, 01/04/97, CCPR/C/79/Add.78. (Concluding Observations/Comments), available on <http://www.unhchr.ch/tbs/doc.nsf>

State included among others: the creation of an “*independent national human rights commission*” with the authority to “*investigate human rights violations and to makerecommendations on remedial action to the Government*”; the review of the jurisdiction of the military courts; the review of the procedures governing the appointment of Lebanese judges; to put an end to the practice of torture in the Lebanese prisons committed by the Lebanese security forces; to undertake legislative amendments which eliminate some forms of discrimination against women, foreign workers, and other vulnerable groups; to amend the Media Law in order to tally with article 19 of the Covenant.<sup>77</sup>

The third periodic reporting round was due on 31/12/1999. As of December 2007, the Lebanese State has still not fulfilled its obligation.<sup>78</sup>

### **INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR)**

Initial reporting round was due on 30/06/1990. The Lebanese State submitted the report on 12/05/1993 (almost 3 years after the due date). Lebanon’s reporting round 2 was due on 30/06/1995. Lebanon’s reporting round 3 was due on 30/06/2000. Lebanon’s reporting round 4 was due on 30/06/2005.

As of December 2007, and after the elapse of more than 12 years from the due date of the second reporting round, the Lebanese State has still not submitted any of the three due reports.<sup>79</sup>

### **CONVENTION AGAINST TORTURE AND OTHER CRUEL INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CAT)**

Initial reporting round was due on 05/10/2001 and the second periodic reporting round was due on 05/10/2005. The Lebanese State did not submit any report to the relevant Committee.<sup>80</sup>

### **CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)**

Initial reporting round was due on 16/05/1998. The Lebanese State submitted the report on 12/11/2003 (more than 5 years after the due date). Second periodic reporting round was due on 16/05/2002. The Lebanese State submitted the report on 11/02/2005 (more than 3 years after the due date).

The third periodic reporting round was due on 16/05/2006. The Lebanese State submitted the report on 07/07/2006.<sup>81</sup>

### **INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD)**

---

<sup>77</sup> *ibid.*

<sup>78</sup> <http://www.ohchr.org/EN/Countries/MENARegion/Pages/LBIndex.aspx>

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

Initial reporting round was due on 12/12/1972. The Lebanese State submitted the report on 17/08/1972 (almost 4 months before the due date).

Lebanon's reporting round: 2; 3; 4; 5 was due on 12/12/1974. The Lebanese State submitted the report on 05/12/1980 (almost 6 years after the due date).

Lebanon's reporting round: 6; 7; 8; 9; 10; 11; 12; 13 was due on 12/12/1982. The Lebanese state submitted the report on 10/06/1997 (almost 15 years after the due date). Lebanon's reporting round: 14; 15; 16; 17 was due on 12/12/1998. The Lebanese State submitted the report on 18/01/2002 (more than 3 years after the due date).

The eighteenth periodic reporting round was due on 12/12/2006. As of December 2007, the Lebanese State has still not submitted the due report.<sup>82</sup>

### **CONVENTION ON THE RIGHTS OF THE CHILD (CRC)**

Initial reporting round was due on 12/06/1993. The Lebanese State submitted the report on 21/12/1994 (18 months after the due date).

Second periodic reporting round was due on 23/06/1998. The Lebanese State submitted the report on 04/12/1998 (almost 6 months after the due date).

The third periodic reporting round was due on 23/06/2003. The Lebanese State submitted the report on 15/11/2004 (more than 16 months after the due date).<sup>83</sup>

### **OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY (CRC-OP-SC)**

Initial reporting round was due on 08/12/2006. As of December 2007, the Lebanese State has still not submitted the due report<sup>84</sup>

### **DEATH PENALTY**

As of the end of 2009, the Lebanese State has not taken any action concerning the "Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty" (of 15 December 1989).<sup>85</sup>

The death penalty is still practiced in Lebanon. Three people were sentenced to death in 2003. The latest shocking event was the executions that took place on the 17<sup>th</sup> of January 2004.<sup>86</sup>

On the 18<sup>th</sup> of December 2007, the Lebanese representative to the sixty-second General Assembly Plenary did not vote neither in favour nor against the "Moratorium on the Use of the Death Penalty" and adopted an ambiguous position by abstaining from voting on it.<sup>87</sup>

---

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, *op. cit.*

<sup>86</sup> Amnesty International, Report: "Lebanon: A Human Rights Agenda for the Parliamentary Elections", MDE 18/005/2005, 18 May 2005, available on <http://web.amnesty.org>  
<http://www.rcponline.org>

<sup>87</sup> UN Department of Public Information, "General Assembly adopts landmark text calling for moratorium on death penalty", GA/10678, Sixty-second General Assembly Plenary, 18 December 2007, available on <http://www.un.org/News/Press/docs/2007/ga10678.doc.htm>

## **TORTURE IN LEBANON**

Lebanon acceded to the Convention Against Torture and Other Cruel Inhuman Treatment or Punishment (CAT) of 10 December 1984 on the 4<sup>th</sup> of November 2000.<sup>88</sup> However, the torture practices in Lebanon reveal that the provisions of the CAT are far away from implementation.

As of the end of 2009, the Lebanese State has not taken any action concerning the Optional Protocol to the above-mentioned Convention (adopted on the 18<sup>th</sup> of December 2002).<sup>89</sup> And thus did not give its consent to the “Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture” established under the provisions of article 2 of this Optional Protocol to carry out its functions, namely but not limited to, conducting “regular visits” to prisons and other detaining facilities in the country.<sup>90</sup>

Torture and ill-treatment are still widely practiced in prisons administered by both the Lebanese Armed Forces and the Internal Security Forces as means to extract confessions.<sup>91</sup>

Michel Moussa, a member of the Lebanese Parliament and chairman of the Parliamentary Human Rights Committee, acknowledged the practice of torture in Lebanon during an agenda-setting meeting of the Committee on the 8<sup>th</sup> of November 2005.<sup>92</sup>

## **TORTURE AT THE LEBANESE MINISTRY OF DEFENSE AND ROUMIEH PRISON**

Detainees, especially in the prison of the ministry of defense and in Roumieh prison, are still subjected to torture and ill-treatment, incommunicado detention, etc., as means of investigation procedures to coerce them to confess.<sup>93</sup>

Allegations from the brother of one of the suspects in the Hariri killing that his father, who was completely healthy, died shortly after his release from detention by the Lebanese security apparatus.<sup>94</sup>

A Human Rights Watch statement on the 11<sup>th</sup> of May 2007 detailed that nine persons accused of “conspiring to commit crimes against the state” were arrested by the Lebanese security apparatus on the 31<sup>st</sup> of March 2007 and were detained at the

---

<sup>88</sup> <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>

<sup>89</sup> *ibid.*

<sup>90</sup> Optional Protocol to Convention Against Torture and Other Cruel Inhuman Treatment or Punishment Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. Available on

<http://www.unhchr.ch/html/menu2/6/cat/treaties/opcat.htm>

<sup>91</sup> Human Rights Watch, Press Release: “Lebanon: Military Courts Used to Prosecute Dissent”, *op. cit.*

<sup>92</sup> “Human Rights Committee set up its agenda. Moussa: we will follow the cases of enforced disappearance”, *An-Nahar Newspaper* (in Arabic), 09 November 2005, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 09/11/2005

<sup>93</sup> <http://www.lebanese-forces.org/hr/wizaraprisin.htm>

<sup>94</sup> Khaled Abu Adas, the brother of Ahmad Abu Adas, a suspect of the Hariri killing, declared that their father was either “poisoned or killed”. Khaled lives in Germany.

Nada Bakri, “Alleged Hariri assassin’s sibling says father was killed. Abu Adas seeks protection for his family”, *The Daily Star*, 09 April 2005, accessed from [www.dailystar.com.lb](http://www.dailystar.com.lb) on 09/04/2005

prison of the Lebanese Ministry of Defense where they were subjected to torture and ill-treatment for seven days.<sup>95</sup> Moreover, some detainees died while in confinement.<sup>96</sup> No independent judicial investigation has been carried out concerning the allegations of torture and ill-treatment.

The International Committee of the Red Cross (ICRC) is still denied access to the prisons and detention centres and especially the prisons of the Ministry of Defense and other prisons operated by the Lebanese security apparatuses.<sup>97</sup>

#### **ARBITRARY ARRESTS AND ABUSING THE RIGHT OF FAIR TRIAL**

University students were arrested for criticizing the policies of the Lebanese Government. On the same context, some intellectuals were arrested and accused of being collaborators with Israel. Others were arrested for allegations of terrorism. The arrested persons were tried by the Military Court which, obviously, falls short of respecting and complying by the international standards and is subjected to political interferences, and where none of the fair legal standards are followed.<sup>98</sup> It is noteworthy to mention that they were subjected to inhuman and degrading treatment.<sup>99</sup>

#### **ENFORCED DISAPPEARANCES AND LEBANESE DETAINEES IN SYRIA**

The Lebanese Government has shown total neglect, acquiescence, and irresponsible approach vis-à-vis the disappearance issue.<sup>100</sup> The Lebanese State has a moral obligation to respect the provisions of the UN Declaration on the Protection of all Persons from Enforced Disappearance (General Assembly resolution 47/133 of the 18<sup>th</sup> of December 1992). Article 5 stipulates that:

*“In addition to such criminal penalties as are applicable, enforced disappearances render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law”.*<sup>101</sup>

---

<sup>95</sup> Human Rights Watch, Joint Statement by human Rights Watch and CLDH: “Lebanon: Investigate Torture Allegations at Ministry of Defense”, Beirut, 11 May 2007, available from <http://hrw.org/english/docs/2007/05/11/leban015908.htm>

<sup>96</sup> Amnesty International, Report: “Lebanon: A Human Rights Agenda for the Parliamentary Elections”, op. cit.

<sup>97</sup> Amnesty International Report on year 2003- Lebanon, available from <http://web.amnesty.org>

<sup>98</sup> *ibid.*

<sup>99</sup> Another example was the detention of a Canadian working with a Christian missionary group on the basis of an allegation that he was a collaborator with the Israelis and he was held in prison with total neglect of all his rights till his release due to international pressure as well as the intervention of the Canadian ministry of foreign affairs with the Lebanese government.

Human rights and democracy situation in Lebanon: Synthesis of events in 2003, op. cit., p. 8

<sup>100</sup> “Solide ”: refute the Lebanese official declarations and the state bears the responsibility of the disappearances of its citizens, An-Nahar Newspaper (in Arabic), 14 February 2005, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 14/02/2005

<sup>101</sup> UN Declaration on the Protection of all Persons from Enforced Disappearance (General Assembly resolution 47/133 of 18 December 1992), accessed from [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.47.133.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.47.133.En?OpenDocument)

Notwithstanding that the Lebanese government has only signed the “Convention for the Protection of All Persons from Enforced Disappearance” of 20 December 2006 on the 6<sup>th</sup> of February 2007<sup>102</sup> and did not pursue any further action towards the ratification of the Convention after that date, this does not release the Government from its moral and legal obligations towards the plights and sufferings of the detainees and their families.

Hundreds of Lebanese are still detained in the Syrian prisons. SOLID (Support of Lebanese in Detention), a Lebanese Human Rights NGO, estimated the number of Lebanese detained illegally in Syria to around 200. Those prisoners are subjected to torture and ill-treatment as documented by several human rights NGOs and the testimony of a few recently released ex-prisoners.<sup>103</sup>

### **HARASSMENT OF HUMAN RIGHTS DEFENDERS**

Several cases of harassment, abuse, intimidation, arbitrary arrest and detention, and ill-treatment of human rights activists were documented in Lebanon.<sup>104</sup>

For instance, two prominent human rights activists, among others, were arbitrary arrested and harassed in 2003. Dr. Mughraby, well known for his opposition to the corruption in the judiciary, was arrested and ill-treated. Another activist, Mrs. Trad, working in the advocacy of the rights of foreign workers in Lebanon was arrested due to her high critical stance on the Lebanese government ill-treatment and illegal arrest of several foreign workers in Lebanon.<sup>105</sup>

In March 2010, the British passport of Nizar Saghieh, a human rights lawyer and a dual British and Lebanese citizen, was seized by the Lebanese General Security for two days, and returned after the intervention of the Lebanese Minister of Interior Ziad Baroud as well as several international and local human rights organizations. Saghieh was defending the rights of Iraqi refugees in Lebanon.<sup>106</sup>

### **RIGHTS OF WOMEN**

Lebanon acceded to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 18 December 1979 on the 16<sup>th</sup> of May 1997.<sup>107</sup>

As of the end of 2009, the Lebanese State has not taken any action concerning the Optional Protocol to the above-mentioned Convention (adopted on the 6<sup>th</sup> of October 1999).<sup>108</sup> And hence did not recognize the competence of “the Committee on the

---

<sup>102</sup>[http://untreaty.un.org/English/notpubl/IV\\_16\\_english.pdf](http://untreaty.un.org/English/notpubl/IV_16_english.pdf)

<http://www.unhchr.ch/tbs/doc.nsf>

<sup>103</sup> Rassemblement Canadien pour le Liban (RCPL) Annual Report 2004, (Quebec: RCPL, February 2005), p. 12

<sup>104</sup> Amnesty International, Report: “Lebanon: A Human Rights Agenda for the Parliamentary Elections”, op. cit.

<sup>105</sup> Human rights and democracy situation in Lebanon: Synthesis of events in 2003, op. cit., p. 10

<sup>106</sup> Human Rights Watch: “Lebanon: Investigate Seizure of Human Rights Lawyer’s Passport”, Beirut, 08 March 2010, available from <http://www.hrw.org/en/news/2010/03/08/lebanon-investigate-seizure-human-rights-lawyers-passport>

<sup>107</sup><http://www.unhchr.ch/tbs/doc.nsf>

<sup>108</sup><http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>

Elimination of Discrimination against Women” to receive and consider individual complaints as stipulated by articles 1 and 2 of the Optional Protocol to CEDAW.<sup>109</sup>

## RESERVATIONS TO THE CEDAW

The Lebanese Government made a series of reservations to the CEDAW that undermine the core and the ultimate objective of the Convention. The reservations entered are regarding article 9 (2), article 16 (1) (c, d, f, g).<sup>110</sup> Article 9 of CEDAW reads the following:

“2. States Parties shall grant women equal rights with men with respect to the nationality of their children”.<sup>111</sup>

Article 16 of CEDAW

“1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.”<sup>112</sup>

Similarly, the Lebanese Government declared that “it does not consider itself bound by paragraph 1” of article 29.<sup>113</sup>

On the 26<sup>th</sup> of June 1998, the Government of Denmark raised an objection to the Lebanese reservations as they are “incompatible with the object and purpose of the present Convention”.<sup>114</sup>

---

<sup>109</sup> Optional Protocol to the Convention on the Elimination of Discrimination against Women (CEDAW), adopted by General Assembly resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999, entered into force 22 December 2000, available on <http://www2.ohchr.org/english/law/cedaw-one.htm>

<sup>110</sup> <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>  
<http://www.lnf.org.lb/windex/brief1.html>

<sup>111</sup> Convention on the Elimination of All Forms of Discrimination against Women. Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entered into force on the 3rd of September 1981, in accordance with article 27(1). Available on <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>

<sup>112</sup> *ibid.*

<sup>113</sup> <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>

Convention on the Elimination of All Forms of Discrimination against Women. *op. cit.*

Article 29 (1) of CEDAW reads the following:

“Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.”

<sup>114</sup> <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N36>

## SEVERAL ASPECTS OF DISCRIMINATION

Personal Status Laws in Lebanon include flagrant discriminatory laws against women. These laws include discriminatory provisions, regarding marriage, divorce, parenting and inheritance. For instance, these laws forbid a Lebanese mother to confer the Lebanese citizenship to her children.<sup>115</sup>

Similarly, the Lebanese Penal Code includes a provision of “mitigating excuse” for a man who kills his wife, or a “close female relative” if he finds her committing adultery or an “illegal sexual intercourse” or even in a “suspicious situation”.<sup>116</sup> Domestic violence against women including rape and “honour killings”/“honour crimes” is still practiced in Lebanon.<sup>117</sup> On another level, the sectarian and confessional system in Lebanon is affecting negatively the rights of women in the country. The absence of a civil marriage law is an illustrative example.<sup>118</sup>

## POLITICAL PARTICIPATION OF WOMEN

Notwithstanding that Lebanon was the first among the Arab countries to grant Lebanese women the right to vote and to run as candidates in parliamentary elections in 1952<sup>119</sup>, the state of political participation of Lebanese women is unsatisfactory.

Few women are involved in politics. Before 2005, 2.3 % of parliamentary seats were held by women. And the ratio of female income to male earned income is: 0.31.<sup>120</sup> In the Lebanese parliamentary elections of 2005, six women won seats in the Lebanese Parliament (out of the total of 128 parliamentary seats).<sup>121</sup> This constituted 4.7 % of the elected parliamentarians.<sup>122</sup> Similarly, just three out of three hundreds municipal councils are headed by women.<sup>123</sup>

---

<sup>115</sup> Amnesty International, Report: “Lebanon: A Human Rights Agenda for the Parliamentary Elections”, op. cit.

<sup>116</sup> *ibid.*

<sup>117</sup> Amnesty International Report on year 2003- Lebanon, op. cit.

Euro-Mediterranean Human Rights Network, “Achieving Gender Equality in Euro-Mediterranean Region-Change is possible and necessary”, (Copenhagen: EMHRN, October 2006), p.12

<sup>118</sup> Lebanon Country Strategy Paper 2002-2006 and National Indicative Programme 2002-2004, op. cit.

<sup>119</sup> United Nations Development Programme, “The Arab Human Development Report 2005: Towards the Rise of Women in the Arab World”, (New York: UNDP, 2006), p. 9

<sup>120</sup> United Nations Development Programme, Human Development Report 2005: “International cooperation at a crossroads: Aid, trade and security in an unequal world”, (New York: UNDP, 2005)

<sup>121</sup> Euro-Mediterranean Human Rights Network, “Achieving Gender Equality in Euro-Mediterranean Region-Change is possible and necessary”, op. cit., pp. 14-15

And <http://www.pogar.org/countries/gender.asp?cid=9>  
<http://www.lp.gov.lb/Presidency/nouwab.htm> (in Arabic)

<sup>122</sup> Global Database of Quotas for Women, International IDEA (Institute for Democracy and Electoral Assistance) and Stockholm University, available from <http://www.quotaproject.org>

<sup>123</sup> Lebanon Country Strategy Paper 2002-2006 and National Indicative Programme 2002-2004, op. cit.

## DOMESTIC WORKERS AND TRAFFICKED WOMEN

Domestic female foreign workers from African and Asian countries are subjected to involuntary domestic servitude, whereas women from some Eastern European countries are trafficked and sexually exploited in the country.<sup>124</sup>

These female domestic workers are made to work excessive hours by their Lebanese employers, face restrictions on their freedoms of movement and association. There are several documented cases of sexual and physical abuse.<sup>125</sup>

Lebanese NGOs estimate the number of women who are recruited as domestic workers in Lebanon to be around 200,000. These workers are mainly Sri Lankan, Filipinas and Ethiopians.<sup>126</sup> Similarly, thousands of trafficked women work in the sex industry and come mainly from Eastern European countries like Russia, Ukraine, Moldova and Belarus.<sup>127</sup>

Sigma Huda, the former UN Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children visited Lebanon on 7-16 September 2005 to assess the trafficking situation. After conducting her mission, Huda reported that trafficking of women who work as domestic workers or forced to work in the sex industry in the country constitutes an alarming problem. She mentioned in her report to the UN Commission on Human Rights that “*Lebanon has a significant problem of trafficking in persons that particularly affects foreign women recruited as domestic workers and foreign women in the sex industry*”.<sup>128</sup>

Furthermore, she voiced her concern that the Lebanese government is not performing “due diligence” in preventing trafficking or protecting its victims. The report stated that “*the Government has until now not done enough to prevent trafficking, to investigate, prosecute and punish traffickers and to assist and protect trafficked persons*”. She recommended that the Lebanese government has to undertake “*necessary legal and institutional reforms*” that tally with international human rights standards in order to address the trafficking situation in the country.<sup>129</sup>

## RIGHTS OF CHILDREN

The Lebanese government signed the Convention on the Rights of the Child (CRC) of 20 November 1989 on the 26<sup>th</sup> of January 1990 and ratified it on the 14<sup>th</sup> of May 1991.<sup>130</sup>

---

<sup>124</sup> Commission of the European Communities, Commission Staff Working paper, Annex to: “European Neighbourhood Policy” Country Report Lebanon, COM (2005) 72 final, Brussels, SEC (2005) 289/3, p. 15

<sup>125</sup> Amnesty International, Report: “Lebanon: A Human Rights Agenda for the Parliamentary Elections”, op. cit.

<sup>126</sup> Nancy McNally, “The contemporary slavery in Lebanon”, An-Nahar Newspaper (in Arabic), 21 April 2006, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 21/04/2006

<sup>127</sup> *ibid.*

<sup>128</sup> United Nations Economic and Social Council, Commission on Human Rights Sixty-second session, Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda “Integration of the Human Rights of Women and a Gender Perspective”, E/CN.4/2006/62/Add.3, 20 February 2006, available from <http://daccessdds.un.org/>

<sup>129</sup> *ibid.*

<sup>130</sup> Office of the High Commissioner for Human Rights, “Convention on the Rights of the Child”, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of

It signed the “Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict” of 25 May 2000 on the 11<sup>th</sup> of February 2002 but did not take further action on it since that date.<sup>131</sup>

Similarly, it signed the “Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography” of 25 May 2000 on the 10<sup>th</sup> of October 2001 and ratified it on the 8<sup>th</sup> of November 2004.<sup>132</sup>

The state of the rights of children is very deteriorating in the country.

Poor children in Lebanon are not enjoying the adequate protection in terms of health, education, prevention from economic or psychological need. Besides minimum age requirement for work is not respected.<sup>133</sup>

Furthermore, the recent political-legal heresy in Lebanon is the draft law submitted by the government to the Lebanese parliament calling for Lebanon to join a so-called “Convention on the rights of the Muslim child” which, besides being contrary to the Lebanese Constitution and to the universality of human rights, constitutes an unprecedented stride towards the Islamization of the Lebanese State.<sup>134</sup>

#### **THE GAP BETWEEN THE PERCEPTION OF CHILDREN RIGHTS IN THE EU SCANDINAVIAN COUNTRIES AND IN LEBANON: AN ILLUSTRATIVE EXAMPLE**

During a seminar held at the Danish Institute of Human Rights in Copenhagen, Denmark on the 29<sup>th</sup> of November 2006, Bente Ingvarsen, a representative of Save the Children –Denmark, raised the issue of a new conceptual approach to “poverty” as referred to poverty in family network. According to Ingvarsen, a “poor” child refers to one with a “poor family network”. Ingvarsen stressed on the need to develop programmes and projects with the aim of taking care emotionally of these children who suffer from this kind of “poverty”.

This is to illustrate the gap between the state of children’s rights in Denmark, a Scandinavian Northern EU country, and Lebanon, a Middle Eastern country, where political expediency, diplomatic hypocrisy, corruption, fundamentalism, combined to other factors, are denying children their basic rights, including the right to life.

#### **MIGRANT WORKERS**

As of the end of 2009, the Lebanese State has not taken any action concerning the “International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families” (MWC) of 18 December 1990.<sup>135</sup>

Lebanon acceded to the “International Convention on the Elimination of All Forms of Racial Discrimination” (ICERD) of 21 December 1965 on the 12<sup>th</sup> of December 1971.<sup>136</sup> However, the Lebanese government did not recognize the

---

20 November 1989, entered into force on the 2<sup>nd</sup> of September 1990, in accordance with Article 49. Available on

<http://www.unhchr.ch/html/menu3/b/k2crc.htm>

<http://www2.ohchr.org/english/bodies/ratification/11.htm>

<sup>131</sup>[http://www2.ohchr.org/english/bodies/ratification/11\\_b.htm](http://www2.ohchr.org/english/bodies/ratification/11_b.htm)

<sup>132</sup>ibid.

<sup>133</sup>Human rights and democracy situation in Lebanon: Synthesis of events in 2003, op. cit., p. 17

<sup>134</sup>“Archbishop Rahi Accuses Government of Islamizing Lebanon”, 6 July 2007, accessed from

<http://www.nowlebanon.com/Default.aspx> on 06/07/2007

<sup>135</sup><http://www.unhchr.ch/tbs/doc.nsf>

<sup>136</sup><http://www.unhchr.ch/tbs/doc.nsf>

competence of “the Committee on the Elimination of Racial Discrimination” (CERD) to receive and consider complaints from individuals as it did not made a declaration as stipulated by article 14 of the ICERD.<sup>137</sup>

In 2005, the UN Committee on Elimination of Racial Discrimination (CERD) expressed its dissatisfaction about the situation of migrant workers who suffer from a lot of discrimination in Lebanon and called upon the Lebanese government to undertake all necessary measures to protect the rights of “*all migrant workers, in particular domestic workers*”.<sup>138</sup>The migrant workers in Lebanon suffer from grave violations of their rights, mainly but not limited to: mistreatment and exploitation by the employment agencies and by their employers, harassment from the police and judicial system, exploitation and forced prostitution of women workers etc.<sup>139</sup>

### **RIGHTS OF HOMOSEXUALS AND LESBIANS**

Homosexuals and lesbians are ill-treated and detained systematically in Lebanon and are suffering from societal persecution.

They are often discriminated against by the authorities, religious groups and society.<sup>140</sup> Article 534 of the Lebanese Penal Code stipulates that “*unnatural sexual intercourse*” is a criminal activity, and it is interpreted as “*homosexual relationships*”.<sup>141</sup>

### **CITIZENS’ SECURITY**

Concerning citizens’ security, some regions in Lebanon are not provided with efficient security measures by the State and are exclusively controlled by some military wings of political groups, and Lebanese and Palestinian militias. Those include large parts of Southern Lebanon, the Bekaa, Northern Lebanon, and the Palestinian refugee camps. A lot of events occurred in those areas that threatened the security of the citizens such as explosion of bombs in civilian areas.<sup>142</sup>

### **RIGHTS OF REFUGEES AND ASYLUM SEEKERS**

Lebanon is not a State Party to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. However, this does not release Lebanon from respecting and abiding by the principle of ‘non-refoulement’ that has become a customary international law.<sup>143</sup>

---

<sup>137</sup> International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entered into force 4 January 1969, available on [http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm)  
<http://www.unhchr.ch/html/menu6/2/fs12.htm>

<sup>138</sup> Amnesty International, Report: “Lebanon: A Human Rights Agenda for the Parliamentary Elections”, op. cit.

<sup>139</sup> Mc Dermott, “Afro-Asian migrants in Lebanon, report of the committee on pastoral care of Afro-Asian migrant workers”, 2003, p.22

<sup>140</sup> Lebanese Protection for the Lesbian, Gay, Bisexual and Transgender Community (Helem), <http://www.helem.net>

<sup>141</sup> Rassemblement Canadien pour le Liban (RCPL) Annual Report 2004, op. cit., p. 24

<sup>142</sup> Human rights and democracy situation in Lebanon: Synthesis of events in 2003, op. cit., p.17

<sup>143</sup> Lebanon: Amnesty International reiterates its concern on the situation of refugees and asylum seekers, AI Index: MDE 18/005/2002, accessed from <http://web.amnesty.org/library>

Lebanese national laws also allow foreigners to seek asylum in Lebanon. As a matter of fact, article 26 of the Foreigners Entry and Residence Law (of 10 July 1962) enables a foreigner “*whose life or freedom is in danger for political reasons*” to seek asylum in Lebanon.<sup>144</sup>

The Lebanese State has also ratified on the 5<sup>th</sup> of October 2000 the 1984 “UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” that entered into force for Lebanon on the 4<sup>th</sup> of November 2000.<sup>145</sup> This Convention prohibits the “*refoulement*” of an individual to a country where he/she could be at risk of facing torture, inhuman or degrading treatment or punishment.

Similarly, Lebanon has ratified the Fourth Geneva Convention of 1949 (relative to the protection of civilian persons in the time of war) on the 10<sup>th</sup> of April 1951.<sup>146</sup>

Unfortunately, Lebanon record concerning the treatment of refugees is shameful. Lebanese authorities are continuously disregarding the applicable domestic laws and international standards of protection.

The situation of refugees and asylum-seekers in Lebanon is very deteriorating. This is well highlighted in the different reports of both national and international non-governmental organizations focusing on human rights issues and concerned with human rights protection, promotion and monitoring, such as Amnesty International, Human Rights Watch, as well as Governmental reports as the U.S. Department of State Reports on human rights practices.

The country is continuously adopting stricter measures to prevent the entry of asylum seekers into the Lebanese borders. Besides, refugees in Lebanon do not have a legal status as the Lebanese Government has not ratified the aforementioned international refugee instruments.

## REFUGEES

There is an estimated number of 352 668 Palestinian refugees registered by the United Nations Relief and Works Agency (UNRWA) in Lebanon. Palestinian refugees in the country suffer from several forms of discrimination. There is a widespread denial and neglect of their basic human rights.<sup>147</sup>

These refugees live in overpopulated and overcrowded camps in dire poverty. Their exact number is unknown due to the lack of efficient and reliable statistics in the country. The Lebanese Government does not provide any kind of services to the refugees who live in bad economic conditions in an environment affected by drugs, crimes and prostitution.

They are being discriminated against, and denied the right to work in specific skilled jobs, to own property, and the freedom of movement.<sup>148</sup> The refugee children suffer from a lot of diseases and lack of nutrition.<sup>149</sup>

The Lebanese laws do not apply to the Palestinian refugee camps and the Government authorities are not involved in their internal affairs.

---

<sup>144</sup> *ibid.*

<sup>145</sup> <http://www.unhchr.ch/html/menu2/6/cat/treaties/conratification.htm>

<sup>146</sup> [http://www.icrc.org/eng/party\\_gc](http://www.icrc.org/eng/party_gc)

<sup>147</sup> Amnesty International Report on year 2003- Lebanon, *op. cit.*

<sup>148</sup> *ibid.*

<sup>149</sup> Radwan Akil, “Khalifeh was shocked by the views and Qabani held his tears”, An-Nahar Newspaper (in Arabic), 25 March 2006, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 25/03/2006

In its report on March 2004, the UN Committee on Elimination of Racial Discrimination (CERD) mentioned the widespread discrimination against the Palestinian refugees in Lebanon. The CERD report voiced its concern about some aspects of flagrant discrimination including “*access to work, health care, housing and social services as well as the right to effective legal remedies*”.<sup>150</sup>

Moreover, those refugees suffer from growing sentiments of hatred, aggressive activities from large groups of the Lebanese population. The Palestinian refugee issue in the country has become devoid from its humanitarian aspect and seen more in “*political terms*”<sup>151</sup>.

### **ASYLUM SEEKERS**

A lot of violations concerning refugees and asylum-seekers have been documented such as systematic arrests, forcible return, deportation, torture, ill-treatment, and even the detention of individuals recognized as refugees by the UNHCR or asylum-seekers whose cases are pending before the UNHCR office in Beirut.

For instance, Amnesty International gave concrete examples of asylum seekers who died in custody from inadequate medical assistance, as well as cases of maltreatment by the Lebanese detention authorities.<sup>152</sup>

Furthermore, a lot of asylum seekers have been charged with entering Lebanon illegally<sup>153</sup> which is in contradiction with the aforementioned Lebanese national and international obligations. For instance, hundreds of refugees and asylum-seekers from countries suffering from war or systematic human rights violations such as Iraq, Sudan and Somalia, were arrested, detained and charged for illegal entry into Lebanon.<sup>154</sup>

Amnesty International has reported the killing of a Sudanese asylum-seeker by a Lebanese General Security officer while attempting to arrest him for illegal entry into Lebanon.<sup>155</sup>

### **ABSENCE OF FREEDOMS**

The Report of the UN Secretary General of March 2005 entitled “In Larger Freedom: Towards Development, Security and Human Rights for All” highlighted that the lack of three basic freedoms (freedom from want, freedom from fear, and freedom to live in dignity) is the main obstacle to development, security and human rights.<sup>156</sup>

---

<sup>150</sup> Concluding observations of the Committee on the Elimination of Racial Discrimination : Lebanon, 28/04/2004, CERD/C/64/CO/3, (Concluding Observations/Comments), available on <http://www.unhchr.ch/tbs/doc.nsf>

<sup>151</sup> Fact Sheet No. 20, “Human Rights and Refugees”, (Geneva: Office of the High Commissioner for Human Rights), available on <http://www.unhchr.ch/html/menu6/2/sheets.htm>

<sup>152</sup> Lebanon: Amnesty International reiterates its concern on the situation of refugees and asylum seekers, op. cit.

<sup>153</sup> UA 318/00 Torture/Medical concern/detention of asylum seekers, Public AI: MDE 18/13/00, 18 Oct 2000. Accessed from <http://web.amnesty.org>

<sup>154</sup> Lebanon: Refugees and asylum seekers at risk, op. cit.

<sup>155</sup> Lebanon: Killing of asylum-seeker should be thoroughly investigated, AI Index MDE 18/004/2001 – News service Nr. 64, 6 Apr. 2001. Accessed from <http://web.amnesty.org>

<sup>156</sup> United Nations General Assembly, “In Larger Freedom: Towards Development, Security and Human Rights for All”, Report of the Secretary General, A/59/2005, 21 March 2005, available from <http://daccessdds.un.org>

The “Arab Human Development Report 2002” detailed that what hinders the development in Arab countries, including Lebanon is the regrettable deficit in three essential factors: freedom, knowledge, and womanpower. Freedom: unfair and restricted elections, lack of clear separation of power (between the executive, legislative and judiciary powers), curtailment in the freedom of expression in the media, repression of the civil society participation; Knowledge: Investment in the research centres is “less than one-seventh of the world average”; Women status: women participation in the political life and economic activities is very low.<sup>157</sup>

Two years later, the “Arab Human Development Report 2004” exposed again the deficiency in the “state of freedoms” in the Arab countries.<sup>158</sup>

### THE STATE OF FREEDOMS IN LEBANON

The Lebanese Constitution guarantees the freedoms of expression, press, assembly, and association. Article 13 of the Constitution:

*“The freedom to express one's opinion orally or in writing, the freedom of the press, the freedom of assembly, and the freedom of association are guaranteed within the limits established by law”.*<sup>159</sup>

As already mentioned, Lebanon is a founding member of the United Nations and should abide by the principles of the Universal Declaration of Human Rights (UDHR) of 1948, including Article 20.<sup>160</sup>

Similarly, Lebanon acceded to the “International Covenant on Civil and Political Rights” (ICCPR) of 16 December 1966 (entered into force on the 23<sup>rd</sup> of March 1976) on the 3<sup>rd</sup> of November 1972. Hence, the Lebanese authorities should guarantee the rights stipulated in the following articles: Article 19 (freedom of expression); Article 21 (peaceful assembly); and Article 22 (freedom of association).<sup>161</sup>

---

<sup>157</sup> The Economist staff, “Arab Development: Self-doomed to failure”, The Economist, 04 July 2002, accessed from [www.economist.com](http://www.economist.com) on 04/11/2005

<sup>158</sup>Rima Khalaf, Speech by H.E. Dr. Rima Khalaf, UN Assistant Secretary-General and Director of the Regional Bureau for Arab States United Nations Development Programme (UNDP) : “Arab Human Development Report 2004: Towards Freedom in the Arab World”, (Amman-Jordan: UNDP, April 2005)

<sup>159</sup>[http://www.servat.unibe.ch/icl/le00000\\_.html#A013](http://www.servat.unibe.ch/icl/le00000_.html#A013)

<sup>160</sup>Article 20 of the UDHR:

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

<http://www.udhr.org/UDHR/default.htm>

<sup>161</sup>International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 49, available on

[http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)

<http://www2.ohchr.org/english/bodies/ratification/4.htm>

<http://www.unhcr.ch/tbs/doc.nsf>

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

Moreover, Lebanon should be committed to implement the UN Declaration on Human Rights Defenders (1998) adopted by consensus by the General Assembly.<sup>162</sup>

Unfortunately, Lebanon has a very bad record concerning the level of freedom. It is classified as a “*Not Free*” country. It has an index of 6 concerning the enjoyment of political rights, and a 5 index concerning civil liberties on a scale where 1 represents the most free and 7 the least free according to the Freedom House Index which uses 14 factors for its assessment such as, but not limited to: press free of censorship, freedom of assembly and demonstration, freedom of religion and free trade unions. Furthermore, Lebanon has a high corruption rank of 71 on a scale range 0-100 with a press freedom rank of 105 and democracy rank of 113 on a scale range of 0-149.<sup>163</sup>

Freedom of the press and expression is not better off in the country. Lebanon is ranked 106 out of 166 countries as regard to the press freedom according to Reporters Without Borders.<sup>164</sup>

The Lebanese Government has enacted laws prohibiting the criticism and the attack of the dignity of the Head of State or foreign leaders, and banning the

---

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

#### Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

#### Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

<sup>162</sup>Full text of the Declaration available at:

<http://www2.ohchr.org/english/issues/defenders/docs/declaration/declaration.pdf>

#### Article 5

For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

- (a) To meet or assemble peacefully;
- (b) To form, join and participate in non-governmental organizations, associations or groups;
- (c) To communicate with non-governmental or intergovernmental organizations.

<sup>163</sup> data on year 2001-2002

Politics and Freedom: Civil liberties index, Freedom House, World Resources Institute, 2003 accessed through <http://earthtrends.wri.org>

[http://earthtrends.wri.org/text/pdfs/country\\_profiles/env\\_cou\\_422.pdf](http://earthtrends.wri.org/text/pdfs/country_profiles/env_cou_422.pdf)

The World Bank, *Assessing Aid: What Works, What Doesn't, and Why*, (New York: Oxford University Press, 1998), p. 135

<http://www.worldaudit.org/countries/le.htm>

Note: the democracy rank corresponds to May 2004.

<http://www.worldaudit.org/democracy.htm>

<http://www.freedomhouse.org/research/freeworld/2004/combined2004.pdf>

<sup>164</sup>World Audit Report 2004, Freedom of the press 2003

publication of any information aiming at disturbing the relations between Lebanon and Syria or affecting the internal security of the two states.<sup>165</sup>

One major scandal relating to the restriction on the freedom of expression in Lebanon was the closure of an opposition channel MTV after the parliamentary elections in 2002. Furthermore, an illegal final verdict was issued by the Court of Cassation on 24 April 2003 stipulating that this channel should remain closed, although most lawyers and law experts in Lebanon opposed this verdict as it is political rather than judicial.<sup>166</sup>

Another example was the ban of a TV programme on another Lebanese channel NTV on the grounds that it disturbed the relations between the Kingdom of Saudi Arabia and Lebanon.<sup>167</sup> The same TV channel was banned on the same year from criticizing Lebanese and Syrian top intelligence officers.<sup>168</sup>

After the Syrian troops' pullout from the country in April 2005, the situation did not improve as several prominent journalists were attacked physically, eliminated and silenced to death. On April 2009, the internal security forces used excessive force while preventing peaceful demonstrators to reach the Parliament. The demonstration was organized by the Support of Lebanese in Detention and Exile (S.O.L.I.D.E.) Association.<sup>169</sup>

As far as freedom of religion is concerned, despite the fact that freedom of religion is guaranteed by the Lebanese Constitution, there are evident indicators of the continuous decline of the religious freedom in the country.

Several events in the recent years exposed the rise in religious intolerance. Furthermore, several attacks were based on religious motives.

A person from the Dutch missionary Centre in Tripoli was killed on the 7<sup>th</sup> of May 2003. An-Nahar newspaper was attacked publicly by Islamic fundamentalist groups for publishing an article named "letter addressed to God".<sup>170</sup>

On the 5<sup>th</sup> of February 2006, as a protest to the publication of cartoons depicting the prophet Mohammad by a Danish newspaper, thousands of Sunnis demonstrators attacked the Danish Consulate in Achrafieh, a Christian populated area in Beirut, and they extended their attacks to two Christian churches in the neighbourhood of the Consulate.<sup>171</sup> Similarly, on the 13<sup>th</sup> of February 2007, three persons were killed and more than twenty were injured as a result of a terrorist attack against two buses in Ain Alaq, a Christian dominated area in Mount Lebanon.<sup>172</sup>

---

<sup>165</sup> Human rights and democracy situation in Lebanon: Synthesis of events in 2003, op. cit., p. 5

<sup>166</sup> Lebanonwire, 2003, Final Verdict on MTV: shut down for good; Court ruling sparks angry reactions. Accessed from <http://www.lebanonwire.com/0304/03042408DS.asp>

<sup>167</sup> Naharnet, Government Takes on NTV alter MTV in Freedom Battle, 3 January 2003. accessed from <http://www.naharnet.com/domino/tn/Newsdsk.nsf/story>

<sup>168</sup> NTV hit by 2 day shutdown over news violations, Samaha suspends bulletins, political programmes, headline readings, 17 December 2003, accessed from <http://www.lebanonwire.com/0312/03121718DS.asp>

<sup>169</sup> Euro-Mediterranean Human Rights Network, "Monitoring Report on Freedom of Association in the Euro-Mediterranean Region", (Copenhagen: EMHRN, December 2009), p. 43

<sup>170</sup> Human rights and democracy situation in Lebanon: Synthesis of events in 2003, op. cit., p. 20  
US Department of State, Lebanon Religious Freedom Report 2003, available from <http://www.state.gov/g/drl/rls/irf/2003/24456.htm>

<sup>171</sup> Lebanon 2007 Country Report on International Religious Freedom, available on <http://lebanon.usembassy.gov/root/pdfs/lebanonifr07.pdf>

<sup>172</sup> *ibid.*

## **INTERMIX OF SEVERAL FACTORS**

Ghassan Rubeiz stated four factors contributing to the perplexing situation of the Middle Eastern societies and to curtailing their freedoms. According to Rubeiz, “*rulers occupy freedoms, religious authorities occupy the mind, colonialists occupy territory, and local militias occupy the street*”.<sup>173</sup>

Three out of the four factors are applicable to the Lebanese case, namely: rulers, religious authorities, and local militias. Moreover these factors are closely interconnected as the delicate status quo in Lebanon has exposed, to the extent that some Lebanese rulers at the top echelon of the supposedly democratic institutions are former war lords and current militias leaders, some religious leaders control militias and exert substantial influence on the decisions of the rulers pertaining to their religious affiliation, in an endless circle that is adding to the complexity and perplexity of the state of affairs in the country.

## **CONCLUDING REMARKS: DEFICIT IN THE EFFECTIVE PARTICIPATION OF THE CIVIL SOCIETY**

The legislation in the Mashrek countries, including Lebanon, constitutes a major obstacle hampering the effective participation of the civil societies in those countries. On the occasion of the 10<sup>th</sup> anniversary Euro-Mediterranean Summit held in Barcelona on the 27-28 November 2005, the Euro-Mediterranean Human Rights Network (EMHRN) Secretariat issued a press release, in which the Network criticized the fact that the role of the civil society is still hampered by the legislation in the Southern Mediterranean countries which does not tally with international human rights standards.<sup>174</sup>

The legal system is outdated and cumbersome and the development of laws is a time-consuming process. The registration process is lengthy. It can take few months to be completed.

The law of Associations in Lebanon dates back to late Ottoman period of 1909. This law was applied to political and non-political associations. This law was affected by a set of “relatively liberal” amendments during the French mandate (1920-1943). Those laws have undergone slight modifications after the independence of the country.<sup>175</sup>

The Ministry of Interior (MOI) is in charge of the registration of non-profit organizations. The MOI has hindered the process of applications of several human rights NGOs.<sup>176</sup> For instance, the HELEM Association (Lebanese Protection for the

---

<sup>173</sup> Ghassan Rubeiz, “The four occupations smothering the Middle East”, The Daily Star, 10 November 2006, accessed from [www.dailystar.com.lb](http://www.dailystar.com.lb) on 10/11/2006

<sup>174</sup> Euro-Med Human Rights Network, press release: “EMHRN Statement following the 10<sup>th</sup> anniversary Euro-Mediterranean Summit, Barcelona 27-28 November 2005. Back to square one?”, Copenhagen 19 December 2005, available from [www.euromedrights.net](http://www.euromedrights.net)

<sup>175</sup> Khaldoun Abou Assi, CIVICUS Civil Society Index Report for the Republic of Lebanon, “Lebanese Civil Society: A Long History of Achievements”, (Beirut: CIVICUS, 2006), pp. 72-73

<sup>176</sup> *ibid.*, p. 73

Lesbian, Gay, Bisexual and Transgender Community)<sup>177</sup> is still awaiting its “declaration of receipt”<sup>178</sup> from the Lebanese Ministry of Interior since 2005.<sup>179</sup>

A 2006 report prepared by CIVICUS (World Alliance for Citizen Participation) criticized the absence of tax laws governing Civil Society Organizations (CSOs), including non-profit organizations in Lebanon. The report stated that “*it is not very clear whether CSOs are eligible for tax exemptions, what the applicable criteria are, how broad and narrow these benefits are, and what the range of CSOs benefit from such a rule is*”.<sup>180</sup>

The report concluded that “*the tax system is burdensome to CSOs*”, “*tax laws are somewhat complicated and unclear; ... they are outdated and contradictory*”.

The situation is further complicated by inconsistent interpretations of legislations and several incoherent ministerial decisions.<sup>181</sup>

Moreover, some measures undertaken by the Ministry of Interior (MOI) violate the independence of civil society in Lebanon. For instance, a representative from the MOI is required to attend the CSOs general assemblies; MOI’s approval is required for any amendment to the by-laws of CSOs; interference in the activities of CSOs and their dissolution on political basis.<sup>182</sup>

Similarly, a lot of restrictions are imposed on the advocacy carried out by Human Rights NGOs. For instance, Human Rights Watch (HRW) was forced to cancel a press conference that was supposed to be held in Beirut on the 30<sup>th</sup> of August 2007 under the excessive pressure and harsh criticism from both the Lebanese Government and Hizbullah.<sup>183</sup> HRW press conference was devoted to issue a report on Hizbullah indiscriminate attacks against civilians during the July-August 2006 war between Israel and Hizbullah.<sup>184</sup>

The State interference and meddling in the internal affairs of some CSOs, especially human rights and democracy NGOs, is not limited to the MOI. It is often practiced by other state agencies and security/military apparatuses.<sup>185</sup>

The restrictive political environment, the outdated and cumbersome legal regime, the democratic deficit, and the deteriorating state of fundamental human rights and freedoms in the country (in particular the freedoms of expression, association, and peaceful assembly), are the main legal and political factors that impede civil society organizations to participate effectively in public affairs and to play an influential role in the the process of democratization in the country.

---

<sup>177</sup> Lebanese Protection for the Lesbian, Gay, Bisexual and Transgender Community (Helem),

<http://www.helem.net>

<sup>178</sup> “Ilm wa khabar”

<sup>179</sup> Euro-Mediterranean Human Rights Network, “Monitoring Report on Freedom of Association in the Euro-Mediterranean Region”, (Copenhagen: EMHRN, December 2009), p. 42

<sup>180</sup> Khaldoun Abou Assi, CIVICUS Civil Society Index Report for the Republic of Lebanon, op. cit., p.75

<sup>181</sup> Ibid., p. 76

<sup>182</sup> Ibid., p. 77

<sup>183</sup> An-Nahar staff, “Siniora is upset from the activities of Human Rights Watch and supports the ‘case of the martyrs of Lebanon’ ”, An-Nahar Newspaper (in Arabic), 29 August 2007, accessed from [www.annaharonline.com](http://www.annaharonline.com) on 29/08/2007

<sup>184</sup> Daily Star Staff, “Siniora, Hizbullah criticize HRW report on 2006 war”, The Daily Star, 30 August 2007, accessed from [www.dailystar.com.lb](http://www.dailystar.com.lb) on 30/08/2007

<sup>185</sup> Khaldoun Abou Assi, “CIVICUS Civil Society Index Report for the Republic of Lebanon”, op. cit., p.78

## TO SEEK, RECEIVE, AND IMPART INFORMATION: INTERNET

### RESTRICTIONS IN SAUDI ARABIA

BY CRYSTAL OSTRUM

J.D. 2011

#### INTRODUCTION

The Internet has given a voice to every person. The Internet has opened many avenues to express whatever message its users desire to express. Internet users can seek out a wealth of information about the world around them. As a forum for expression, the Internet offers any of its users an audience. The Internet has changed the world.

Across the globe, governments are preventing those voices from relaying their message. Governments are censoring websites so Internet users cannot learn what those voices are saying. Governments are monitoring what information is being sought, and blocking sites containing information they do not want to be read. The freedom of expression includes giving information and receiving information. The exclusion of any one forum for communication, such as the Internet, erodes the freedom of expression as a whole.

Section II of this paper will look at restrictions on the Internet first in the Kingdom of Saudi Arabia, as the focus of the paper. Section III of this paper will then look around the world, to those who think that access to an open uncensored Internet is a human right. Next, Section IV will look to practices of Internet censorship and restriction around the world and how they compare to the practices carried out by the Saudi government.

Section V of this paper will analyze the international and regional human rights treaties to determine, first if there is a right to an open Internet within the freedom of expression. Second, Section V will discuss whether or not there are any obligations on the state of Saudi Arabia, and other states, to allow for an open internet as a human right. Finally, the paper will conclude with recommendations as to laying a foundation to protect the right to an open uncensored Internet under customary international law.

#### SAUDI ARABIA AND THE INTERNET

In the Kingdom of Saudi Arabia, the government controls all “broadcast media,” including television, satellite, and radio.<sup>186</sup> The Saudi government “hesitated for years before allowing public Internet access in the country in 1999.”<sup>187</sup> As of 2009, the CIA World Factbook reports that Saudi Arabia has 9.774 million Internet users.<sup>188</sup> In that

---

<sup>186</sup> Central Intelligence Agency, *The World Factbook, Saudi Arabia*, <https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html> (last visited Apr. 29, 2011).

<sup>187</sup> Human Rights Watch, *False Freedom: Online Censorship in the Middle East and North Africa*, Vol. 17, at 4 (Nov. 2005).

<sup>188</sup> Central Intelligence Agency, *The World Factbook, Saudi Arabia*, <https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html> (last visited Apr. 29, 2011).

same year, OpenNet Initiative calculated that 38 percent of the population were ‘Internet users.’<sup>189</sup> In a report by Freedom House, a human rights advocacy group, most Internet users “access the internet from home” and “[a]bout 16 percent of the user population frequents internet cafés.”<sup>190</sup>

Once the public was allowed to access the Internet, the government became well skilled at censoring online content. The Internet Services Unit is the “the state institution charged with coordinating Saudi Internet policy.”<sup>191</sup> After only a year and a half at work, the agency “boasted that it had blocked more than 200,000 Web sites.”<sup>192</sup>

Saudi Arabia is transparent about its censorship activities. The government “is forthright about its policies on and methods of blocking Web sites, listing them on the ISU’s Web site.”<sup>193</sup> While the “vast majority” of the blocked sites did “feature[] pornographic material or material related to gambling or drugs,” Human Rights Watch reports that “some—such as specific pages from Amnesty International’s Web site criticizing human rights abuses in Saudi Arabia—were political.”<sup>194</sup> The state’s official policy is to block content which is “incompatible with Islamic religion and national systems.”<sup>195</sup>

#### CONTENT FILTERING

The Communications and Information Technology Commission (“CITC”) carries out the “responsibilities of developing Internet Filtering measures and requirements.”<sup>196</sup> The CITC functions as the regulatory arm while the Internet Services Unit (“ISU”) “is responsible for managing the internet infrastructure.”<sup>197</sup> Internet infrastructures which develop gradually in response to user demand generally result in decentralized networks. In contrast, the Saudi system has been planned out with three distinct bottleneck areas, or access points, which makes the filtering more easy and efficient.

Data service providers are connected to these three international access points and closely monitored by the CITC.<sup>198</sup> The agency provides a list of prohibited websites to

---

<sup>189</sup> OpenNet Initiative, *Saudi Arabia* (Aug. 2009), <http://opennet.net/research/profiles/saudi-arabia>.

<sup>190</sup> Freedom House, *Freedom on the Net: A Global Assessment of Internet and Digital Media*, 286 (Apr. 18, 2011).

<sup>191</sup> Human Rights Watch, *False Freedom: Online Censorship in the Middle East and North Africa*, Vol. 17, at 4 (Nov. 2005).

<sup>192</sup> *Id.*; see also Communications and Information Technology Commission, *General Information on Filtering Service*, <http://www.internet.gov.sa/learn-the-web/guides/content-filtering-in-saudi-arabia> (featuring illustrations of CITC filters at international access points before routing the traffic to the ISP servers).

<sup>193</sup> Human Rights Watch, *False Freedom: Online Censorship in the Middle East and North Africa*, Vol. 17, at 4 (Nov. 2005).

<sup>194</sup> *Id.*

<sup>195</sup> Communications and Information Technology Commission, *General Information on Filtering Service*, <http://www.internet.gov.sa/learn-the-web/guides/content-filtering-in-saudi-arabia> (“As per At the Council of Ministers Resolution No. 163 date 10.24.1417 H, the blocking is made for the websites and materials that are incompatible with Islamic religion and national systems, and in compliance with the permanent security committee guidelines. The Commission assigned the task of directly blocking websites that promote pornography and provides a means of circumvention without having to refer to the Committee.”).

<sup>196</sup> *Id.*

<sup>197</sup> Freedom House, *Freedom on the Net: A Global Assessment of Internet and Digital Media*, 287 (Apr. 18, 2011).

<sup>198</sup> Communications and Information Technology Commission, *General Information on Filtering Service*, <http://www.internet.gov.sa/learn-the-web/guides/content-filtering-in-saudi-arabia>.

“data service providers, who provide the filtering technical solutions, in accordance with CITC requirements and policies.”<sup>199</sup> From the data service providers, the path then leads to the internet service providers (“ISPs”) who connect to the Internet backbone for the country and provide service to Internet users.<sup>200</sup> Freedom House reports there were 53 ISPs in the country in 2009.<sup>201</sup>

The database which the CITC provides to data service providers is comprised of a commercially created list of sites which should be blocked, and a local list of sites which should be blocked.<sup>202</sup> The commercial list is created by a private company which “specialize[s] in sites classification . . . which includes more than 90 different classifications/categories.” The primary targeted content for blocking is material containing “pornography, gambling and drugs.”<sup>203</sup> The private company updates the list each day.<sup>204</sup> The agency and the private company keep in “continuous communication . . . to avoid any error in rating classification” on the commercial list.<sup>205</sup>

The local list, on the other hand, is compiled by “CITC through the addition of sites that are recommended by public users, after reviewing and ensuring, that such sites contain[] illegal material.”<sup>206</sup> The CITC states that “[p]ornographic sites” constitute “92.80% of the local list.”<sup>207</sup> Websites designed to “bypass filtering systems . . . represent 4.43% of the local list.”<sup>208</sup> All other types of banned content constitute less than three percent of the local list.<sup>209</sup> The CTIC describes this miscellaneous group as websites containing “gambling, drugs, magic” and the like.<sup>210</sup> There is a process whereby the public can request the CITC to unblock or block a specific site.<sup>211</sup> If a local list website has been wrongly categorized, it will be removed from the block list.

#### INTERNET RESTRICTIONS OTHER THAN CONTENT FILTERING

The Saudi government has undertaken other steps to restrict its citizen’s access to information. This includes mandatory blogger registration, intermittent Facebook blockages, and the monitoring of computer users at Internet cafés.

The CITC website offers tips for starting your own blog, lists blogging websites, and even refers to how popular blogging has become.<sup>212</sup> However, the Kingdom of

---

<sup>199</sup>*Id.*

<sup>200</sup>*Id.*

<sup>201</sup> Freedom House, *Freedom on the Net: A Global Assessment of Internet and Digital Media*, 287 (Apr. 18, 2011).

<sup>202</sup> Communications and Information Technology Commission, *General Information on Filtering Service*, <http://www.internet.gov.sa/learn-the-web/guides/content-filtering-in-saudi-arabia>.

<sup>203</sup>*Id.*

<sup>204</sup>*Id.*

<sup>205</sup>*Id.*

<sup>206</sup>*Id.*

<sup>207</sup> Communications and Information Technology Commission, *General Information on Filtering Service*, <http://www.internet.gov.sa/learn-the-web/guides/content-filtering-in-saudi-arabia>.

<sup>208</sup>*Id.*

<sup>209</sup>*Id.*

<sup>210</sup>*Id.*

<sup>211</sup>*Id.* (“URLs will be added only after being reviewed by CITC. The sites that fall under the CITC responsibilities (pornographic sites, sites that provide the means to bypass the filtration systems) are added directly to local list, all other requests are submitted to the committee for study and decision.”).

<sup>212</sup> Communications and Information Technology Commission, *What Are Web Logs and How Can You Write One?*, <http://www.internet.gov.sa/learn-the-web/guides/what-are-web-logs-and-how-can-you-write-one> (“Before you write and post your entry, please remember two things: If your weblog is

Saudi Arabia recently enacted a requirement for bloggers to obtain licenses before they are allowed to publish online content.<sup>213</sup> Any bloggers wishing to write and publish from within the Kingdom must get the license.<sup>214</sup> Eligibility requirements for a license “include an age minimum (20 years), an education requirement (at least a high school diploma), and a clean record.”<sup>215</sup> With this new law, the Saudi government is claiming that it “aims to supervise organization, not to increase censorship of Saudi websites.”<sup>216</sup> Bloggers, however, lamented the new requirements as another form of censorship.

Saudi Arabia was named “among the 10 worse countries to be a blogger, citing the widespread self-censorship and local calls by influential clerics for harsh punishment for online writers who post content deemed heretical.”<sup>217</sup> Freedom House reports that bloggers are “[o]ften arrested and detained without specific charges.”<sup>218</sup>

The blogger registration law, aside from being another way to censor and monitor free expression, has been criticized as adding more bureaucratic red tape. One blogger complained: “I am not ready to stand in line at a government office to register, I already do that for my national ID, my family ID, my driver’s license, my motorcycle’s license, my car’s registration.”<sup>219</sup> The new blogging rules also “prohibit criticism of Islam or anything that compromises public order.”<sup>220</sup> It seems unlikely that the regulations were imposed merely for the supervision of organization since the regulations specifically outline content restrictions for registrants.

In 2009, Saudi citizens gathered in a Facebook group to show solidarity in protest against the government. The page was “set up to complain about the government’s handling of the floods, in the absence of other legal venues for protest.”<sup>221</sup> The page garnered a large following of “[m]ore than 11,000.”<sup>222</sup> The social networking video

---

public, everyone, including your father, teacher, neighbor and current and future boss can read your entry. Basically anything you ever post on the Internet can be found from there later even if you remove the original material from your website. Therefore it is advisable to think critically about every blog entry and comment you write on the Internet: what would happen if for instance your father or boss would find about your entry or comments a) now or b) 10 years from now?”); Freedom House, *Freedom on the Net: A Global Assessment of Internet and Digital Media*, 288 (Apr. 18, 2011) (estimating there are 10,000 bloggers in Saudi Arabia).

<sup>213</sup>See *Saudis Must Apply for Govt. License to Start Blogging*, ALARABIYA.NET (Jan. 3, 2011) <http://www.alarabiya.net/articles/2011/01/03/132053.html>.

<sup>214</sup>Qichen Zhang, *Saudi Arabia Requires License for Bloggers*, OPENNET INITIATIVE (Jan. 14, 2011), <http://opennet.net/blog/2011/01/saudi-arabia-requires-license-bloggers>.

<sup>215</sup>*Id.*

<sup>216</sup>*Id.* (quoting a Saudi Ministry spokesperson speaking about the new regulation as imposing on a minor burden: “We only need a name and a telephone number if possible.”).

<sup>217</sup>OpenNet Initiative, *Saudi Arabia* (Aug. 2009), <http://opennet.net/research/profiles/saudi-arabia>.

<sup>218</sup>Freedom House, *Freedom on the Net: A Global Assessment of Internet and Digital Media*, 289 (Apr. 18, 2011).

<sup>219</sup>Qichen Zhang, *Saudi Arabia Requires License for Bloggers*, OPENNET INITIATIVE (Jan. 14, 2011), <http://opennet.net/blog/2011/01/saudi-arabia-requires-license-bloggers>.

<sup>220</sup>See Deborah Amos, *Social Media Revolution Hits Saudi Arabia*, NPR (Jan. 26, 2011), <http://www.npr.org/2011/01/26/133212623/social-media-revolution-hits-saudi-arabia>.

<sup>221</sup>Richard Spencer, *Saudis Protest on Facebook Over Government Handling of Floods*, The Telegraph (4:56 PM GMT Nov. 2009), <http://www.telegraph.co.uk/news/worldnews/middleeast/saudi-arabia/6685083/Saudis-protest-on-Facebook-over-government-handling-of-floods.html> (“The death toll rose to 103 after the strongest rains for years lashed the western city of Jeddah . . . The deaths have been blamed on poor construction of houses and infrastructure like bridges, and residents of the city say the government had been made aware of allegations that they were of poor construction.”).

<sup>222</sup>Richard Spencer, *Saudis Protest on Facebook Over Government Handling of Floods*, THE TELEGRAPH (4:56 PM GMT Nov. 2009),

website YouTube was also used as a medium for posting videos showing the full extent of the flood damage.<sup>223</sup>

In 2010, Saudi Arabia blocked Facebook. The social networking site was inaccessible “for several hours . . . after the government deemed it morally inappropriate in accordance with the country’s conservative values.”<sup>224</sup> The ban was lifted a few hours later.<sup>225</sup> As social networking sites have been essential to recent uprisings across the Middle East and North Africa, it will be interesting to see if any other restrictions are placed on social networking sites in the future.

Saudi Arabia has also been keeping tabs on Internet cafés to thwart anonymous web surfing. In 2009 Internet cafés were “ordered by the Ministry of Interior to install hidden cameras and provide a record of names and identities of their customers. . . .”<sup>226</sup> The regulations “ban[] the use of prepaid cards or unlicensed satellite Internet other than the one certified for use by the café.”<sup>227</sup> The Internet cafés are not allowed to remain open past midnight, and no patrons under the age of 18 are permitted to use Internet cafés.<sup>228</sup> These types of restrictions are also very repressive of the right to free expression.

## **ADVOCACY FOR A FREE INTERNET AS A HUMAN RIGHT**

The United States has been very supportive of access to information on the Internet to be treated as, and protected as, a universal human right. The U.S. has advocated to other countries the importance of the right. American companies have banded together to formulate policies to safeguard the right. American lawmakers have proposed legislation aimed at protecting the right.

### ADVOCACY THROUGH DIPLOMACY

The United States’ annual report on human rights for 2009 found that “2009 was a year in which more people gained access to the internet but at the same time governments spent more ‘time, money and attention’ finding ways to control it.”<sup>229</sup>

U.S. Secretary of State Hillary Clinton gave a speech in January in Washington in which she declared that the United States supports a universal human right to access

---

<http://www.telegraph.co.uk/news/worldnews/middleeast/saudi-arabia/6685083/Saudis-protest-on-Facebook-over-government-handling-of-floods.html>.

<sup>223</sup>See Deborah Amos, *Social Media Revolution Hits Saudi Arabia*, NPR (Jan. 26, 2011),

<http://www.npr.org/2011/01/26/133212623/social-media-revolution-hits-saudi-arabia>.

<sup>224</sup>Qichen Zhang, *Saudi Arabia Blocks Facebook for Hours Over Moral Concerns*, OPENNET INITIATIVE (Nov. 14, 2010), <http://opennet.net/blog/2010/11/saudi-arabia-blocks-facebook-over-moral-concerns>.

<sup>225</sup>*Id.*; see also David Murphy, *Saudi Arabia Defriends, Refriends Facebook*, PCMAG.COM (Nov. 13, 2010), <http://www.pcmag.com/article2/0,2817,2372651,00.asp>.

<sup>226</sup>Helmi Noman, *Restriction on Internet use in the Middle East on the rise: Internet cafés in Saudi must install hidden cameras*, OPENNET INITIATIVE (Apr. 16 2009), <http://opennet.net/blog/2009/04/restriction-internet-use-middle-east-rise-internet-caf%C3%A9s-saudi-must-install-hidden-came>.

<sup>227</sup>*Id.*

<sup>228</sup>*Id.* (noting that Saudi Arabia is not the first country to place restrictions and monitor internet café usage. “In March 2008, Jordan’s Ministry of Interior ordered Internet cafés to install cameras to monitor users, and to register the users’ personal data such as their names, phone numbers and time of use, as well as the IP number of the café and data of Web sites explored by the users, all on pretext of maintaining security.”).

<sup>229</sup>*Internet restrictions curtail human rights, says US*, BBC NEWS (March 11, 2010 19:50 GMT), <http://news.bbc.co.uk/2/hi/americas/8563084.stm>.

information on the Internet. She stated that the Internet should be a place “where all of humanity has equal access to knowledge and ideas...”<sup>230</sup> Secretary of State Hillary Clinton “linked the freedom to use the Internet without government obstruction to basic human rights such as freedom of religion, freedom of speech and freedom of assembly.”<sup>231</sup>

### ADVOCACY THROUGH BUSINESS PARTNERSHIPS

The Global Network Initiative (“GNI”) is an organization which aims to “provid[e] good practice guidance for [information and communications technology (“ICT”)] companies.”<sup>232</sup> Participants include civil society organizations, investors, and academic organizations, as well as ICTs, like Google, Inc., Microsoft, and Yahoo! Inc.<sup>233</sup>

The group’s “development of good practice is strengthened by the diversity of its participants and the different perspectives they bring.”<sup>234</sup> The group believes that all too often, “[c]ivil society and business interests . . . appear disconnected from one another or at odds on these issues.”<sup>235</sup> The group hopes that the many different interests working “together in a multi-stakeholder process” will mean that these stakeholders all “contribute to the development of practical solutions.”<sup>236</sup>

The Global Network Initiative derives its principles from “internationally recognized laws and standards for human rights.”<sup>237</sup> Their principles specifically reference the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).<sup>238</sup> The GNI Principles look to uphold the freedom of expression:

---

<sup>230</sup> Jane Morse, *Internet Freedom Essential to Human Rights, Economic Prosperity: Secretary Clinton defines U.S. policy on upholding Internet freedom*, AMERICA.GOV, <http://www.america.gov/st/democracyhr-english/2010/January/20100121130421ajesrom0.9331629.html>; but see Stanley Lubman, *Internet Censorship in China and Human Rights*, CHINA REALTIME REPORT, WALL ST. J. (Feb. 10, 2010 8:02 AM HKT), <http://blogs.wsj.com/chinarealtime/2010/02/10/stanley-lubman-internet-censorship-in-china-and-human-rights/> (arguing the U.S. linking of the Internet to human rights does more harm than good to the encouragement human rights in China. “The American view of the Internet as a liberalizing force rests on assumptions that overlook cultural differences. Recent research indicates that the Chinese seem to use the Internet quite differently than Europeans and Americans. For example, a recent McKinsey report cited by the Financial Times found that ‘Chinese users spend most of their time online on entertainment while their European peers are much more focused on work.’”).

<sup>231</sup> Jane Morse, *Internet Freedom Essential to Human Rights, Economic Prosperity: Secretary Clinton defines U.S. policy on upholding Internet freedom*, AMERICA.GOV, <http://www.america.gov/st/democracyhr-english/2010/January/20100121130421ajesrom0.9331629.html> (“Having the freedom to connect to the Internet, she said, ‘is like the freedom of assembly, only in cyberspace.’”).

<sup>232</sup> Inaugural Report 2010, Global Network Initiative, at 6, [http://www.globalnetworkinitiative.org/cms/uploads/1/GNI\\_annual\\_report\\_2010.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_annual_report_2010.pdf).

<sup>233</sup> Participants, Global Network Initiative, <http://www.globalnetworkinitiative.org/participants/index.php>; see also Inaugural Report 2010, Global Network Initiative, at 1, [http://www.globalnetworkinitiative.org/cms/uploads/1/GNI\\_annual\\_report\\_2010.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_annual_report_2010.pdf).

<sup>234</sup> Inaugural Report 2010, Global Network Initiative, at 6, [http://www.globalnetworkinitiative.org/cms/uploads/1/GNI\\_annual\\_report\\_2010.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_annual_report_2010.pdf).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Principles, Global Network Initiative, <http://www.globalnetworkinitiative.org/principles/index.php>.

<sup>238</sup> *Id.*

“Freedom of opinion and expression is a human right and guarantor of human dignity. The right to freedom of opinion and expression includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>239</sup>

The members of GNI understand that they “have an obligation to comply with lawful government demands, and ICT companies can and should play a role in addressing legitimate concerns such as cybercrime, national security and the safety of children online.”<sup>240</sup> However, the Principles of GNI state that there is also a duty on the part of ICT companies to be wary of governments using those legitimate concerns to trample human rights. The Principles point out that: “ICT companies . . . have a responsibility – rooted in internationally recognized human rights standards – to respect the free expression and privacy rights of their users.” If, and “[w]hen ICT companies receive government demands that effect such rights, tension can arise between these two responsibilities.”<sup>241</sup> The guidance GNI seeks to develop would advise ICTs facing this problem.

#### ADVOCACY THROUGH LEGISLATION

An Internet Human Rights Bill has been proposed in the United States Senate. Senator Dick Durbin introduced in 2010 a bill to “impose penalties on U.S. companies that violate the human rights of bloggers, activists and other Internet users living in repressive nations.”<sup>242</sup> ITC companies in the United States provide filtering software to an alarming number of authoritarian regimes to restrict access to the Internet and the freedom of expression.<sup>243</sup>

---

<sup>239</sup>*Id.*

<sup>240</sup> Inaugural Report 2010, Global Network Initiative, at 2, [http://www.globalnetworkinitiative.org/cms/uploads/1/GNI\\_annual\\_report\\_2010.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_annual_report_2010.pdf).

<sup>241</sup>*Id.*

<sup>242</sup> Grant Gross, *Senator to Introduce Internet Human Rights Bill*, PC WORLD (March 2, 2010 1:50 PM), [http://www.pcworld.com/article/190579/senator\\_to\\_introduce\\_internet\\_human\\_rights\\_bill.html](http://www.pcworld.com/article/190579/senator_to_introduce_internet_human_rights_bill.html); see also David Talbot, *Internet Industry Told to Respect Human Rights Abroad*, TECHNOLOGY REVIEW, March 3, 2010, <http://www.technologyreview.com/web/24680/?a=f>. This is not the first such bill. In 2002 and 2003, bills were introduced to allow the United States to develop technology to combat Internet censorship in other countries, much like anti-jamming activities carried out by the U.S. over radio. See Legislative Update, *Global Internet Freedom: Can Censorship and Freedom Coexist?*, 13 DEPAUL J. ART. & ENT. LAW, 229 (2003).

<sup>243</sup> Richard Winfield and Kristin Mendoza, *Does China Hope to Remap the Internet in its own Image?*, 2 J. INT’L MEDIA & ENT. LAW 85, 94 (2008-2009) (“The majority of Middle Eastern states rely on commercial filtering software produced by the U.S.-based companies Secure Computing and Websense. For example, Tunisia, which block[ed] material on political opposition, human rights, and methods of bypassing the filtering, use[d] SmartFilter software, created by the U.S. company Secure Computing. Saudi Arabia uses SmartFilter, which customized filtering software to target sites ‘defaming’ Islam or the royal family and politically charged sites. Iran also uses SmartFilter. The United Arab Emirates uses the SmartFilter filtering software to block ‘objectionable’ content, while it guides use of the Internet to establish itself as an economic leader in the region. Yemen uses Websense, also a U.S.-based company.”).

Senator Durbin's "proposed legislation would require Internet companies to take 'reasonable steps' to protect human rights."<sup>244</sup> The Senator stated that he "recognize[d] that the technology industry faces difficult challenges when they deal with repressive governments."<sup>245</sup> However those companies have a responsibility, and "Congress shares in that responsibility, to ensure that American companies are not complicit in violating freedom of expression."<sup>246</sup>

Senator Durbin asked representatives for Facebook why the company is not a member of the Global Network Initiative. Facebook responded that "it didn't have the resources to participate in the group."<sup>247</sup> Senator Durbin was not satisfied with that answer, as GNI "dues are a maximum of US\$60,000."<sup>248</sup> Facebook also stated that it is not a member of the GNI because "it didn't have operations in China, one of the nations most identified with censorship..."<sup>249</sup> However, "[a]bout 70 percent of Facebook's users are outside the U.S."<sup>250</sup>

Furthermore, Senator Durbin reasoned that "Facebook had asked for the State Department's help when it was blocked in Vietnam. 'If Facebook expects our government to help resolving efforts to censor its service, it only seems reasonable that they accept some responsibility themselves for addressing human rights issues.'"<sup>251</sup> There was a hearing, but no law was passed.

## INTERNET CENSORSHIP AROUND THE WORLD

The Global Network Initiative reports that "Internet censorship is a rising trend, with approximately 40 countries filtering the Web in varying degrees."<sup>252</sup> This number "includ[es] democratic and non-democratic governments."<sup>253</sup> Freedom House recently reported that "[i]n 23 of the 37 countries assessed, a blogger or other internet user was arrested for content posted online."<sup>254</sup> This growing trend of governments censoring the Internet has also led to a more cutting edge capability to monitor, censor, and block Internet use.<sup>255</sup> More governments are working towards making their Internet

---

<sup>244</sup> Grant Gross, *Senator to Introduce Internet Human Rights Bill*, PC WORLD (March 2, 2010 1:50 PM), [http://www.pcworld.com/article/190579/senator\\_to\\_introduce\\_internet\\_human\\_rights\\_bill.html](http://www.pcworld.com/article/190579/senator_to_introduce_internet_human_rights_bill.html).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> Grant Gross, *Senator to Introduce Internet Human Rights Bill*, PC WORLD (March 2, 2010 1:50 PM), [http://www.pcworld.com/article/190579/senator\\_to\\_introduce\\_internet\\_human\\_rights\\_bill.html](http://www.pcworld.com/article/190579/senator_to_introduce_internet_human_rights_bill.html).

<sup>250</sup> *Id.* ("The company, and others like it, could benefit from the dialog at GNI, said Michael Posner, assistant secretary for democracy, human rights and labor at the U.S. Department of State. Companies need to work collectively to combat censorship and human rights abuses, Posner said.")

<sup>251</sup> *Id.*

<sup>252</sup> Inaugural Report 2010, Global Network Initiative, at 3, [http://www.globalnetworkinitiative.org/cms/uploads/1/GNI\\_annual\\_report\\_2010.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_annual_report_2010.pdf).

<sup>253</sup> *Id.*

<sup>254</sup> Freedom House, *Freedom on the Net: A Global Assessment of Internet and Digital Media*, 3 (Apr. 18, 2011).

<sup>255</sup> Inaugural Report 2010, Global Network Initiative, at 3, [http://www.globalnetworkinitiative.org/cms/uploads/1/GNI\\_annual\\_report\\_2010.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_annual_report_2010.pdf) ("Governments are using more sophisticated censorship and surveillance techniques, including blocking social networks, to restrict a variety of types of content, including content that is legally restricted (e.g., drugs) or culturally sensitive (e.g., related to sexuality), or that implicates national security matters.")

infrastructure centralized for the purposes of controlling the Internet in their country.<sup>256</sup>

Of the countries that restrict the use of the Internet in some way, there are two main approaches. This has been presented as a dichotomy between the “China Model” and the “Cuban Model.”<sup>257</sup> The Cuban Model works to “censor the Internet by severely limiting access to computers and the Internet altogether.”<sup>258</sup> This is the approach taken by “Cuba, North Korea, Singapore, and to some extent Myanmar.”<sup>259</sup>

The other way to restrict Internet freedom is to allow Internet use, then filter or block content selectively. This is coined the “China Model”—China encourages Internet usage, but spends a lot of time and effort controlling what those Internet users can see.<sup>260</sup>

## CHINA<sup>261</sup>

The United States’ annual report on human rights for 2009 found China to be “among the worst offenders for blocking communications.”<sup>262</sup> The U.S. criticized the Chinese government for its “increased . . . efforts to monitor internet use, control content, restrict information, block access to foreign and domestic websites, encourage self-censorship, and punish those who violated regulations.”<sup>263</sup> The U.S. report highlighted that this is a massive undertaking, as “[t]housands of people at all levels of political life are deployed to monitor electronic communications.”<sup>264</sup>

The U.S. has a special role in China’s Internet censorship, it is primarily American companies providing the Chinese government with the technology it needs to carry out this the blocking, filtering, and monitoring of websites.<sup>265</sup> While the U.S. “restricts some exports destined for use by Chinese security forces, such as tear gas and handcuffs,” as of yet no such restrictions exist for “hi-tech exports, such as database software and video probes.”<sup>266</sup>

---

<sup>256</sup> Freedom House, *Freedom on the Net: A Global Assessment of Internet and Digital Media*, 6-7 (Apr. 18, 2011).

<sup>257</sup> Richard Winfield and Kristin Mendoza, *Does China Hope to Remap the Internet in its own Image?*, 2 J. INT’L MEDIA & ENT. LAW 85, 96-97 (2008-2009).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* (“North Korea has an isolated, domestic intranet consisting of around thirty government-approved sites that are available only to a privileged minority. Cuba also severely limits public access and has plans for a similar intranet. Singapore also censors mainly by limiting access. Finally, Myanmar, while it uses some filtering technology, also relies heavily on its ability to prevent access to the Internet.”).

<sup>260</sup> *Id.*

<sup>261</sup> China signed but did not ratify the ICCPR. United Nations, Treaty Collections, Status, Chapter IV: 4, Human Rights, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>262</sup> *Internet Restrictions Curtail Human Rights, says US*, BBC NEWS (March 11, 2010 19:50 GMT), <http://news.bbc.co.uk/2/hi/americas/8563084.stm>.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> Richard Winfield and Kristin Mendoza, *Does China Hope to Remap the Internet in its own Image?*, 2 J. INT’L MEDIA & ENT. LAW 85, 93 (2008-2009) (“U.S. IT companies have exported these and similar products to China for years. . . . Some companies altogether deny selling their technologies to repressive regimes. Some claim they cannot—and have no obligation to—determine whether security forces will use their technology for repressive ends. The Chinese authorities do, however, execute a high level of surveillance and monitoring, and use imported technologies to achieve this end. And these companies market and often custom-make technologies for the Chinese government.”).

<sup>266</sup> *Id.*

It is argued that China is leading the way towards legitimizing the practice of Internet censorship. China is currently “driving the demand for Internet censoring technology,” which provides a market for these products, that otherwise might not be a profitable market for ITC companies.<sup>267</sup> China is “lobbying in the international arena for greater control over Internet resources” and for “adoption of its proposed Internet norms, and acceptance of its practices.”<sup>268</sup> If the world follows China down this path, “there is no doubt that it will have the effect of curtailing freedom of the press globally.”<sup>269</sup>

#### AUSTRALIA<sup>270</sup>

The Australian government is following China down the path of curtailing access to information on the Internet. In 2007, the Labor Party was elected with Internet censorship as a part of its party platform.<sup>271</sup> The government censors the Internet with statutory requirements on ISPs. Australia is the first “Western democracy [to] require, through formal statute, ISPs to block users from accessing certain materials online.”<sup>272</sup>

The law is enforced by the Australian Communications and Media Authority (“ACMA”).<sup>273</sup> For Australian-hosted sites that host material which is prohibited, the ACMA “sends a takedown notice to the ISP or Internet Content Host.”<sup>274</sup> On the other hand, if the ACMA comes across a website containing what it considers “prohibited content, or *may* constitute prohibited content, but is not hosted in Australia, the ACMA notifies Web blocking software vendors to add the site to their block lists.”<sup>275</sup> The agency “maintains a ‘black list’ of roughly 1100 sites that should be blocked by these vendors.”<sup>276</sup>

Unlike China and Saudi Arabia, “Australia's Internet deployment . . . was driven by user demand for access to the Web and emerged in a . . . freeform, market driven fashion, rather than following a centralized plan or model.”<sup>277</sup> As a result, there is no

---

<sup>267</sup>*Id.* at 85, 97.

<sup>268</sup>*Id.* at 85, 97.

<sup>269</sup>*Id.* at 85, 97.

<sup>270</sup> Australia signed the ICCPR in December of 1972 and ratified it in August of 1980. Australia signed with several ratifications, none of which are related to the freedom of expression. United Nations, Treaty Collections, Status, Chapter IV: 4, Human Rights,

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>271</sup>See UNITED NATIONS YOUTH ASSOCIATION OF AUSTRALIA, INTERNET CENSORSHIP BLUE PAPER, at 1 (Dec. 2008), <http://unya.org.au/assets/Documents/bluepapers/Blue-Paper-Censorship.pdf>.

<sup>272</sup> Derek E. Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship*, 31 U. PA. J. INT'L L. 493, 495 (2009-2010) (“Australia plans to mandate censorship by law, rather than through informal pressure on Internet Service Providers (“ISPs”) (as the United Kingdom has done) or through partial measures aimed at intermediaries such as search engines (as France and Germany have done).”).

<sup>273</sup>See Australian Communications and Media Authority, *New Restricted Access Arrangements*, [http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_310905](http://www.acma.gov.au/WEB/STANDARD/pc=PC_310905) (last visited Apr. 24, 2011).

<sup>274</sup> Derek E. Bambauer, *Filtering in Oz: Australia's Foray into Internet Censorship*, 31 U. PA. J. INT'L L. 493, 505 (2009-2010).

<sup>275</sup>*Id.* (emphasis in original) (“While the Rudd government has implied that these sites are almost entirely composed of child pornography, approximately 49% of the list's sites were child pornography, 63% were RC content, and 32% were X18+ material. One site on the black list, for example, is an antiabortion website, whose pictures of aborted fetuses led to its categorization as RC. An ACMA spokesperson, testifying before a parliamentary committee, stated that the Authority would seek to block content classified as RC, X18+, or R18+ that is not protected by an age verification system. ACMA's blacklist thus includes material, such as R18+ content, that is lawful for adults to view and possess.”).

<sup>276</sup>*Id.*

<sup>277</sup>*Id.* at 509.

central point of entry “where filtering can be deployed to achieve complete coverage.”<sup>278</sup> This is the reason the statute must regulate ISPs to achieve a uniform censored Australian Internet.<sup>279</sup> The natural, market-driven growth of the Australian Internet infrastructure makes it a “fascinating test case” as it “seeks to retrofit Internet filtering to a network infrastructure that did not contemplate this need as a design goal.”<sup>280</sup> This scheme, if successful, will open a new path to the China Model of restricting Internet freedoms:

“Authoritarian countries have often built their network infrastructures with information control as an express requirement: Saudi Arabia created an architecture where Internet traffic flows through three ‘choke points’ . . . allowing filtering to occur at three centralized locations. Similarly, China deployed its networks to allow censorship to occur at multiple control points, from international gateways to the network backbone to regional network providers.”<sup>281</sup>

#### EGYPT<sup>282</sup>

In 2004, activists told Human Rights Watch that the Internet is a useful tool in helping them spread their information to the young people of Egypt. Mustafa ‘Abd al-‘Aziz, “a journalist for Cairo’s independent Nahdat al-Misr,” went so far as to call the “Internet ‘a paradise of human rights.’”<sup>283</sup> He called it a paradise because the Internet is not easy to control. Hackers can get through firewalls. Websites can mask their true content and avoid censorship, if only for a short time. Coded messages can be passed between activists. This “difficulty. . . [m]akes it one of the most open means of spreading human rights information to the public, particularly young people.”<sup>284</sup> Surely President Mubarak understood that when Egyptians started filling Tahrir Square.

Indeed, Egypt’s Internet blackout in January 2011 was a last ditch attempt to quell the rebellion. The blackout reportedly began “with the mostly state-owned

---

<sup>278</sup>*Id.* at 493, 509.

<sup>279</sup> Derek E. Bambauer, *Filtering in Oz: Australia’s Foray into Internet Censorship*, 31 U. PA. J. INT’L L. 493, 509 (2009-2010).

<sup>280</sup>*Id.* at 493, 508.

<sup>281</sup> Derek E. Bambauer, *Filtering in Oz: Australia’s Foray into Internet Censorship*, 31 U. PA. J. INT’L L. 493, 508 (2009-2010).

<sup>282</sup> Egypt signed the ICCPR in August of 1967 and ratified it in January 1982. United Nations, Treaty Collections, Status, Chapter IV: 4, Human Rights, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>283</sup> Human Rights Watch, *False Freedom: Online Censorship in the Middle East and North Africa*, Vol. 17, at 21 (Nov. 2005) (“Gamal Eid, a defense lawyer specializing in human rights and Internet issues, describes the effect the Internet has had on the human rights movement as ‘immeasurable.’ ‘Human rights organizations can now send out calls for help whenever the rights of a citizen have been violated,’ he told Human Rights Watch. “‘They can now launch online campaigns directed at individuals, officials, and ministers by sending out emails accompanied by activist signatures to the president, the attorney general, or the minister of the interior.’”).

<sup>284</sup>*Id.*

Telecom Egypt disabling its networks, with four smaller network providers following suit.”<sup>285</sup>

The blackout gained international attention and vocal opposition. The United States reiterated its opinion as to the freedom to use the Internet. The White House issued a formal statement that Egypt should “turn the Internet and social-networking sites back on.” The statement made clear that the U.S. views “the freedom to access the Internet and . . . use social-networking sites” as essential freedoms.<sup>286</sup>

The Internet blackout resulted in a “blanket communications shutdown,” causing the protests to take “place in an information vacuum.”<sup>287</sup> Until the blackout, protests had been coordinated via social networking sites. However, during the blackout “nobody knew what was happening anywhere else--not even on the other side of the river in Tahrir Square.”<sup>288</sup> The Internet black out lasted for five days and “was restored the day after Egyptian President Hosni Mubarak pledged not to seek re-election after 30 years in power.”<sup>289</sup>

The advent of social media as a tool for revolutionaries has made it possible for their messages to go further. As one writer argues, “the occurrence of a ‘social media revolution,’ at this point, should be neither noteworthy nor remarkable.”<sup>290</sup> On the contrary, “[i]f a dictator is overthrown or a government ousted, it would be notable if Facebook or Twitter weren't used.”<sup>291</sup> Egypt may serve as a warning to other authoritarian regimes that this form of communication could be a very powerful tool against them.

## THE INTERNET AND HUMAN RIGHTS LAW

The importance of Internet freedom is clear—the flow of information and ideas is quicker than ever with the Internet as its medium. However, there is some question as to whether access to an open Internet is a ‘human right,’ as the United States has suggested. This section will examine treaties which may confer a right to a free Internet, as a component of the freedom of expression. This section will also look to examine regional treaties and determine if Saudi Arabia has any responsibility to recognize such a right. Finally, this section will examine the possibility that access to a free internet is a right which should be respected under international customary law.

### THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

---

<sup>285</sup> Declan McCullagh, *Egypt's Internet Disconnect Reaches 24 Hours*, CNET NEWS (Jan. 28, 2011 2:43 PM PST), [http://news.cnet.com/8301-31921\\_3-20029973-281.html#ixzz1CNgNP600](http://news.cnet.com/8301-31921_3-20029973-281.html#ixzz1CNgNP600).

<sup>286</sup>*Id.*

<sup>287</sup>*Id.* (quoting Index on Censorship's Egypt regional editor Ashraf Khalil).

<sup>288</sup>*Id.*

<sup>289</sup> Stephen Shankland, *Egypt gets its Internet Back*, CNET NEWS (Feb. 2, 2011 3:40 AM PST), [http://news.cnet.com/8301-30685\\_3-20030335-264.html?tag=mncol;txt](http://news.cnet.com/8301-30685_3-20030335-264.html?tag=mncol;txt); *see also Amid Unrest, Egypt went Offline (roundup)*, CNET NEWS (Feb. 2, 2011 11:30 PM PST), [http://news.cnet.com/8301-13578\\_3-20029928-38.html?tag=epicStories](http://news.cnet.com/8301-13578_3-20029928-38.html?tag=epicStories) (listing relevant news stories in order on the protests and Internet blackout).

<sup>290</sup> Caroline McCarthy, *There's No Such Thing As 'Social Media Revolution'*, CNET.COM (Jan. 26, 2011 4:00 AM PST), [http://news.cnet.com/8301-13577\\_3-20029519-36.html](http://news.cnet.com/8301-13577_3-20029519-36.html) (arguing there is too much focus on the social media and not enough focus on the message. “Social media has changed the world, but by no means does it provide a substitute for the human energy and willpower that can bring down governments and cause global reverberations. Let's focus on understanding what really happens.”).

<sup>291</sup>*Id.*

The International Covenant on Civil and Political Rights (“ICCPR”) was signed in New York in 1966.<sup>292</sup> There are currently 167 parties to the treaty.<sup>293</sup> Saudi Arabia is not a party to the ICCPR.<sup>294</sup> The treaty guarantees, among other rights, the freedom of expression. First, Article 19 protects the “right to hold opinions without interference.”<sup>295</sup> Second, Article 19 provides that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>296</sup>

The ICCPR expressly protects the right to “seek, receive and impart information...through...any media.”<sup>297</sup> The Internet is a medium through which people seek information, receive information, and impart information. Therefore, it follows that the ICCPR protects a right to an unrestricted Internet under this clause.

However, the ICCPR permits limitations on the right to free speech. The limitations must be “provided by law,” which should prevent the arbitrary limitation of the right to free speech.<sup>298</sup> The limitations must also be “necessary . . . [f]or respect of the rights or reputations of others” or “[f]or the protection of national security or of public order (ordre public), or of public health or morals.”<sup>299</sup> This limitations clause could easily be used to justify the censorship Saudi Arabia undertakes. The Saudi government, transparent in its censoring activities, has said that more than 90% of blocked local sites are pornographic. Their argument would be that the government needs to protect the morals of its conservative Muslim society by blocking pornographic material. While blocking pornographic material may be pretext for blocking content that is political in nature or critical of the Saudi regime, the numbers are on the Saudi’s side. With a great deal of blocked sites being legitimately violative of community standards, and a system in place to contest site blockings, the limitation could be valid under the ICCPR. Since Saudi Arabia is not party to the ICCPR, this is merely theoretical.

#### THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

However, Saudi Arabia is a member of the United Nations. Saudi Arabia ratified the UN Charter on October 18, 1945.<sup>300</sup> The United Nations General Assembly adopted the Universal Declaration of Human Rights in Paris, in 1948.<sup>301</sup> The UDHR is not a binding resolution. Instead, it is a statement of principles asserting a “common standard of achievement.”<sup>302</sup>

---

<sup>292</sup> United Nations, Treaty Collections, Status, Chapter IV: 4, Human Rights, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* Saudi Arabia is not a party to the International Covenant on Economic, Social and Cultural Rights. See United Nations, Treaty Collections, Status, Chapter IV: 3, Human Rights, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en).

<sup>295</sup> International Covenant on Civil and Political Rights, art. 19, Dec. 16, 1966.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> United Nations, Treaty Collections, Status, Chapter 1: 1, Charter of the United Nations, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I-1&chapter=1&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&lang=en).

<sup>301</sup> Office of the High Commissioner for Human Rights, Universal Declaration of Human Rights, <http://www.ohchr.org/en/udhr/pages/introduction.aspx>.

<sup>302</sup> Universal Declaration on Human Rights, preamble, Dec. 10, 1948.

Article 19 of the UDHR provides, “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>303</sup> Abid Hussein, a Special Rapporteur for the U.N. Commission on Human Rights expressed the view that access to the Internet is protected under the UDHR.<sup>304</sup> He is of the opinion, “that ‘while perhaps unique in its reach and application, the Internet is, at base, merely another form of communication to which any restriction and regulation would violate the rights set out in the Universal Declaration of Human Rights and, in particular, article 19.’”<sup>305</sup>

Mr. Hussein discussed in his report the advent of new technology, and interpreting how the use of that technology should be protected. He believes that we should err on the side of protecting a newfound freedom—“in case of doubt, the decision should be in favour of free expression and flow of information.”<sup>306</sup> With this in mind, the use of the Internet as a channel for free expression should be protected. “With regard to the Internet, the Special Rapporteur wishes to reiterate that on-line expression should be guided by international standards and be guaranteed the same protection as is awarded to other forms of expression.”<sup>307</sup>

In 2005, the U.N. Commission on Human Rights “called on governments ‘to facilitate equal participation in, access to and use of, information and communications technology such as the Internet,’ and to ‘refrain from imposing restrictions...on access to or use of information and communication technologies, including...the Internet.’”<sup>308</sup> Even if the UDHR can be interpreted to protect access to a free Internet, Saudi Arabia is not under any legal obligation to protect that right. However, as the UDHR is a “common standard for achievement” for member states of the UN, Saudi Arabia should work towards meeting that standard.<sup>309</sup>

Human Rights Watch, in its report *False Freedom: Online Censorship in the Middle East and North Africa*, argues that the UDHR is “a foundational document of the United Nations to which all member states are deemed to adhere, and is widely considered a statement of the customary international law of human rights.”<sup>310</sup> In stating the importance and the impact of the UDHR, Article19.org quotes Pakistan’s Chief Justice Muhammad Haleem as saying:

“The result is that the Universal Declaration is now widely acclaimed as a Magna Carta of humankind, to be complied with by all actors in the world arena. What began as mere common aspiration is now hailed both as an authoritative interpretation of the human rights provisions of

---

<sup>303</sup> Universal Declaration on Human Rights, art. 19, Dec. 10, 1948.

<sup>304</sup> Human Rights Watch, *False Freedom: Online Censorship in the Middle East and North Africa*, Vol. 17, at 10-11 (Nov. 2005).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 14 (citing Commission on Human Rights, Report on the Sixty-First Session: The Right to Freedom of Opinion and Expression, Human Rights Resolution 2005/38).

<sup>309</sup> Universal Declaration on Human Rights, preamble, Dec. 10, 1948.

<sup>310</sup> Human Rights Watch, *False Freedom: Online Censorship in the Middle East and North Africa*, Vol. 17, at 11 (Nov. 2005).

the UN Charter and as established customary law . . . constituting the heart of a global bill of rights.”<sup>311</sup>

### REGIONAL TREATIES

The Cairo Declaration on Human Rights in Islam (“CDHRI”) was signed by member states of the Organisation of Islamic Conference in 1990.<sup>312</sup> Saudi Arabia is a member.<sup>313</sup>

The International Humanist and Ethical Union (“IHEU”) submitted a statement to the Secretary-General of the United Nations, criticizing the CDHRI as “an attempt to limit the rights enshrined in the UDHR and the International Covenants.”<sup>314</sup> The group noted the large amount of overlap as, the “vast majority of the Member States of the OIC are signatories to the UDHR and the International Covenants, the ICCPR and ICESCR.”<sup>315</sup> The IHEU views the adoption of the CDHRI as a move by these states to “reneg[e] on the obligations” those states “freely entered into in signing the UDHR and the two covenants.”<sup>316</sup> The IHEU states that the CDHRI greatly conflicts with the UDHR.<sup>317</sup>

CDHRI, Article 22 states that “[e]veryone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari’ah.”<sup>318</sup> Freedom of expression is thus limited where that freedom is in conflict with the religious law of Islam. This is unlike a limitation to protect the morals of the community, this prohibits not only pornographic speech, but also speech which dissents from the principles of the Shari’ah.

Article 22 of the CDHRI provides a “right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari’ah.”<sup>319</sup> There again, opinions of right and wrong are limited by what is defined in the Shari’ah. Only within those limits is there a right to express those opinions.

The CDHRI promotes access to information, as “[i]nformation is a vital necessity to society.” This right, like the others is restrained as information “may not be exploited or misused in such a way as may violate sanctities and the dignity of

---

<sup>311</sup> Article 19, *The Article 19 Freedom of Expression Handbook: International and Comparative Law, Standards and Procedures*, at 10 (August 1993), available at <http://www.article19.org/pdfs/publications/1993-handbook.pdf>.

<sup>312</sup> The Cairo Declaration on Human Rights in Islam, The Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Arab Republic of Egypt, from 9-14 Muharram 1411H (31 July to 5 August 1990), available at <http://www.oic-oci.org/english/article/human.htm>.

<sup>313</sup> Member States, Organisation of the Islamic Conference, [http://www.oic-oci.org/member\\_states.asp](http://www.oic-oci.org/member_states.asp).

<sup>314</sup> *The Cairo Declaration and the Universality of Human Rights*, Written Statement to the Secretary-General of the United Nations, International Humanist and Ethical Union (May 2008), <http://www.iheu.org/taxonomy/term/445>.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> The Cairo Declaration on Human Rights in Islam, The Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Arab Republic of Egypt, from 9-14 Muharram 1411H (31 July to 5 August 1990), available at <http://www.oic-oci.org/english/article/human.htm>.

<sup>319</sup> *Id.*

Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.”<sup>320</sup>

Article I, section (a) recognizes equality despite a difference of political opinion, stating that “[a]ll men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, color, language, sex, religious belief, political affiliation, social status or other considerations.”<sup>321</sup>

The Saudis might point to Article 17 as support for their censorship of pornographic or offensive material: “(a) Everyone shall have the right to live in a clean environment, away from vice and moral corruption, an environment that would foster his self-development and it is incumbent upon the State and society in general to afford that right.”<sup>322</sup> This right to live away from vice and moral corruption is likely a trump to the right of expression of material that may be deemed morally corrupt by the State.

The theme of the CDHRI is that all rights are limited by the Shari’ah, or by the community standards of morality. This treaty is in conflict with the ideals of the UDHR, and furthermore does not impose any obligations on countries to refrain from censoring or restricting expression on the Internet.

#### CUSTOMARY INTERNATIONAL LAW

Customary international law develops over time. To be considered a customary norm, a practice must “have emerged from consistent state practice followed from a sense of legal obligation.”<sup>323</sup> Three elements are necessary. The practice must be consistent. The practice must be customary, or generally accepted. Finally, the practice must be undertaken because the state believes the practice to be a legal obligation.

To constitute a customary international norm, the practice must be generally practiced or accepted. The norm need not be followed “unanimous[ly],” yet “the practice must at least be widespread.”<sup>324</sup> Article 19.org, an organization dedicated to

---

<sup>320</sup>*Id.*

<sup>321</sup>*Id.* (Equality is based on the view that “[a]ll human beings are God’s subjects, and the most loved by Him are those who are most useful to the rest of His subjects, and no one has superiority over another except on the basis of piety and good deeds.”); *see also Final Communique Issued By the Emergency Meeting of the Committee of Permanent Representatives To The Organisation of The Islamic Conference on the Alarming Developments in Libyan Jamahiriya*, ORGANISATION OF THE ISLAMIC CONFERENCE (March 8, 2011), [http://www.oic-oci.org/topic\\_detail.asp?t\\_id=5022](http://www.oic-oci.org/topic_detail.asp?t_id=5022) (discussing the situation in Libya. The OIC supports peaceful protests and the organization is providing food and aide to displaced persons. “The meeting recalled the importance attached by the Charter of the OIC and its Ten-Year Programme of Action for Member States to consolidate the principles of good governance, promote human rights, fight corruption, expand political participation and inclusive development, and address the growing challenges in the political, social and economic domains which cannot be tackled effectively except through the implementation of comprehensive reforms in various sectors.” However, “[t]he meeting emphasized the imperative of respecting the sovereignty, territorial integrity of Libya and non-interference in its internal affairs stressing the principled and firm position of the OIC against any form of military intervention to Libya.”).

<sup>322</sup>The Cairo Declaration on Human Rights in Islam, The Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Arab Republic of Egypt, from 9-14 Muharram 1411H (31 July to 5 August 1990), *available at* <http://www.oic-oci.org/english/article/human.htm>.

<sup>323</sup>Article 19, *The Article 19 Freedom of Expression Handbook: International and Comparative Law, Standards and Procedures*, at 26 (August 1993), *available at* <http://www.article19.org/pdfs/publications/1993-handbook.pdf>.

<sup>324</sup>*Id.*

expanding the rights of free expression, acknowledges that “only the most widely accepted principles of freedom of expression law - such as that people should not be imprisoned for the peaceful expression of their beliefs - may be considered customary norms.”<sup>325</sup> The right to access a free Internet is not among the most widely accepted principles of free expression. In fact, a large amount of countries practice some form of Internet censorship or restriction. The Global Network Initiative describes “Internet censorship [as] a rising trend, with approximately 40 countries filtering the Web in varying degrees, including democratic and non-democratic governments.”<sup>326</sup> Governments are dedicating more and more resources towards developing state of the art methods of filtering, blocking, and monitoring online content.<sup>327</sup>

To constitute an international customary norm, the practice is “followed from a sense of legal obligation.”<sup>328</sup> Here again, it is problematic to say that a free and open Internet is perceived by countries to be a legal obligation. Saudi Arabia is transparent and open as to its web filtering policies. Other countries are just as upfront about their censorship of the Internet. If these countries perceived their activities as in violation of a legal obligation, most of them would not be so open about their restrictive policies.

The acceptance of a customary international norm may be hindered by “disagreements as to the scope of a customary norm as well as the point at which it ripened into binding law.”<sup>329</sup> Indeed scope is relevant here. Freedom of expression, without this freedom to access an open internet, may itself be a customary international norm. This is a more narrow scope which likely has more support by being more generally and consistently practiced and being viewed by states as carrying some legal obligation.

Article 19.org argues that “...government practice in negotiating and approving international instruments, especially in the human rights field, has been accorded an increasingly important role in the development of customary law.”<sup>330</sup> Freedom of expression has been negotiated and agreed upon in many international instruments. Under that premise, the Article 19 organization argues that “Articles 19 and 20 of the Universal Declaration (on freedom of expression, peaceful assembly and association) are generally accepted to be declaratory of customary norms.”<sup>331</sup>

## **BUILDING THE FOUNDATION OF A CUSTOMARY NORM**

The freedom to access an unfiltered Internet filled with unfettered free expression is thus not an international customary norm. Absent a treaty which specifically

---

<sup>325</sup>*Id.*

<sup>326</sup> Inaugural Report 2010, Global Network Initiative, at 3, [http://www.globalnetworkinitiative.org/cms/uploads/1/GNI\\_annual\\_report\\_2010.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_annual_report_2010.pdf).

<sup>327</sup>*Id.* (“Governments are using more sophisticated censorship and surveillance techniques, including blocking social networks, to restrict a variety of types of content, including content that is legally restricted (e.g., drugs) or culturally sensitive (e.g., related to sexuality), or that implicates national security matters.”).

<sup>328</sup> Article 19, *The Article 19 Freedom of Expression Handbook: International and Comparative Law, Standards and Procedures*, at 26 (August 1993), available at <http://www.article19.org/pdfs/publications/1993-handbook.pdf>.

<sup>329</sup>*Id.*

<sup>330</sup>*Id.*

<sup>331</sup>*Id.* (“...an advocate could credibly argue that widespread acceptance of the treaties . . . has fleshed out the content of those norms, at least regarding areas where the main human rights treaties offer comparable protections.”).

touched on the matter, the process of getting this right to be protected under customary norms would be a long process.

Countries, such as the United States, that believe the Internet should be free of censorship as a part of the freedom of expression should make their case to other countries. Advocate countries should accrue bi-lateral agreements with other countries. This would lend support that the protection of this right is a generally accepted norm.

Each country should enact domestic legislation, which would also in the aggregate develop a showing that the protection of this right is a generally accepted norm and that those countries view protecting this right as a legal obligation.

Advocates should also work to get a resolution passed by the U.N. General Assembly to express the view that the Internet should be free of content restrictions as part of the freedom of expression. This would not be a binding rule of law, but it would bolster the case for the right to be protected under international customary law.

Finally, civil society organizations could help further these aims. Organizations should be formed in each country to carry out work similar to the Global Network Initiative. Civil society organizations could also help raise awareness of the issue. This could lead to a change in elected officials' views on the topic. Over time, these acts would build a foundation for legitimizing the protection this right as a customary norm.

## **CONCLUSION**

The freedom to seek, receive, and impart information, through any media of our choice, is an important one. Democracies depend on the dissemination of information and open debate on the issues to make the system work. This trend of governments censoring the Internet, and monitoring its users is troubling. As technology progresses, new media for communication will likely be developed. A trend which only applies rights to traditional media could leave us with no rights at all. If each new forum for our speech will find our speech unprotected, our freedom of expression on outmoded, unused technology will become a vestigial right. This trend should be stopped before we arrive at such a point where all of our rights are meaningless.

## WHEN USE OF FORCE UNDER CHAPTER VII IS A NECESSARY U.N. ENFORCEMENT MEASURE

BY NICOLE RUZINSKI  
J.D. CANDIDATE, 2012

**“WHEN ATROCITIES ARE COMMITTED AGAINST INNOCENTS, THE INTERNATIONAL COMMUNITY MUST SPEAK WITH ONE VOICE.”<sup>332</sup>**

This statement expresses the importance of the enforcement measures of the United Nations (U.N.). When an action is taken through the U.N. System, it becomes the statement of all member states and an act by many. Though the U.N. Charter encourages all attempts to make a peaceful settlement between disputing states<sup>333</sup>, at times peaceful settlement will be either impossible or improbable. In these circumstances, the use of force under the Security Council’s Chapter VII powers becomes the only option to uphold the purpose of the Charter and ensure the protection of human rights.

This paper will examine the enforcement measures of the U.N. as well as discuss the circumstances that prompt a stronger response from the U.N. Security Council. Part One will examine the enforcement procedures found within the U.N. Charter. Part Two will look at two case studies, South Africa and Libya, and examine the measures taken by the U.N. in each circumstance. Finally, the paper will conclude with a discussion of the different criteria that can be used by the Security Council to determine when use of force, rather than sanctions, is a required response from the Security Council. While sanctions may be effective in attempting to change the policies of a government, their slow effect does little to stop governments that are engaging in violence.

### THE ENFORCEMENT PROCEDURES OF THE UNITED NATIONS SYSTEM

The U.N. System was born from the aftermath of World War II.<sup>334</sup> At the forefront of the system was the protection and promotion of human rights.<sup>335</sup> In its Charter, the U.N. sets its purpose in Article One, stressing the goal of protecting international peace and working collectively to solve world problems.<sup>336</sup> The Article’s first paragraph states:

The purposes of the United Nations are to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful

---

<sup>332</sup> U.N. SCOR, 66th Sess., 6490th mtg. at 3, U.N. Doc. S/PV.6490 (Feb. 25, 2011) (statement by U.S. Representative to the Security Council, Michelle Rice) [hereinafter Meeting 6490].

<sup>333</sup> U.N. Charter, art. 33.

<sup>334</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 135 (2d ed., 2009).

<sup>335</sup> *Id.*

<sup>336</sup> U.N. Charter art. 1, para. 1.

means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.<sup>337</sup>

Therefore, at its outset, the U.N. created a goal of enforcement through a collective system, seeking collective action from member states.<sup>338</sup> The Charter also further enumerates the goal of “promoting and encouraging respect for human rights and for fundamental freedoms for all”<sup>339</sup> and “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>340</sup> It is clear that the U.N. system would need some enforcement mechanism to protect these rights and seeks the aid of all states to achieve these goals.

However, key to this new system was to promote these rights well also respecting the sovereignty of each member state.<sup>341</sup> The respect for sovereignty is best seen through the principle of non-intervention that is equally prominent within the U.N. Charter.<sup>342</sup> It is unlikely that many states would have signed the U.N. Charter if they did not have a guarantee that their domestic affairs would not be subject to international control.<sup>343</sup> The enforcement measures must walk a line between ensuring the guarantees of sovereignty and non-intervention while also living up to the purposes of the U.N. As Article Two states, “this principle [of non-intervention] shall not prejudice the application of enforcement measures under Chapter VII.”<sup>344</sup> The U.N. can only be as strong as its ability to make states comply with the treaties they have signed. The enforcement measures can be found in both the Human Rights Council, the main human rights body of the U.N., as well as the Security Council.

#### THE HUMAN RIGHTS COUNCIL<sup>345</sup>

The Human Rights Commission (the Commission) was created as a subsidiary of the Economic and Social Council (ECOSOC) of the General Assembly (G.A.) in 1946.<sup>346</sup> The Commission also had its own sub-body that was staffed by 26 human rights experts to evaluate the compliance of states.<sup>347</sup> The Commission did not take its first actions until 1967 and formed ad hoc expert groups to investigate human rights violations in South Africa.<sup>348</sup> ECOSOC passed a resolution allowing the Commission

---

<sup>337</sup>U.N. Charter art. 1, para. 1.

<sup>338</sup> U.N. Charter art. 1, para. 4.

<sup>339</sup> U.N. Charter art. 1, para. 3.

<sup>340</sup> U.N. Charter art. 1, para. 2.

<sup>341</sup>ROBERT F. GORMAN, GREAT DEBATES AT THE UNITED NATIONS: AN ENCYCLOPEDIA OF FIFTY KEY ISSUES, 1945-2000 101 (2001). Indeed the U.N. Charter contains a provision in its opening chapter stressing that “the Organization is based on the principle of the sovereign equality of all its members.” U.N. Charter art. 2, para. 1.

<sup>342</sup> U.N. Charter art. 2, para. 7.

<sup>343</sup>JOST DELBRUCK, A FRESH LOOK AT HUMANITARIAN INTERVENTION UNDER THE AUTHORITY OF THE UNITED NATIONS, 67 IND. L. J. 887, 889 (1994) (discussing the importance of the principle of non-intervention under general international law).

<sup>344</sup> U.N. Charter, art. 2, para. 7.

<sup>345</sup> The Human Rights Council was originally know as the Human Rights Commission

<sup>346</sup> Henkin, *supra* note 3, at 417. The U.N. Charter grants authority to ECOSOC, a General Assembly body, to create any necessary commissions to fulfill the purposes of the Charter. *Id.* See also U.N. Charter, art. 68. The Commission meets for only six-week periods each year. Henkin, *supra* note 3, at 417.

<sup>347</sup> Henkin, *supra* note 3, at 417.

<sup>348</sup>*Id.* at 419. This step was important to establish the authority of the Commission. *Id.* Previously, ECOSOC had ruled that “the Commission had no power to take any action in regard to any complaints

to review “gross human rights violations” and created the new purpose of the Commission as a monitor.<sup>349</sup> The Commission is given the power to conduct studies related to information it receives regarding violations of human rights and report its results to ECOSOC.<sup>350</sup> The Commission developed special procedures to comply with the resolution.<sup>351</sup>

The special procedures are sub-commissions, which allow independent experts, called Special Rapporteurs, to examine the human rights conditions in a particular country.<sup>352</sup> There are several different functions that may be performed in order to examine issues within a specific country or over a particular area of human rights.<sup>353</sup> ECOSOC has also permitted the Commission to use an additional procedure called the 1503 procedure.<sup>354</sup> The 1503 procedure looks more in-depth at specific gross violations of human rights and determines whether the issue should be sent to the full Commission.<sup>355</sup> The procedure is completely confidential and there are strict criteria to trigger this mechanism.<sup>356</sup> If a complaint successfully meets all the necessary criteria, it is forwarded to the offending state for a response to the allegations.<sup>357</sup> The process is long and after the initial complaint, the complaining party has no further access.<sup>358</sup> The Commission will then decide whether to take any further measures and terminate review.<sup>359</sup> There are no other remedies that may come from the Commission.<sup>360</sup>

In 2006 the Human Rights Commission transformed into the Human Rights Council (the Council).<sup>361</sup> The Council is now an independent body and also has a new

---

concerning human rights.” *Id.* With no power to take action, the Commission was limited in its ability to deal with complaints. *Id.*

<sup>349</sup>*Id.* at 420 (citing E.S.C. Res. 1235 (XLII), U.N. ESCOR, 42d Sess., Supp. No. 1, U.N. Doc. E/4393 (June 6, 1967)). The Commission is given the power to conduct studies related to information it receives regarding violations

<sup>350</sup> E.S.C. Res. 1235 (XLII), U.N. ESCOR, 42d Sess., Supp. No. 1, U.N. Doc. E/4393, at 17-8 (June 6, 1967).

<sup>351</sup> Henkin, *supra* note 3, at 420.

<sup>352</sup>*Id.* The Chairperson of the Commission appoints the experts, who are unpaid and may serve for six years. *Id.* at 420-21.

<sup>353</sup>*Id.* at 423. The first is a fact-finding role where experts meet with people in a certain country to determine the state of human rights and hear any concerns people may have. *Id.* at 421. Second, communications may be issued to address a specific concern in a country and request a country to address those claims. *Id.* Third, the special procedures issue public statements to draw attention to a particular crisis to place more pressure on governments. *Id.* at 422. Fourth, studies may be conducted to examine trends in human rights and attempt to identify future issues. *Id.* Fifth, the special procedures may define human rights standards. *Id.* Finally, the special procedures will create annual reports for the Commission regarding key points of a mission and make recommendations. *Id.*

<sup>354</sup>*Id.* at 432. The name of the procedure comes from the resolution passed by ECOSOC in 1970. *Id.*

<sup>355</sup>*Id.*

<sup>356</sup>*Id.* First of these criteria is that any complaint cannot be politically motivated. *Id.* Second, there must be “reasonable grounds to believe it referred to a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.” *Id.* Someone with direct knowledge must also submit any claim. *Id.* Every complaint must be thorough and detail all allegations and evidence of abuse. *Id.* at 433. Finally, a party must have exhausted all domestic remedies. *Id.*

<sup>357</sup>*Id.* at 433.

<sup>358</sup> Henkin, *supra* note 3, at 433.

<sup>359</sup>*Id.* The Commission can decide on “four different courses of action: (1) to discontinue reviewing the matter; (2) to keep the situation under review... (3) to keep the situation under review and appoint a country special procedure to monitor...; and (4) to refer the matter to the public 1235 procedure...” *Id.*

<sup>360</sup>*Id.*

<sup>361</sup>*Id.* at 434. One of the main reasons for the reforms is the make-up of the Commission. *Id.* In 2001 the Commission included many states that were also major violators of human rights including Saudi

monitoring procedure.<sup>362</sup> The Universal Periodic Review requires the Council to review member states every four years.<sup>363</sup> First working groups will review the state practices and prepare a report.<sup>364</sup> States then have the option of reviewing the report and can accept or refuse any recommendations.<sup>365</sup> The working group will then adopt the report and then the Council will adopt it.<sup>366</sup> The initial assessments of the new procedure suggest that states are taking it more seriously and are more cooperative.<sup>367</sup>

One of the major flaws of the Commission and the Council is that none of the decisions have binding effect on the states. States are not required to cooperate with any investigations and often do not.<sup>368</sup> It is also difficult for individuals to bring claims to the Council because they must exhaust local remedies, which may be difficult in a country where their rights are already suppressed. Only time will tell if the new reforms that have been put in place will really create a difference in the functionality of the Council.<sup>369</sup> The Council can have no legitimacy in the international community if it continues to allow human rights abusers to serve. Overall, the Council lacks any effective enforcement measures that make it a viable pathway to solving an international crisis.

#### THE SECURITY COUNCIL

The U.N. Charter grants the greatest authority to the Security Council (S.C.) to ensure states comply with the purposes of the U.N. Charter.<sup>370</sup> Only the S.C. may bring enforcement measures through either peaceful or non-peaceful means.<sup>371</sup> However only certain parties may come before the Council. The first party that may come before the council is any member state.<sup>372</sup> Non-state parties may also come before the S.C. so long as the party is willing to accept the dispute settlement standards in the U.N. Charter.<sup>373</sup> The G.A. may also bring matter before the S.C. for “situations which are likely to endanger international peace and security.”<sup>374</sup> The Secretary General is the final party who may “bring any matter which in his opinion may threaten the maintenance of international peace and security.”<sup>375</sup> If any of these three parties bring a dispute to the S.C., the S.C. must meet.<sup>376</sup>

The S.C. is expressly given the authority to investigate any dispute that is brought to its attention.<sup>377</sup> If the S.C. determines initially that “the conditions [necessary for the exercise of its functions] do not exist, it will not include the matter referred on its

---

Arabia and Libya. *Id.* The Commission suffered problems with legitimacy and any action taken by the Commission became heavily politicized. *Id.* at 435.

<sup>362</sup>*Id.* at 435-8.

<sup>363</sup>*Id.* at 438.

<sup>364</sup> Henkin, *supra* note 3, at 438.

<sup>365</sup>*Id.*

<sup>366</sup>*Id.*

<sup>367</sup>*Id.*

<sup>368</sup> *See generally id.* at 426-31.

<sup>369</sup> Overall reviews of the Council have so far been poor. *Id.* at 442.

<sup>370</sup> U.N. Charter, art. 25.

<sup>371</sup> *See* U.N. Charter, ch. vi-vii.

<sup>372</sup> U.N. Charter, art. 35, para. 1.

<sup>373</sup> *Id.*

<sup>374</sup> U.N. Charter, art. 11, para. 3.

<sup>375</sup> U.N. Charter, art. 99.

<sup>376</sup> BENEDETTO CONFORTI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* 153 (3d. ed. 2005).

<sup>377</sup> U.N. Charter, art. 34.

agenda.<sup>378</sup> The Council President will do the initial review to eliminate any obvious noncompliance.<sup>379</sup> However, any member of the S.C. may take this power from the President.<sup>380</sup> Once on the agenda, the S.C. will formally investigate “any dispute or situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”<sup>381</sup> This gives the S.C. a fact-finding role and the ability to collect any necessary information on a situation.<sup>382</sup> The decision of the S.C. to investigate will be binding on the state parties to the dispute.<sup>383</sup> Upon completion of an investigation, there are two different dispute settlements.

The first form of settlement is known as peaceful settlement and is governed by Chapter VI of the U.N. Charter.<sup>384</sup> The key language triggering a S.C. response is any “dispute or situations the continuation of which is likely to endanger the maintenance of international peace and security.”<sup>385</sup> The language suggests that the situation must have some severity before the S.C. will take action.<sup>386</sup> States are first encouraged to use peaceful means to settle a dispute;<sup>387</sup> however, if the S.C. finds those methods unsatisfactory, it will intervene under Article 36.<sup>388</sup>

The second form of settlement falls under Chapter VII of the U.N. Charter and deals with situations where there is the “existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>389</sup> These actions are only taken in the most severe situations, as they require intervention into the internal matters of a state. The S.C. may first take provisional measures in an attempt to prevent the further proliferation of the situation.<sup>390</sup> The S.C. may then take non-military intervention measures in an attempt to get a state or states to comply with the Charter.<sup>391</sup> The measures ordered may include “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.”<sup>392</sup> One of the most common measures would be the use of economic sanctions as a way to coerce a state to change its behavior.<sup>393</sup> Should the

---

<sup>378</sup> Conforti, *supra* note 45, at 153.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 153-4.

<sup>381</sup> U.N. Charter, art. 34.

<sup>382</sup> Conforti, *supra* note 45, at 155.. The S.C. will pass a general resolution creating a committee to conduct the investigation. *Id.* The investigation function may also be used in cases where the S.C. has already ruled but is continuing to monitor. *Id.* at 157.

<sup>383</sup> *Id.* at 158. Article Twenty-five requires any member state “to accept and carry out the decisions of the Security Council in accordance with the present Charter.” U.N. Charter, art. 25. It is unclear what the repercussions may be if a state were to refuse to cooperate with an investigation. Conforti, *supra* note 45, at 160.

<sup>384</sup> *See generally* U.N. Charter, ch. VI.

<sup>385</sup> U.N. Charter, art. 37, para. 2.

<sup>386</sup> Conforti, *supra* note 45, at 162. The S.C. has full discretion in deciding what situations threaten peace and security. *Id.* Article Thirty-eight also suggests that parties may request the S.C. to make a recommendation even if the dispute does not threaten peace and security. *Id.* at 163.

<sup>387</sup> U.N. Charter, art. 33.

<sup>388</sup> U.N. Charter, art. 36.

<sup>389</sup> U.N. Charter, art. 39.

<sup>390</sup> U.N. Charter, art. 40.

<sup>391</sup> U.N. Charter, art. 41.

<sup>392</sup> *Id.*

<sup>393</sup> Henkin, *supra* note 3, at 524. Sanctions also raise human rights concerns in and of themselves because of the negative effect they can have on a local population. *Id.* at 525.

sanctions prove ineffective or the circumstances so severe, the S.C. may also order forceful intervention.<sup>394</sup>

The S.C. certainly has more effective remedies than the Human Rights Council. Decisions made by the S.C. are binding on the states and also allow for positive action and not just recommendations.<sup>395</sup> However, like every S.C. decision, it will still be subject to the veto power of the permanent members.<sup>396</sup> Actually passing enforcement actions can be extremely difficult, especially when the situations that arise are highly political. The enforcement mechanism is not perfect, but if it is used, it carries the weight of the entire international community, which brings a sense of legitimacy to the action.

## CASE STUDIES

### SOUTH AFRICA AND APARTHEID

As noted above, South Africa provided the first instance for the Human Rights Commission to take some sort of positive action towards enforcing human rights. While apartheid existed long before the 20<sup>th</sup> century in South Africa, it became heavily politicized in the early 1950s following the end of colonialism.<sup>397</sup> Apartheid gained international criticism in the 1970s but did not become greatly vilified till the 1980s.<sup>398</sup> Economic sanctions were used to put pressure on the government to change the discriminatory regime.<sup>399</sup> Change finally occurred with the renunciation of apartheid in 1990 and voting rights for everyone.<sup>400</sup>

### History

Southern Africa had been subject to foreign rule since the first Dutch settlers in the 1600s.<sup>401</sup> However, the real force of the apartheid grew out of the British colonial takeover in the early 20<sup>th</sup> century.<sup>402</sup> During this time, discrimination against black Africans grew and became a political platform for the white leaders.<sup>403</sup> The British worked with the Afrikaners by employing them in the mining industry.<sup>404</sup> They also unified the British colonies to form South Africa and created a white only government, giving only white males the ability to vote and explicitly excluding the native black South Africans.<sup>405</sup> The new government created a formal policy of

---

<sup>394</sup> U.N. Charter, art. 42.

<sup>395</sup> U.N. Charter, art. 25.

<sup>396</sup> U.N. Charter, art. 27. Passage in the S.C. requires an affirmative vote by at least nine members, including all five permanent members. *Id.* While the veto power is not explicitly named, if any of the five permanent members were to veto a decision, it could not pass. *Id.*

<sup>397</sup> NANCY L. CLARK AND WILLIAM H. WORGER, *SOUTH AFRICA THE RISE AND FALL OF APARTHEID* 3-4 (2004). Racial segregation and slavery can be traced back to the earliest settlers in South Africa. *Id.* at 3. Under colonial rule, discrimination against indigenous people was not unusual and accepted. *Id.*

<sup>398</sup> *Id.* at 5.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 5-6.

<sup>401</sup> *Id.* at 11.

<sup>402</sup> *Id.* at 16.

<sup>403</sup> Clark and Worger, *supra* note 66, at 18-9. Hereinafter, black Africans shall be referred to as Africans.

<sup>404</sup> *Id.* at 19. The Dutch speakers represented the white majority and wanted to make Afrikaners an official language. *Id.* The descendants of the Dutch settlers were known as Afrikaners. *Id.*

<sup>405</sup> *Id.* at 20.

segregation aimed at protecting the white interests in economic and political arenas.<sup>406</sup>

Africans were not completely complacent in the government oppression and formed the African National Congress (ANC).<sup>407</sup> The effects of the ANC were extremely limited and were halted by the rise of the Afrikaner political movement, who cooperated with the British to promote segregationist policies.<sup>408</sup> The increased industrialization of the country during World War II caused a growth in urban African populations and challenged the government segregation policies.<sup>409</sup> The ANC attempted to negotiate changes with the government however the more extreme white party proposed apartheid as a solution to the disagreement between both sides.<sup>410</sup> White voters elected the National Party in 1948, which commenced the period of form apartheid for the next nearly 50 years.<sup>411</sup>

The process of instituting apartheid required a great deal of new legislation as every aspect of life had to be divided on racial lines.<sup>412</sup> The Population Registration Act of 1950 created a system for people to register their race with the government as White, Coloured or Native.<sup>413</sup> The pass system was streamlined requiring all citizens to register with the government in order to gain passage into white areas.<sup>414</sup> The system allowed the government to more easily spread division into all areas of life.<sup>415</sup>

---

<sup>406</sup> *Id.* at 21. Whites only accounted for 20 percent of the population in South Africa. *Id.* Much legislation focused on keeping Africans out of skilled labor and limiting wages. *Id.* Africans were also prevented from forming any labor groups or fighting to their rights. *Id.* In response to opposition, the government prevented African's from working independently in areas like farming. *Id.* at 22. Africans were also only given poor quality land and limited areas of the country. *Id.* In cities, African were segregated into the own areas or sent back to the rural areas when work was completed. *Id.* These policies were cemented in the 1927 with the Native Administration Act that placed all laws related to Africans separate from the rest of government and allowed the government to rule by decree. *Id.*

<sup>407</sup> *Id.* at 23. The Congress was made of African elites and was fairly moderate. *Id.* While they did pose some challenge to the government, the effect was minimal. *Id.* at 24. There was also some organization among African labor that attempted to fight for better wages but were often met with force. *Id.*

<sup>408</sup> *Id.* at 26-27, 31.

<sup>409</sup> Clark and Worger, *supra* note 66, at 36-7. African represented "more than 50 per cent of the industrial workforce" at this time. *Id.* at 37.

<sup>410</sup> *Id.* at 39-40. There were two competing white parties at this time in South Africa. The United Party suggested Africans continued to work in urban areas because they were such a large part of the workforce, but did not give them political rights. *Id.* at 40. The more extreme Herengide National Party (later National Party) instead suggested that Africans should be segregated to rural areas with limited migrant workers allowed to enter cities. *Id.* A more moderate sector advocated for apartheid, which would allow Africans to remain in cities but force them out of "white" areas. *Id.*

<sup>411</sup> *Id.* at 42. The National Party promoted the fear of whites that African unrest could lead to greater strife. *Id.* at 41. They claimed apartheid was a "safe solution" and that the opposing party was in favor of integration. *Id.* The National party won a majority of the parliament seats with the minimum number of votes. *Id.*

<sup>412</sup> *Id.* at 45.

<sup>413</sup> *Id.* at 45-6. The categories extended to include Asian. *Id.* at 46. Later acts also attempted to clarify how to classify people, focusing mainly on appearance and descent. *Id.*

<sup>414</sup> *Id.* at 46. Black Africans could only stay in urban areas for 72 hours without obtaining special passes. *Id.* They could also not live in an urban areas unless they had worked for the same employer for 10 years or were born there. *Id.* Each person had "a 'reference book' which included an individual's photograph, address, marital status, employment record, list of taxes paid, influx control endorsements, and rural district where officially resident." *Id.* It was a criminal offense for a person not to have his reference book with him at all times. *Id.*

<sup>415</sup> Clark and Worger, *supra* note 66, at 47. Mixed race marriage was officially abolished. *Id.* Groups were segregated by geographic area and all public facilities were also divided with no equality requirement. *Id.* at 48. The greatest impact came in the area of education where African school were governed by a separate department and took away any government support for schools. *Id.* at 49-50.

Racial groups also determined political rights with white having the most power.<sup>416</sup> Apartheid was not implemented without opposition from Africans,<sup>417</sup> however their protests only led to further repression and the creation of a police state.<sup>418</sup> The government also attempted to create independent African “homelands” that were thought to act as their own states and also making the residents citizens of the homeland rather than South Africa.<sup>419</sup>

Apartheid had a huge impact on South African society. One area was in economic development. The state experienced significant economic growth, however only whites saw financial benefit from this.<sup>420</sup> Wages for Africans were frozen at the same rates.<sup>421</sup> Africans were increasingly forced to migrate to the “homelands” which were economically weak due to their so-called independence from government.<sup>422</sup> Frequent labor strikes in industrial areas triggered some divestment by international companies who did not want to risk business in an unstable market.<sup>423</sup> South Africa was in the state of a virtual police state, with government crackdowns after every protest and extreme violence.<sup>424</sup>

### THE U.N. RESPONSE

The first U.N. interest into the problems of South Africa came from the General Assembly (G.A.) after reports by India that Indians were being discriminated against following the end of colonial rule.<sup>425</sup> The dispute was sent to the First Committee of the General Assembly and a resolution was passed for mediation between the two governments.<sup>426</sup> In 1952, South Africa rejected all proposals for negotiations and claimed that the proposals were “unconstitutional.”<sup>427</sup> The first attempt at enforcing the U.N. Charter was ineffective and South Africa felt no threat from violating its international agreements.

In 1952, several states proposed that the issue of apartheid in South Africa be placed on the General Assembly agenda.<sup>428</sup> Once again, South Africa argued that the G.A. would be violating Article Two of the Charter and “neither the Charter nor any

---

<sup>416</sup>*Id.* at 48.

<sup>417</sup>*See generally id.* at 53-9.

<sup>418</sup>*Id.* at 54.

<sup>419</sup>*Id.* at 59-61.

<sup>420</sup>*Id.* at 63.

<sup>421</sup> Clark and Worger, *supra* note 66, at 63.

<sup>422</sup>*Id.* at 65-6. The result was that most Africans were living in poverty. *Id.* at 67. The homelands were also overcrowded and farming conditions were poor. *Id.* The governments of the “homelands” were often corrupt and the whites would handpick the rulers who would present the least opposition. *Id.* at 67-8.

<sup>423</sup>*Id.* at 69-72.

<sup>424</sup>*Id.* at 77-8.

<sup>425</sup>LOUIS B. SOHN, RIGHTS IN CONFLICT: THE UNITED NATIONS & SOUTH AFRICA 48 (1995). South Africa argued that this strictly an issue of the sovereign state and the General Assembly had no authority to intervene.*Id.* at 49. The representative noted that Article Two of the U.N. Charter stated that “within the domain of its domestic affairs, a State is not subject to control or interference, and its actions could not be called into question by any other State.” *Id.* He stated that even a recommendation by the General Assembly can be considered intervention and instead sought an Advisory Opinion from the International Court of Justice. *Id.* at 50. The G.A. argued that because South Africa had made an agreement with India regarding the treatment of immigrants, the issue was no longer solely domestic.*Id.* at 51.

<sup>426</sup>*Id.* at 54, 56.

<sup>427</sup>*Id.* at 56.

<sup>428</sup>*Id.* at 63.

other binding document contained any definition of fundamental human rights.”<sup>429</sup> The G.A. again ignored the protests of South Africa and authorized the Human Rights Commission to continue to monitor apartheid in South Africa and “suggest measures which would help to alleviate the situation and promote peaceful settlement.”<sup>430</sup> The Commission again reported that apartheid was against the U.N Charter and that the institution was a threat to external peace.<sup>431</sup> In 1955, South Africa stated that it would not participate in the G.A.’s discussions of apartheid and was absent from the 1956 Session.<sup>432</sup> South Africa continued to deny the authority of the G.A. and the matter finally went to the Security Council (S.C.) in 1960.<sup>433</sup>

The S.C. debated the validity of a claim against South Africa.<sup>434</sup> The states that brought the matter to the S.C. “expressed concern that in this case the maintenance of international peace and security is endangered.”<sup>435</sup> South Africa countered these claims by again stating there was no authority for the U.N. to intervene and that South Africa has not threatened other nations or started any dispute that could threaten international peace.<sup>436</sup> The S.C. passed a resolution noting that “the continued disregard by [South Africa] of the resolutions of the General Assembly calling upon it to revise its policies and bring them into conformity with its obligations and responsibilities under the Charter of the United Nations” and the concern of other states has created “international friction and if continued might endanger international peace and security.”<sup>437</sup> The S.C. requested South Africa to “initiate measures aimed at bringing about racial harmony based on equality...and to abandon its policies of apartheid and racial discrimination.”<sup>438</sup>

States continued to push the issue of apartheid in the G.A., with some even calling for South Africa to be expelled from the U.N.<sup>439</sup> In a 1961 resolution, the G.A. stated that the S.C. needed to take up the matter under the enforcements powers in Chapter VI and VII of the Charter.<sup>440</sup> It also stated that if South Africa continues to ignore recommendations, the situation will have risen to a threat to peace.<sup>441</sup> In the following year, the G.A. passed its first enforcement resolution against South Africa and gave directions to other states for governing their relations.<sup>442</sup> Included in the measures was break off diplomatic relations, closing ports to South African ships, and boycotting South African exports.<sup>443</sup> A Special Committee was also formed to monitor South Africa and report to either the G.A. or S.C.<sup>444</sup> There was also a request for the S.C. to

---

<sup>429</sup>*Id.* at 67.

<sup>430</sup>*Id.* at 69.

<sup>431</sup> Sohn, *supra* note 94, at 70.

<sup>432</sup>*Id.* at 72.

<sup>433</sup>*Id.* at 76.

<sup>434</sup>*Id.*

<sup>435</sup>*Id.*

<sup>436</sup>*Id.*

<sup>437</sup> Sohn, *supra* note 94, at 77 (citing S.C. Res. 134, U.N. Doc. S/RES/134 (April 1, 1960)).

<sup>438</sup> S.C. Res. 134, ¶ 4, U.N. Doc. S/RES/134 (April 1, 1960).

<sup>439</sup> Sohn, *supra* note 94, at 81. The opposition was especially strong from other African states. *Id.* at 78. South Africa continued to deny the legitimacy of the General Assembly to pass any resolutions on the matter, accusing the U.N. of applying a “double standard” as other states also violated the Charter. *Id.* at 80.

<sup>440</sup>*Id.*

<sup>441</sup>*Id.* at 82.

<sup>442</sup>*Id.* at 84.

<sup>443</sup>*Id.*

<sup>444</sup>*Id.* Member states were expected to support the Committee and do nothing that would hinder its work. *Id.*

consider taking enforcement measures and potentially remove South Africa from the General Assembly.<sup>445</sup> The results of the resolution were mixed.<sup>446</sup> South African again did not acknowledge authority and one some states actually followed the resolution.<sup>447</sup>

In 1963 the S.C. took its first enforcement measure; it requested an arms embargo against South Africa.<sup>448</sup> The S.C. noted that by providing arms, states were “indirectly providing encouragement in various ways ...to perpetuate, by force, its policy of apartheid.”<sup>449</sup> In 1963, the U.N. also established the meaning of its enforcement mechanisms, holding recommendations to fall under Chapter VI of the U.N. Charter and therefore not binding on states.<sup>450</sup> They also held that human rights prevailed over the prohibition on intervention.<sup>451</sup> Additional resolutions also granted the “right of the international community to provide humanitarian assistance regardless of the non-intervention provision.”<sup>452</sup> While South Africa continued to reject the authority of the U.N. to rule on apartheid, these measures set an important precedent for how the U.N. system could enforce international agreements.

It was not till 1970 that the S.C. finally found that South African posed a potential threat to international peace and security.<sup>453</sup> This resolution was still not mandatory, but reinforced the arms embargo.<sup>454</sup> The G.A. once again past a resolution requesting the S.C. to take enforcement measures under Chapter VII.<sup>455</sup> It also encouraged states to cut off diplomatic ties and called apartheid “a crime against humanity.”<sup>456</sup> Again, nothing binding had been passed forcing states to comply with any measures or requiring South Africa to change its behavior.

---

<sup>445</sup> Sohn, *supra* note 94, at 85. The Secretary-General also sent the resolution the S.C. to implement further measures. *Id.* The General Assembly did acknowledge that its resolution was not binding, but encouraged states to follow the recommendations and the S.C. to pass a binding resolution. *Id.*

<sup>446</sup>*Id.* at 84.

<sup>447</sup>*Id.* Subsequent reports from the Special Committee continued to urge the S.C. to take measures to enforce the Charter in South Africa. *Id.* 85-6. The many reports were also helpful in shifting public opinion on apartheid. *Id.* at 86.

<sup>448</sup>*Id.* at 88-9 (*citing* S.C. Res. 181, U.N. Doc. S/RES/181 (Aug. 7, 1963). The resolution was a response to the action already undertaken by several states to end sales of arms to South Africa. *Id.* at 86. South Africa again rejected all discussion of the issue, continuing to claim it was a domestic matter. *Id.* Of the permanent members of the S.C., the United States and the Soviet Union agreed with many African states that South Africa posed a threat to peace. *Id.* at 86-7. The United Kingdom thought apartheid did not rise to such a level that it posed a threat to peace and security. *Id.* at 87. France though there should never be intervention in domestic jurisdiction, but agreed that weapons should not be sold to South Africa. *Id.* at 87-8. France and the United Kingdom were the only two countries to abstain from voting on the resolution. *Id.* at 88.

<sup>449</sup> S.C. Res. 181, U.N. Doc. S/RES/181 (Aug. 7, 1963).

<sup>450</sup> Sohn, *supra* note 94, at 92.

<sup>451</sup>*Id.*

<sup>452</sup>*Id.* at 93.

<sup>453</sup>*Id.* at 106.

<sup>454</sup>*Id.* at 107. The General Assembly also continued to pass resolutions condemning the practice of apartheid. It was especially influenced by the Lusaka Manifesto on Southern Africa, passed by the Organization of African Unity in 1969. *Id.* at 103. The Manifesto was a pledge to promote equality in their own states and the region. *Id.* They also promoted the use of peaceful measures to ring about change. *Id.* at 104. The Manifesto called for the ostracization of South Africa from the U.N. and international community. *Id.* The General Assembly also adopted the Manifesto and also voted to increase economic sanctions. *Id.* at 105.

<sup>455</sup>*Id.* at 108-9.

<sup>456</sup> Sohn, *supra* note 94, at 108-9.

In an attempt to place apartheid directly in international law, the G.A. passed Convention on the Suppression and Punishment of the Crime of Apartheid in 1973.<sup>457</sup> The Convention made violators criminally responsible “whether they commit, participate in, directly incite or conspire in the commission of the acts.”<sup>458</sup> There was also renewed support for stripping the credentials of South Africa.<sup>459</sup> The S.C. finally imposed mandatory sanctions against South Africa, though not without initial opposition from members of the S.C.<sup>460</sup> This was the first time Chapter VII of the Charter was used against South Africa and considered apartheid to constitute a threat to peace and security.<sup>461</sup>

Both the G.A. and S.C. continued to pass resolutions into the 1980s. In 1984, the S.C. declared a new South African constitution to be incompatible with the U.N. Charter.<sup>462</sup> In 1985 the S.C. condemned the violence perpetrated by the South African government against opposition and the mass arrests.<sup>463</sup> Finally in 1989, the G.A. passed a Declaration on Apartheid, which presented a rubric for South Africa’s transition of racial discrimination.<sup>464</sup> Included in the principles were a “non-racial and democratic state,” equal citizenship and participation in the government, recognition of human rights, and an end to the state of emergency.<sup>465</sup> The Secretary-General was charged with putting the blueprint into action and in 1990 the South African government made some concessions.<sup>466</sup> After repeal of the some of the major apartheid laws, a National Peace Accord was signed in 1991 and work began on forming a new constitution.<sup>467</sup> When violence broke out in 1992 during constitutional formation, the S.C. again condemned the violence.<sup>468</sup> U.N. observers were put in place to help the country transition and ensure that recommendations were being put in place.<sup>469</sup> Finally in 1994 elections were held under the new system bringing and end to white-minority rule.<sup>470</sup>

### SOUTH AFRICA TODAY

---

<sup>457</sup>*Id.* at 123.

<sup>458</sup>*Id.* at 124.

<sup>459</sup>*Id.* at 130.

<sup>460</sup>*Id.* at 140-5. France, though agreeing with coercing South Africa to obey its international agreements, did not want to deny a country to self-defense. *Id.* at 142.

<sup>461</sup>*Id.* at 143. South Africa again condemned the resolution as a violation of its jurisdiction. *Id.* at 144. The Foreign Minister also blamed the international communities interventions as the cause of the violence in South Africa. *Id.* Nevertheless, the resolution was put into effect and overseen by the Secretary-General. *Id.*

<sup>462</sup> Sohn, *supra* note 94, at 152. This followed General Assembly resolutions condemning the constitutional proposals from the South African government and calling for a total abolishment of apartheid. *Id.*

<sup>463</sup>*Id.* at 153. The S.C. also “demanded that the [state of] emergency ‘be lifted immediately.’” *Id.* Members states were also encouraged to divest in South African and not purchase any exports. *Id.*

<sup>464</sup>*Id.* at 158.

<sup>465</sup>*Id.* at 159-60. There were also principles supporting the free formation of political parties and the release of political prisoners. *Id.* The blueprint also requested South Africa to cooperate with the international community. *Id.* at 160. Upon adopting these measures, South Africa would again be welcome to participate in the U.N. *Id.* at 161.

<sup>466</sup>*Id.* at 161-2.

<sup>467</sup>*Id.* at 163.

<sup>468</sup> Sohn, *supra* note 94, at 165.

<sup>469</sup>*Id.* at 166-7.

<sup>470</sup>*Id.* at 171.

In 1994, Nelson Mandela was elected as the first African president of South Africa.<sup>471</sup> The new constitution was officially passed in 1996, which stated that every citizen was equal before the government.<sup>472</sup> Voting continued to fall along traditional race lines in the new government.<sup>473</sup> Political parties continued to be drawn on largely racial lines and there were fears that a party of one race would only protect that race once in power.<sup>474</sup>

There have been significant improvements to the living conditions of the people of South Africa.<sup>475</sup> African households finally had running water and electricity and new homes were being constructed in place of the shacks found during apartheid.<sup>476</sup> Education also improved for Africans as many were admitted to universities for the first time and elementary schools were required to integrate.<sup>477</sup>

While there have been significant advances, the remnants of a longstanding government oppression were not easily removed.<sup>478</sup> Unemployment is still a huge problem as economic programs are slow to be implemented.<sup>479</sup> South Africa has an abundance of low-wage workers, but lacks sufficient workers trained in specialized skills.<sup>480</sup> The settling of land restitution is also a slow process with some estimates expecting the last of determinations to be completed in 150 years.<sup>481</sup> The poverty has also led to an increase of crime in cities.<sup>482</sup> Perhaps the greatest problems faced by South Africa today is the rampant spread of HIV/AIDS and the lack of available treatment and education to prevent the spread of the disease.<sup>483</sup>

## LIBYA

Libya is a country that for many years has been full of human rights violations despite its position within the U.N. Recently, the situation in Libya has become tense prompting U.N. intervention under Chapter VII.

## HISTORY

Libya had a long history of being under control of other powers and was a major battleground during World War II.<sup>484</sup> Following the war, France and the United Kingdom controlled the country until 1951.<sup>485</sup> The country formed a constitutional

---

<sup>471</sup> Clark and Worger, *supra* note 66, at 110.

<sup>472</sup> *Id.* at 113. The constitution contained provisions stating all were equal regardless of race, religion, ethnic origin, and culture among many other categories. *Id.* There were also protections for fair trial and prohibition against torture. *Id.*

<sup>473</sup> *Id.* at 114-5.

<sup>474</sup> *Id.* at 115.

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> Clark and Worger, *supra* note 66, at 115-6.

<sup>478</sup> *Id.* at 116.

<sup>479</sup> *Id.*

<sup>480</sup> *Id.* at 117.

<sup>481</sup> *Id.* at 116.

<sup>482</sup> *Id.* Some have described South Africa as the most violent country in the world with high murder rates and easy access to weapons. *Id.*

<sup>483</sup> Clark and Worger, *supra* note 66, at 117.

<sup>484</sup> HUMAN RIGHTS WATCH, LIBYA: WORDS TO DEEDS, THE URGENT NEED FOR HUMAN RIGHTS REFORM 11 (2006) [hereinafter HRW 2006].

<sup>485</sup> *Id.*

monarchy under King Idris.<sup>486</sup> Most important for the growth of Libya was the discovery of oil, which helped the country escape poverty though power was still only in the hands of a few.<sup>487</sup>

In 1969, military officers led a coup against the monarchy who they thought worked too closely with the West.<sup>488</sup> The Revolutionary Command Council became the new government, later replaced by the Arab Socialist Union, led by Mu'ammār al-Qadhafi.<sup>489</sup> A Constitutional Proclamation was adopted in December 1969 giving people the right to health care, education, and religious freedom.<sup>490</sup> Notably absent from the list of rights was the freedom of opinion which was limited by public interest and the beliefs of the ruling party.<sup>491</sup> No formal constitution has been adopted since that date.<sup>492</sup> Al-Qadhafi has been the leader since this time and controls all aspects of Libyan life.<sup>493</sup>

In 1975 al-Qadhafi published “the Green Book” which outlined his theory of government, focusing on communism and Islam, called Jamahiriya.<sup>494</sup> To support this system, political parties were banned in 1972.<sup>495</sup> No group could oppose the ideology of Jamahiriya.<sup>496</sup> In 1973, many hundred of Libyans were arrested for allegedly violating the ban on opposing ideologies.<sup>497</sup> The arrests included many academics, journalists, lawyers and anyone else labeled an enemy.<sup>498</sup> The system was officially adopted in 1977 with the Declaration of the People’s Authority, formally creating local congresses and changing the country’s name to the Great Socialist People’s Libyan Arab Jamahiriya.<sup>499</sup> State repression continued through the 1970s and 1980s including a government takeover of religious institutions.<sup>500</sup> There were further escalations throughout the 1980s.<sup>501</sup>

The development of human rights looked promising in 1988.<sup>502</sup> The General People’s Congress passed the Great Green Charter of Human Rights in the

---

<sup>486</sup>*Id.*

<sup>487</sup>*Id.* at 12.

<sup>488</sup>*Id.*

<sup>489</sup>*Id.*

<sup>490</sup> HRW 2006, *supra* note 133, at 12.

<sup>491</sup>*Id.*

<sup>492</sup>*Id.*

<sup>493</sup>*Id.*

<sup>494</sup>*Id.* Jamahiriya means “state of the masses.” *Id.* The system argued against the use of parliamentary systems and considered political parties to be “contemporary dictatorships.” *Id.* 12-3. All citizens were expected to participate in the Basic People’s Congresses to debate all government considerations. *Id.* at 13. Al-Qadhafi considers it an advanced democracy because there are no elections for representatives and citizens represent themselves. *Id.*

<sup>495</sup>*Id.* at 13.

<sup>496</sup> HRW 2006, *supra* note 133, at 13.

<sup>497</sup>*Id.* at 13.

<sup>498</sup>*Id.* Some were imprisoned and others were disappeared. *Id.*

<sup>499</sup>*Id.* The congresses existed at every local administrative level. *Id.* Each congress elected an executive body who selects a representative for the national body. *Id.* Committees then ran the General People’s Congress, each headed by a secretary. *Id.* The government then extended to all areas of life. *Id.* at 14.

<sup>500</sup>*Id.* at 14. Many international companies left Libya following the initial socialist takeover and those that did not leave had their assets frozen. *Id.* In 1979 the United States declared Libya a sponsor of terrorism. *Id.* Libyan jets engaged with U.S. Air Force jets, which resulted in the Libyan jets being shot down. *Id.* U.S. citizens were banned from traveling to Libya and Libyan oil imports were restricted. *Id.* The United Kingdom ended relations with Libya in 1984. *Id.*

<sup>501</sup>*Id.* In 1986 a bombing in Berlin was blamed on al-Qadhafi. Subsequently, the U.S. commenced air raids in two cities, allegedly killing al-Qadhafi’s daughter. *Id.* at 14-5. Additional economic sanctions were also imposed. *Id.* at 15.

<sup>502</sup> HRW 2006, *supra* note 133, at 15.

Jamahiriyān Era.<sup>503</sup> Many basic rights were included in the Charter including freedom of thought, equality and the prohibition on harsh punishment.<sup>504</sup> Libya also signed the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>505</sup> In 1989 the reforms were ignored as greater government repression re-emerged following the return of several Libyans was Afghanistan.<sup>506</sup>

Throughout the 1990s, Libya continued to face internal resistance from Islamic political groups.<sup>507</sup> After some economic pressure from the international community, the Government attempted some minor reforms in order to improve economic investments.<sup>508</sup> The organization Human Rights Watch (HRW) first began observing Libya in 2005 and published a report on where the country stood regarding human rights.<sup>509</sup> They noted that while there may have been some promising steps in Libya, there was still much work to be done regarding human rights. One important change was the abolishment of the People's Court<sup>510</sup>; however, many prisoners convicted in that court are still in prison and there is no plan for how to release them or pay restitution.<sup>511</sup> The government controlled all media in the country.<sup>512</sup> Freedom of association was essentially banned, with no group allowed to oppose the ideology of the government.<sup>513</sup> In 2005, HRW found that Libyan law contained many guarantees

---

<sup>503</sup>*Id.*

<sup>504</sup>*Id.* The Charter also included an independent judiciary and a goal of abolishing capital punishment.

*Id.*

<sup>505</sup>*Id.*

<sup>506</sup>*Id.* Some of the returning Libyans sought to overthrow al-Qadhafi and established Islamic law government. *Id.* This group still exists today. *Id.*

<sup>507</sup>*Id.* at 16. In 1996 there was a major incident at a prison in Tripoli. *Id.* There was a prison uprising where guards responded by shooting prisoners with hundreds dead. *Id.* The government's claims to have acted appropriately and has not cooperated with any inquiries into the incident. *Id.*

<sup>508</sup>HRW 2006, *supra* note 133, at 16-7. In 2003, several political prisoners were released, some who had been imprisoned for 30 years. *Id.* at 17. Families were also informed of some prisoners who had died in custody with limited details. *Id.* Libyan relations with U.S. also improved including some support in stifling the Islamic resistance forces. *Id.* at 18. Libya also improved its relations with European countries. *Id.* at 20.

<sup>509</sup>*Id.* at 1.

<sup>510</sup>The People's Court tried economic, political, and security crimes. *Id.* at 22. Many of the charges should have been protected under the Charter. *Id.*

<sup>511</sup>*Id.* Human Rights Watch requests that those who were arrested for peaceful protests should be released from prison. *Id.* at 26. Libya was also continuing executions of prisoners. *Id.* at 34. Also, continued torture of prisoners during interrogation directly violated Libya's commitments under the CAT. *Id.* at 49. HRW found that torture was not limited to only Libyan citizens but also foreigners. *Id.* at 50. One of the most famous cases involved Bulgarian nurses who were accused of purposefully injecting patients with HIV. *Id.* at 51. They were initially sentenced to death, but those convictions were later overturned. *Id.* at 50-1. The accused testified to HRW that they were "subject to electric shocks, beating to the body with cables and wooden sticks, and beatings on the soles of their feet." *Id.* at 51. Libyans were tried for the use of torture however the lead investigator still insisted the nurses had made up their story. *Id.* at 53. All interrogators accused of torture were acquitted. *Id.*

<sup>512</sup>*Id.* at 56. The government claims that people are free to express themselves within the Basic People's Congresses. *Id.* The media is considered free because the people run the government, so the people really run the media. *Id.* Most news reports still paint the government in a favorable light and critical journalists have been imprisoned. *Id.* at 57. In its report, HRW notes that Libya's law does not match the human rights documents it is party to. *Id.* at 58.

<sup>513</sup>*Id.* at 73. The government claims other associations are not necessary because of the political system. *Id.* The country is only one group, so there is never an opposing side. *Id.* Again, HRW notes that these restrictions violate Libya's international human rights obligations. *Id.*

regarding human rights, but these provisions were rarely implemented and people's rights were directly violated or denied protection.<sup>514</sup>

The most recent HRW report in 2009 noted some improvements in the Libya's penal code regarding human rights.<sup>515</sup> However, there were still many areas where the country fell short of its obligations.<sup>516</sup> Freedom of expression opened up with the establishment of private media and less prosecutions.<sup>517</sup> While journalists are taking a more critical public stance, many of the laws still make them subject to prosecution.<sup>518</sup> These controls still violate international obligations.<sup>519</sup> Right of freedom of assembly and association are still nonexistent.<sup>520</sup> The rights of prisoners have not improved, including those imprisoned without charges, political prisoners and those that have been disappeared.<sup>521</sup> Even with documented abuses, there is still no remedy when human rights are violated.<sup>522</sup>

In February 2011, uprisings began in Libya against the government.<sup>523</sup> The unrest followed similar movements throughout the Middle East.<sup>524</sup> Many of the protests began in the city of Benghazi where 2,000 people marched on government offices.<sup>525</sup> The government responded by using rubber bullets and water cannons.<sup>526</sup> One official "warned that the authorities 'will not all a group of people to move around at night and play with the security of Libya.'"<sup>527</sup> Further protests formed which clashes with pro-government protesters.<sup>528</sup> Reports grew of violence against protesters and deaths that resulted from the attacks.<sup>529</sup> Internet sites were also blocked as protesters had used

---

<sup>514</sup>*Id.* at 77-80.

<sup>515</sup>HUMAN RIGHTS WATCH, TRUTH AND JUSTICE CAN'T WAIT: HUMAN RIGHTS DEVELOPMENTS IN LIBYA AMID INSTITUTIONAL OBSTACLES 2 (2009) [hereinafter HRW 2009].

<sup>516</sup>*Id.*

<sup>517</sup>*Id.* at 20.

<sup>518</sup>*Id.* at 23. The penal code is still extremely broad making with a threat of imprisonment. *Id.* Journalists are still prosecuted for "incitement against eh Jamahiriya system." *Id.* at 24.

<sup>519</sup>*Id.* at 24.

<sup>520</sup>*Id.* at 27. To hold any meeting, a committee must get approval from the government 30 days in advance. *Id.* It is illegal to organize any sort of demonstration and demonstrators will be subject to arrest. *Id.* Any nongovernmental organization is still connected to the government who maintains tight control in the authorization of organizations. *Id.* at 28. The government may remove the authorization of an organization for any organization without any justification. *Id.* There are some human rights organizations, although all are run by al-Qadhafi's family members. *Id.* at 28-9.

<sup>521</sup>See generally HRW 2009, *supra* note 184, at 34-45.

<sup>522</sup>*Id.* at 46. Some families have at least received notice that the family member was disappeared. *Id.* at 52. Death certificates contain no specific information regarding a person's death nor do they state when they died. *Id.* at 53. There have been some offers of compensation, but only in exchange for the families not pursuing any other legal remedy. *Id.* at 55. When families have become too vocal, they themselves have been subject to arrest. *Id.* at 58.

<sup>523</sup>*Middle East Protests: County by County-Libya*, BBC NEWS (Apr. 11, 2011), <http://www.bbc.co.uk/news/world-12482311> (last visited Apr. 25, 2011).

<sup>524</sup>*Id.*

<sup>525</sup>*Libya Protests: Second City Benghazi Hit By Violence*, BBC NEWS (Feb. 16, 2011), <http://www.bbc.co.uk/news/world-africa-12477275> (last visited April 11, 2011).

<sup>526</sup>*Id.*

<sup>527</sup>*Id.* The government also claimed the protest was much smaller including non-Libyans. *Id.* They also wanted Libyans to use the proper channels to address their opinions. *Id.* Nevertheless, there was a release of 100 prisoners who were members of a banned opposition group. *Id.*

<sup>528</sup>*Libya Protests: Al-Bayda Security Chief 'Sacked,'* BBC NEWS (Feb. 17, 2011), <http://www.bbc.co.uk/news/world-africa-12490504> (last visited Apr. 11, 2011).

<sup>529</sup>*Id.* On February 18, HRW reported that 24 people were killed in protests. *Id.* There are reports of the use of gunfire by government security forces and limiting of supplies. *Id.* As more reports came in, the numbers killed grew to 84. *Libya Protests: 84 Killed in Growing Unrest, Says HRW*, BBC NEWS

social media to organize.<sup>530</sup> Protests continue to spread and government violence against the protesters grew. One week into the protests, there were reports of police forces defecting and joining the anti-government movement.<sup>531</sup> As the police defect, the government relies on special forces and foreign mercenaries.<sup>532</sup> As violence continued against citizens, a call came for the international community to intervene.

### U.N. INTERVENTION

On February 23, 2011, the Human Rights Council released a draft resolution regarding the situation in Libya.<sup>533</sup> It “strongly condemn[ed] the recent extremely grave human rights violations committed in Libya” and “call[ed] upon the Libyan authorities to immediately put an end to all human rights violations.”<sup>534</sup> The Council also set up an international investigation to look into any violations in the country.<sup>535</sup>

On February 25, 2011, the S.C. met to discuss peace in Africa.<sup>536</sup> The S.C. was meeting under its Chapter VII powers to examine the outbreak of violence.<sup>537</sup> The Secretary-General noted that recommendations that were made by the Human Rights Council and the statement by the High Commissioner for Human Rights who urged that the international community has an obligation to protect those whose rights have been violated.<sup>538</sup> The Secretary also noted the increase in refugees as a result of the violence and the effect this has on other states in the region.<sup>539</sup> The representative from Libya also spoke at the meeting, recognizing the extreme violence against civilians.<sup>540</sup> He called from the S.C. to take action.<sup>541</sup> The following day, the meeting of the S.C. continued with other members also condemning the events in Libya.<sup>542</sup>

On February 26, 2011, the S.C. adopted Resolution 1970 condemning the actions in Libya.<sup>543</sup> The S.C. states it is “acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41.”<sup>544</sup> The Resolution

---

(Feb. 19, 2011), <http://www.bbc.co.uk/news/world-africa-12512536> (last visited Apr. 11, 2011). There were also reports that the security forces were removing government critics from their homes. *Id.*

<sup>530</sup>*Libya Protests Leave 24 Dead, Says Rights Group*, BBC NEWS (Feb. 18, 2011)

<http://www.bbc.co.uk/news/world-africa-12502657> (last visited April 11, 2011).

<sup>531</sup>*Libya Unrest: Violence Against Protesters Backfires*, BBC NEWS (Feb. 21, 2011),

<http://www.bbc.co.uk/news/world-middle-east-12523007> (last visited Apr. 11, 2011).

<sup>532</sup>*Id.*

<sup>533</sup> Human Rights Council Res. S-15, Feb. 15, 2011, U.N. GOAR, 15<sup>th</sup> Special Sess., A/HRC/S-15/L.1, at 1 (Feb. 23, 2011).

<sup>534</sup>*Id.*

<sup>535</sup>*Id.* at 2.

<sup>536</sup> Meeting 6490, *supra* note 1, at 2.

<sup>537</sup>*Id.*

<sup>538</sup>*Id.* at 3.

<sup>539</sup>*Id.* He also notes that there have been many statements from regional leaders and international organizations condemning the actions and seeking some remedy. *Id.*

<sup>540</sup>*Id.* at 4. The representative noted that the protestors were peaceful and were seeking protection of their rights. *Id.* He condemns the actions of the government and maintains that Libya can become a progressive state. *Id.* at 4-5.

<sup>541</sup>*Id.* at 5.

<sup>542</sup> U.N. SCOR, 66th Sess., 6491st mtg. at 2, U.N. Doc. S/PV.6491 (Feb. 26, 2011). The representative of the United Kingdom stated the situation “demands an immediate end to violence and repression, full respect for human rights and international law, and accountability for those responsible for the violence.” *Id.* The representative for the U.S. stressed that “when atrocities are committed against innocents, the international community must speak with one voice.” *Id.* at 3. The U.S. also called into question the legitimacy of the leadership in government. *Id.*

<sup>543</sup> S.C. Res. 1970, 1, U.N. Doc. S/RES/1970 (Feb. 26, 2011) [hereinafter Resolution 1970].

<sup>544</sup>*Id.* at 2.

demands an end to the violence and also calls for Libya to follow international human rights law.<sup>545</sup> The S.C. is also sending the case to the International Criminal Court for review of any possible criminal charges against individuals.<sup>546</sup> An immediate arms embargo is placed on Libya allowing no direct or indirect supply of weapons.<sup>547</sup> Travel bans are placed on any individual listed in the Resolution with some exceptions for humanitarian, religious or judicial travel.<sup>548</sup> Finally, the S.C. places an asset freeze on certain Libyan government members.<sup>549</sup> A S.C. committee is formed to continue to monitor the situation and ensure states are implementing the Resolution.<sup>550</sup>

Following the imposition of sanctions, the violence in Libya continued to grow. On February 27, the rebels had overtaken a city near the capital, which was still controlled by the government.<sup>551</sup> There was also growing concern over the amount of refugees who were entering neighboring countries, which has a chance to further upset the region.<sup>552</sup> With the situation only escalating, four countries proposed a new resolution before the S.C.<sup>553</sup> The French representative noted the prior resolution “ha[s] not been sufficient” and “violence against the civilian population has only increased.”<sup>554</sup> A vote was taken on the resolution and no country vetoed.<sup>555</sup> The representative from Lebanon noted the resolution “takes into account the calls by the people of Libya and the demands by the League of Arab States for an end to the violent acts and atrocious crimes being carried out by the Libyan authorities against their people.”<sup>556</sup>

Resolution 1973 was again passed under the authority of the S.C. Chapter VII powers on March 17, 2011.<sup>557</sup> The resolution once again condemns the “gross and systematic violation of human rights” and calls on Libya to “comply with their

---

<sup>545</sup>*Id.* at ¶ 1.

<sup>546</sup>*Id.* at ¶ 4. All Libyan authorities must also cooperate fully with the ICC and assist in any investigations. *Id.* at ¶ 5.

<sup>547</sup>*Id.* at ¶ 9. An exception is made for any humanitarian aid that may be given. *Id.* Libya must also not export any arms. *Id.* at ¶ 10. All Member States have a duty to inspect any cargo being sent to and from Libya. *Id.* at ¶ 11.

<sup>548</sup>*Id.* at ¶ 15. Those listed in Annex I of the Resolution are high ranking officials and military leaders in the regime. *See generally id.* at 8-9.

<sup>549</sup> Resolution 1970, *supra* note 212, at ¶ 17. Those listed in Annex 2 are mainly those of the Qadhafi family. *Id.* at 10. The assets are also to eventually be made available to help the people of Libya. *Id.* at ¶ 18. Exceptions may be made for reasonable personal expenses. *Id.* at ¶ 19. Other expenses will be subject to approval and additional accounts may be frozen when necessary. *Id.* at ¶ 20.

<sup>550</sup>*Id.* at ¶ 24.

<sup>551</sup>*Libya Uprising: Anti-Gaddafi Forces Control Zawiyah*, BBC NEWS (Feb. 27, 2011) <http://www.bbc.co.uk/news/world-africa-12591025> (last visited Apr. 11, 2011). The government also criticized former official who joined the opposition groups. *Id.*

<sup>552</sup>*Libya Revolt As It Happened: Sunday*, BBC NEWS (Feb. 27, 2011), <http://news.bbc.co.uk/2/hi/9409004.stm> (last visited Apr. 11, 2011).

<sup>553</sup> U.N. SCOR 66th Sess., 6498th mtg., at 2, U.N. Doc. S/PV.6498 (Mar. 17, 2011) [hereinafter Meeting 6498]. The countries were France, Lebanon, United Kingdom and the United States. *Id.*

<sup>554</sup>*Id.* at 2. He also noted that the opinion of the international community is nearly unanimous. *Id.*

<sup>555</sup>*Id.* at 3. Brazil, China, Germany, India, and the Russian Federation all abstained. *Id.* The representative of Germany objected to the use of military force out of concern for the number of casualties that could occur. *Id.* at 5. India focused on the negative economic effects that could be felt by other states with tighter economic sanctions. *Id.* at 6. Brazil did not see military force as the actual solution to the problem. *Id.* at 5.

<sup>556</sup>*Id.*

<sup>557</sup> S.C. Res. 1973, 2, U.N. Doc. S/RES/1973 (Mar. 17, 2011) [hereinafter Resolution 1973].

obligations under international humanitarian law.<sup>558</sup> The Resolution calls for a cease-fire and to find a solution to the demands of the people.<sup>559</sup> Member States are authorized to take measures to protect Libyan civilians short of actual occupation.<sup>560</sup> A no fly zone is created, allowing only for humanitarian flights.<sup>561</sup> Finally, the resolution increases the enforcement measures in Resolution 1970, including expanding the asset freeze and requiring stricter enforcement of the arms embargo.<sup>562</sup>

Also noteworthy is Libya's removal from the Human Rights Council.<sup>563</sup> The G.A. voted to remove Libya upon the recommendation of the Human Right Council.<sup>564</sup> The G.A. noted that it was necessary for them to show respect for the U.N. Charter and to uphold human rights values.<sup>565</sup> This was the first time a country had been expelled from the Council and certainly sends a strong statement of the organizations condemnation of the government's action.<sup>566</sup>

### CURRENT SITUATION

Following the passage of Resolution 1973, the government in Libya called for a ceasefire.<sup>567</sup> A coalition of forces organized to begin enforcing the no-fly zone and commencing airstrikes against the government military.<sup>568</sup> Despite the claims of a ceasefire, the military continued to fire against civilians.<sup>569</sup> In late March 2011, NATO took control over the airstrikes.<sup>570</sup> The rebel forces continued to advance in the country with the aid of the no-fly zone.<sup>571</sup>

---

<sup>558</sup>*Id.* at 1. The Resolution also notes that the Secretary-General had already called a cease-fire. *Id.* at 2. It stresses that further action does not deny the sovereignty of Libya. *Id.*

<sup>559</sup>*Id.* at ¶ 1-2.

<sup>560</sup>*Id.* at ¶ 4.

<sup>561</sup>*Id.* at ¶ 6-7. Member States are to take all necessary measures to ensure compliance and provide any necessary assistance. *Id.* at ¶ 8-9.

<sup>562</sup>*See generally* *Id.* at ¶ 13-6, 19-21.

<sup>563</sup> U.N. GAOR 66th Sess., 76th mtg., at 1, U.N. Doc. GA/11050 (Mar. 1, 2011).

<sup>564</sup>*Id.*

<sup>565</sup>*Id.*

<sup>566</sup>*Id.* at 5.

<sup>567</sup> *Libya: Pro-Gaddafi Forces 'To Observe Ceasefire'*, BBC NEWS (Mar. 18, 2011), <http://www.bbc.co.uk/news/world-africa-12787739> (last visited Apr. 20, 2011). Libya claimed to be ending all military operations despite the government's denial of the S.C. authority to pass the resolution. *Id.*

<sup>568</sup> Liz Sly, Greg Jaffe, and William Branigin, *Allied Strikes Hit Libyan Forces in Misurata, But Snipers Continue to Claim Lives*, WASHINGTON POST (Mar. 23, 2011), [http://www.washingtonpost.com/world/us-jet-crashes-in-libya-pilots-safe-gates-says-air-strikes-should-slow-soon/2011/03/22/ABNC0ICB\\_story.html](http://www.washingtonpost.com/world/us-jet-crashes-in-libya-pilots-safe-gates-says-air-strikes-should-slow-soon/2011/03/22/ABNC0ICB_story.html) (last visited Apr. 20, 2011).

<sup>569</sup>*Id.* There were also reports of government snipers in Misurata shooting civilians attempting to enter a hospital. *Id.*

<sup>570</sup> Marybeth Sheridan and Greg Jaffe, *Coalition Agrees to Put NATO in Charge of No-Fly Zone in Libya*, WASHINGTON POST (Mar. 25, 2011) [http://www.washingtonpost.com/world/coalition-agrees-to-put-nato-in-charge-of-no-fly-zone-in-libya/2011/03/24/ABIZNLSB\\_story.html](http://www.washingtonpost.com/world/coalition-agrees-to-put-nato-in-charge-of-no-fly-zone-in-libya/2011/03/24/ABIZNLSB_story.html) (last visited Apr. 20, 2011).

<sup>571</sup> Liz Sly and Scott Wilson, *New Coalition Airstrikes Reportedly Underway in Libya; Strikes Help Rebels Advance*, WASHINGTON POST (Mar. 27, 2011), [http://www.washingtonpost.com/politics/airstrikes-help-libya-rebels-advance/2011/03/26/AFdmWkeB\\_story.html](http://www.washingtonpost.com/politics/airstrikes-help-libya-rebels-advance/2011/03/26/AFdmWkeB_story.html) (last visited Apr. 20, 2011). Though the airstrikes weakened the government military, clashes continued between the rebel forces and the military. *Id.*

The rebels experienced a major victory when governments began recognizing the movement in Benghazi as the new government of Libya.<sup>572</sup> The Transitional National Council (TNC) seeks to form a democratic government in Libya.<sup>573</sup> France was the first to recognize the rebel movement even before the passage of Resolution 1973.<sup>574</sup> However, the government still lacks recognition from nearly all major states and the U.N.

The conflict in Libya is on-going and international involvement continues. Recent airstrikes have been questioned as they appear to be aimed at directly killing members of the government.<sup>575</sup> The latest round of airstrikes killed members of the Qadhafi family and the government claims NATO is attempting to assassinate al-Qadhafi.<sup>576</sup> It is unclear if the response to this attack will lead to a change in strategy for the NATO airstrikes.<sup>577</sup> The conflict shows no signs of ending soon and violence continues.

## ANALYSIS

The situations in South Africa and Libya brought to different responses from the U.N. They also represent two different periods in U.N. history. South Africa was one of the first crises faced by the international community and came at a time when the U.N. was determining its authority and how far it could reach into state sovereignty. The crisis in Libya has arisen after many U.N. enforcement actions giving the U.N. a range of past behavior to help to determine its current action. Despite these different periods in history, the two issues raise questions of when military intervention is really necessary. The situation in South Africa only arose to the use of sanctions as an enforcement measure while Libya has seen the use of military force all under the aim of protecting peace and security. The nature of these conflicts really highlight why military force has been appropriate in Libya but would have been excessive in South Africa.

### GOAL OF ENFORCEMENT

Sanctions can be defined as “non-military measures used to influence a nation to conform to some desired behavior or to punish a nation for violating some

---

<sup>572</sup> On March 5, 2011, the rebels formed the Transitional National Council (TNC) stating it was the new government of Libya operating out of Benghazi. *Founding Statement of the Interim Transitional National Council*, THE LIBYAN REPUBLIC NATIONAL TRANSITIONAL COUNCIL (Mar. 5, 2011), <http://ntclibya.org/english/founding-statement-of-the-interim-transitional-national-council/> (last visited Apr. 20, 2011). The TNC declares all representatives of the former regime illegitimate. *Id.*

<sup>573</sup> *A Vision of a Democratic Libya*, THE LIBYAN REPUBLIC NATIONAL TRANSITIONAL COUNCIL, <http://ntclibya.org/english/libya/> (last visited Apr. 20, 2011). They want to write a new constitution that contains protections for civil liberties and is transparent. *Id.* The new state would also allow political organizations, free expression, free elections, and promote economic development. *Id.*

<sup>574</sup> Thomas E. Ricks, *French Recognition of the Libyan Rebels Likely Means NATO Goes in, so Here are the Eight Steps It Should Take*, FOREIGN POLICY (Mar. 10, 2011), [http://ricks.foreignpolicy.com/posts/2011/03/10/french\\_recognition\\_of\\_the\\_libyan\\_rebels\\_likely\\_mean\\_s\\_nato\\_goes\\_in\\_so\\_here\\_are\\_the\\_e](http://ricks.foreignpolicy.com/posts/2011/03/10/french_recognition_of_the_libyan_rebels_likely_mean_s_nato_goes_in_so_here_are_the_e) (last visited Apr. 20, 2011). France is joined by only five other countries who have recognized the rebel government.

<sup>575</sup> Kareem Fahim and Mark Mazzetti, *Allied Defending Actions in Libya After Airstrike*, NEW YORK TIMES (MAY 1, 2011), [https://www.nytimes.com/2011/05/02/world/africa/02libya.html?\\_r=1&hp](https://www.nytimes.com/2011/05/02/world/africa/02libya.html?_r=1&hp) (last visited May 1, 2011).

<sup>576</sup> *Id.*

<sup>577</sup> *Id.*

international law.<sup>578</sup> The S.C. and Member States are attempting to coerce another Member State to act according to its international obligations.<sup>579</sup> The measures may take on many forms as seen in the two case studies above. They may consist of limits on certain imports or exports, limiting access to monetary assets, and restrictions on movement.<sup>580</sup> Traditional sanctions are aimed at the entire state and are not limited to a certain group or government.<sup>581</sup> It is expected that the extreme hardship caused by the sanctions will force a country to bend towards the collective international will and remedy its behavior.<sup>582</sup>

Clearly a sanction is an intervention. While other states may not physically enter a state border, they are becoming involved in the domestic behavior of a state. This contrasts the Article 2(7) prohibition on intervention but only for the greater goal of protecting collective peace and security. Therefore sanctions can only be used in cases of serious threats, but not those that rise to the need of military force.

Sanctions do have their own problems as well. Sanctions may take a long time before there really is an effect. In cases requiring immediate response, sanction may prove ineffective and swaying the offending nation to change its behavior. There are also concerns over who is really affected by the sanctions. Often a blanket sanction across a country will have an effect both the offending party as well as the innocent parties in a state. There must be a cost benefit analysis determining if the harm to innocent parties is less than the end to the offending conduct. The sanctions may also have an effect on neighboring states that do business with the violating state party. If trade is cut off, it will affect all trading partners. In contrast, if the goal is to bring a swift end to government behavior, force would bring the best result.

#### NATURE OF THE CONFLICT

South Africa and Libya present two very different scenarios for the violation of international peace and security. The nature of the conflicts demonstrates why two different enforcement measures were used to attempt to solve each crisis. In South Africa, the dispute with the international community involved the creation of an oppressive regime that discriminated on race and marginalized the majority of society. While the program of apartheid certainly violated the international standards of human rights, it was also an area within the domestic affairs of the country. Also, while facing some internal challenges, there was not a large, organized opposition movement in the country, though this was most likely a result of the apartheid system itself. In short, the conflict in South Africa involved changing a government policy not necessarily a change in government.

In contrast, the conflict in Libya is violent and moving quickly. The government is directly firing against its citizens with deadly force. The conflict is also a movement of self-determination by the people of Libya. This directly violates the provisions in the ICCPR that protect both the freedom of expression and the right to self-determination.<sup>583</sup> As a party to the ICCPR, Libyan citizens have a right to choose

---

<sup>578</sup>JOY K. FAUSEY, DOES THE UNITED NATIONS' USE OF COLLECTIVE SANCTIONS TO PROTECT HUMAN RIGHTS VIOLATE ITS OWN HUMAN RIGHTS STANDARDS?, 10 CONN. J. INT'L. L. 193, 195 (1994).

<sup>579</sup>*Id.* at 195-6.

<sup>580</sup>*Id.* at 197.

<sup>581</sup>*Id.* at 197-8.

<sup>582</sup>*Id.* at 199.

<sup>583</sup> ICCPR, art. 1, para. 1, art. 19.

their political environment.<sup>584</sup> Therefore, the Libyan government was not only violating its ICCPR treaty obligations, but also its obligations under Art. 55 of the U.N. Charter.<sup>585</sup> The conflict was more about taking down an oppressive government than changing a political program as in South Africa. Especially telling is the reaction of the Libyan representatives to the U.N. who also calls for an end to the conflict and a protection for peoples' political demands.<sup>586</sup>

Sanctions were more appropriate to fight apartheid because the conflict dealt with changing a government policy and not ending immediate violence. Also, apartheid centered on many economic policies limited the access of the African population to certain jobs and careers.<sup>587</sup> As one anti-apartheid leader noted "the single most important factor in changing the Government has been sanctions."<sup>588</sup> By crippling the economy, the sanctions helped influence the government in changing its policy. In contrast, the sudden and severe nature of the conflict in Libya makes the use of sanction inappropriate. Sanctions would take too long to be effective and lead to too many deaths that could be prevented.

#### GOVERNMENT FORCE AGAINST CIVILIANS

Another difference between the incidents is the type of force used against civilians. While as a system apartheid was unarguably oppressive, the violence used by the government against civilians was more limited. While there were some deaths at the hand of the apartheid regime, the government more often imprisoned political opposition.<sup>589</sup> Laws were continually passed extending detentions.<sup>590</sup> The government had established an extensive intelligence force that sought to quell resistance movements before they started.<sup>591</sup> That is not say there were not instances of brute force, however they did not have the same rapid expansion and death toll as the current situation in Libya.

Violence in Libya has been against massive groups of people. The government has been indiscriminate in attacking civilians.<sup>592</sup> Militias have conducted air attacks

---

<sup>584</sup> ICCPR art. 19, para. 1. In contrast, South Africa did not sign the ICCPR until 1994 after the end of apartheid. *Status*, UNITED NATIONS TREATY COLLECTION (Apr. 30, 2011)

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Apr. 30, 2011).

<sup>585</sup> U.N. Charter, art. 55. The Article calls on states to promote "the principle of equal rights and self-determination" with "universal respect for, and observance of, human rights and fundamental freedoms." *Id.*

<sup>586</sup> *See* Meeting 6490, *supra* note 1, at 4-5.

<sup>587</sup> *See supra* part II.A.1.

<sup>588</sup> LYNN BERAT, UNDOING AND REDOING BUSINESS IN SOUTH AFRICA: THE LIFTING OF THE COMPREHENSIVE ANTI-APARTHEID ACT OF 1986 AND THE CONTINUING VALIDITY OF STATE AND LOCAL ANTI-APARTHEID LEGISLATION, 6 CONN. J. INT'L L. 7, 12 (1990).

<sup>589</sup> Clark and Worger, *supra* note 66, at 77.

<sup>590</sup> *Id.* The definition of crimes also expanded allowing imprisonment for anything that could be considered "dangerous to public safety, including any action that could encourage resistance to the government, causing a disturbance, furthering any political aim, or causing feelings of hostility between races." *Id.* at 77-8.

<sup>591</sup> *Id.* at 78.

<sup>592</sup> Peter Finn, *Experts Say Gaddafi Relying on Paramilitary Forces, Foreign Mercenaries to Crush Protests*, WASHINGTON POST (Feb. 23, 2011) [http://www.washingtonpost.com/world/experts-say-gaddafi-relying-on-paramilitary-forces-foreign-mercenaries-to-crush-protests/2011/02/23/ABySdZQ\\_story.html](http://www.washingtonpost.com/world/experts-say-gaddafi-relying-on-paramilitary-forces-foreign-mercenaries-to-crush-protests/2011/02/23/ABySdZQ_story.html) (last visited Apr. 20, 2011).

against protestors.<sup>593</sup> Mercenaries have gone on hunting campaigns searching for protestors.<sup>594</sup> It is unknown how extensive al-Qadhafi's paramilitary and regular military resources are.<sup>595</sup> Violence also exploded quickly and continued for an extended period. The continued escalation requires a quick response from the international community. Recent numbers place death totals as high as 30,000.<sup>596</sup>

### REGIONAL THREATS

When conflicts spill across borders, the threat to peace and security is even greater because the turmoil it can lead to in other nations. Apartheid was a regime limited to South Africa. While the U.N. did deal with situations that arose in Rhodesia, it was more a result of the end of colonialism than a spillover from the South Africa.<sup>597</sup> In 1972, the majority African population in Rhodesia fought against the white regime.<sup>598</sup> While there is evidence that the white police and military were receiving aid from South Africa, overall the two regimes were not connected.<sup>599</sup> By contrast, the situation in Libya is spreading across its borders.

As violence continues against citizens, people have fled to nearby countries.<sup>600</sup> The influx of people creates instability in those countries, as they must attempt to accommodate large amounts of people in little time. As violence continues, Libyans have fled to both Tunisia and Egypt.<sup>601</sup> On the Tunisian border, conflict has broken out, preventing refugees from entering the country and placing them in greater danger.<sup>602</sup> Egypt has seen its own influx of refugees, some returning Egyptians and others Libyans.<sup>603</sup> The influx of new refugees threatens the stability of these countries that are already facing their own political turmoil.<sup>604</sup>

---

<sup>593</sup> Sudarsan Raghavan, *Gaddafi Loyalists Launch Attacks Against Civilians as Conflict in Libya Escalates*, WASHINGTON POST (Feb. 22, 2011), [http://www.washingtonpost.com/national/libyan-regime-launches-brutal-crackdown/2011/02/21/AB83YGI\\_story.html](http://www.washingtonpost.com/national/libyan-regime-launches-brutal-crackdown/2011/02/21/AB83YGI_story.html) (last visited Apr. 20, 2011). There were also reports of pilots who landed in Malta, stating they had been ordered to bomb the leading opposition city, Benghazi, but refused. *Id.*

<sup>594</sup>*Id.*

<sup>595</sup> Finn, *supra* note 261.

<sup>596</sup> Bradley Klapper, *Libya Death Toll Could Be as High as 30,000*, HUFFINGTON POST, (Apr. 27, 2011), [http://www.huffingtonpost.com/2011/04/27/libya-death-toll-could-be\\_n\\_854582.html](http://www.huffingtonpost.com/2011/04/27/libya-death-toll-could-be_n_854582.html) (last visited Apr. 27, 2011).

<sup>597</sup> Sohn, *supra* note 94, at 96. There was some support within the U.N. that thought South African policies were influencing neighboring countries. *Id.*

<sup>598</sup> Clark and Worger, *supra* note 66, at 80. The S.C. responded quickly to the violence and urged states to not recognize the minority ruled government. Sohn, *supra* note 94, at 97-8. The S.C. only used economic sanctions and never made the sanctions binding. *Id.* at 98.

<sup>599</sup> Clark and Worger, *supra* note 66, at 80. Once Africans had overtaken the majority of the country, the government negotiated with the Africans to ensure some property rights for the white landowners but ultimately relinquish control. *Id.*

<sup>600</sup> *Responding to the Crisis in Libya, North Africa Humanitarian Situation*, UNHCR, <http://www.unhcr.org/pages/4d7755246.html> (last visited Apr. 27, 2011).

<sup>601</sup>*Id.*

<sup>602</sup> *Tensions on Libya-Tunisia Border Stem Outflow of Refugees*, UNHCR (Apr. 29, 2011), <http://www.unhcr.org/4dba94ce9.html> (last visited Apr. 29, 2011). UNHCR has noted that as many as 31,000 have crossed the border in one day. *Id.* Aid that has been put in place is already beyond capacity and people continue to cross the border. *Id.*

<sup>603</sup> Melissa Fleming, *UNHCR Chief Applauds Egypt, Calls for Humanitarian Access to Libya*, UNHCR (Apr. 1, 2011), <http://www.unhcr.org/4d95c3239.html> (last visited Apr. 27, 2011). It is estimated that 160,000 people have entered Egypt. *Id.* UNHCR has set up some shelter for the refugees, but is also attempting to gain more access. *Id.*

<sup>604</sup>*Id.*

## **CONCLUSION**

The different responses to the situations in South Africa and Libya highlight the wide range of measures that may be taken by the U.N. S.C. While every situation should be resolved with the least force necessary, there are certain times where peaceful settlement is inappropriate. First, the desired result of the U.N. measure must be considered, especially the speed at which it can lead to a resolution. Sanctions will often take longer to really influence a state's behavior. Force can bring an end to a conflict much sooner. If a situation requires a quick remedy, sanctions will be ineffective. Second, the nature of the conflict itself may require a different response. Where the U.N. is seeking to change a government's policy, sanctions can be an effective way of influencing political behavior and persuade a government to change. However, as in Libya where both government officials and citizens are attempting to execute their political rights and are denied by the government, greater support should be given to their cause. Third, the force used by the government against civilians must also be taken into account. While both South Africa and Libya demonstrate inexcusable abuse by governments, the swift and excessive force in Libya requires greater intervention. Finally, where the situation has spilled across borders, the threat to peace and security is immensely greater and Chapter VII provides the only immediate solution available to the U.N. International invention and force are actions that should never be entered into lightly, however in certain situations, peaceful settlement is not enough and the U.N. S.C. must use its full powers granted in the Charter.

## **A SURVEY OF THE PROTECTIONS AFFORDED TO THE RIGHTS OF GAY AND LESBIAN INDIVIDUALS**

BY JASON STIENER  
J.D. 2011

### **INTRODUCTION**

Although it is only recently that international legal institutions have begun to consider the human rights of gay and lesbian people, the history of the struggle to advance equality under law has a rich and complicated historical background. This background has framed the debate between those that would seek to advance these rights under domestic and international legal frameworks, and those that do not acknowledge the legitimacy or importance of these aims. This paper will attempt to trace the historical background of laws criminalizing the relationships of same-sex couples and relate this context to current attempts by human rights advocates, NGO's, and international institutions to eliminate these discriminatory statutes and to ensure that gay and lesbian people are entitled to the full and equal protection of the law.

### **BACKGROUND OF LAWS PROHIBITING SAME-SEX RELATIONSHIPS IN THE UNITED STATES**

Laws against relationships between same-sex couples in the United States date back to the very founding of the first British colonies in North America, and indeed, British law provided the original framework in which these discriminatory laws were first justified. The first British law which addressed homosexuality was passed by Parliament in 1533, and made it a capital offense for any person to “commit the vile and detestable and abominable vice of buggery with man or beast.”<sup>605</sup> It was not until 1861 that the death penalty was dropped as the punishment for violation of this statute.<sup>606</sup> Similar laws were found on the Continent, however, unlike these, English law did not criminalize same-sex *female* relationships.<sup>607</sup>

The American colonies adopted the British legal approach to homosexuality in various ways, but by the time the States ratified the Bill of Rights, all of them had enacted criminal statutes prohibiting homosexuality.<sup>608</sup> The Southern states incorporated British law directly into their legal systems, either by wholesale incorporation, as in the case of Virginia, or else the reenacted it verbatim, as in the case of South Carolina.<sup>609</sup> However, the New England states were influenced by the doctrine of Puritanism, and they enacted their own laws that drew from a very conservative and restrictive interpretation of biblical doctrine and canonical law. As such, their prohibitions on same-sex relationships were particularly severe. They

---

<sup>605</sup> Louis Crompton, *Homosexuals and the Death Penalty in Colonial America*, p277, *Journal of Homosexuality*, Vol. 1(3), 1976

<sup>606</sup> *Ibid* at 278.

<sup>607</sup> *Ibid* at 278.

<sup>608</sup> *Ibid* at 282.

<sup>609</sup> *Ibid* at 278.

included the death penalty as punishment, and they equally penalized both female and male same-sex physical contact.<sup>610</sup> The Mid-Atlantic states took from a number of different influences: for a brief time the Quaker influence in Pennsylvania and New Jersey led to statutes which were the most humanitarian, only providing for a prison term of six months for a violation of the statute, however, eventually all of the states either adopted the more prohibitive approach found in the New England or that of the southern states.

Although the death penalty was removed, over time, as the punishment for same-gender sexual relationships, all states retained criminal prohibitions against it until 1962, when Illinois became the first state to decriminalize homosexual contact between consenting adults in private. Over the following decades, more states began to eliminate legal restrictions on same-gender sexual activity, and the trend was unambiguously in the direction of increased liberty after the 1970's. In 1973, the American Psychiatric Association removed homosexuality from its list of mental disorders, and Wisconsin in 1982 became the first state to ban discrimination *on the basis of* sexual orientation. As the number of openly gay people increased and the general public began to know gay people in their own lives, attitudes predictably loosened and public laws started to reflect people's reduced biases, which led even more closeted gay people to make their identities known, and so forth, leading to an obvious momentum in the direction of more liberty in the recognition that discrimination based on sexual orientation was a civil rights issue. This momentum naturally alarmed those who opposed equality for gay and lesbian people, who perceived the trend as an indication that people were *becoming* or being *converted* to a homosexual "lifestyle". They perceived the increased number of openly gay individuals as evidence that being gay was a deliberate decision that one made. This is important because this presupposition informs the basis for most opposition to legal equality for gays and lesbians in the United States. The conclusion that sexual orientation is a changeable and not innate characteristic led them to conclude that this "decision" was not one worthy of legal protection. By analogy to race, which cannot be changed, they argued that gay and lesbian people had made a decision to deviate from the norm and as such the majority heterosexual population was under no obligation to extend legal protection to them or recognition to their partnerships.

Inevitably, the evolving debate about the legitimacy of same-sex relationships and the constitutionality of statutes prohibiting consensual adult same-gender sexual contact made their way to the Supreme Court in three notable cases. The first, *Bowers v. Hardwick*, upheld the constitutionality of laws prohibiting homosexual contact between consenting adults. Consistent with the views of those who considered homosexuality a choice, and a behavior rather than an orientation, the majority in *Bowers* applied a rational basis test to a Georgia statute criminalizing same-sex contact between men and finding that the law furthered a long-standing social interest against the propriety of homosexual activity. Rather than recognizing that sexual activity is but one component of a full panoply of privacy interests that surround decisions of love, companionship, and intimacy, the majority focused exclusively on the issue of whether the constitution, or its writers, had envisaged or would support a constitutional protection of the act of sodomy, whether engaged in by same-sex or opposite sex couples. In this manner, the majority refused to acknowledge the common desire of both homosexual and heterosexual people to share their lives with another person and to expect a zone of privacy around intimate matters that the state

---

<sup>610</sup> Ibid at 278.

would respect. While the Court recognized this right in *Griswold v. Connecticut*, famously declaring the absurdity of a government presence in the bedroom - the court in *Bowers* found that the government *did* have a place in the bedrooms of same-sex couples.

Unlike *Bowers* before it, *Romer v. Evans* represented movement in the direction of increased protections for gay and lesbian Americans. *Romer* struck down a Colorado statute that expressly prohibited municipalities and counties from enacting laws that protected gay and lesbian people from discrimination. Applying a rational basis analysis, the majority held that by its singling out of gay people, the law furthered no rational government interest and was motivated solely by animus toward gay people as a class. Writing for the majority, Justice Kennedy remarked that the Colorado statute was “at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.”<sup>611</sup> The most recent landmark American constitutional jurisprudence regarding homosexuality is *Lawrence v. Texas*, which struck down sodomy laws between consenting adults of the same gender. Writing for the majority, Justice Kennedy explicitly disavowed *Bowers*, stating that it “was not correct when it was decided, and it is not correct today.” Applying a 14<sup>th</sup> amendment substantive due process analysis, Kennedy found that sexual activity between consenting adults of the same gender was a liberty interest that fell within the zone of privacy established by previous cases such as *Griswold*, *Eisenstadt*, and *Roe*. While this analysis did not recognize gay and lesbian people as a class worthy of strict scrutiny review, it nevertheless eliminated the criminal opprobrium that had long been used to justify continued animus, harassment, and discriminatory laws by those who disapproved of gay and lesbian people and their intimate relationships. Justice O’Connor’s concurring opinion went even further in advancing gay rights, by applying an equal protection analysis that could eventually be used to strike down laws prohibiting same-sex couples from marrying.

## **BACKGROUND OF LAWS PROHIBITING SAME-SEX RELATIONSHIPS IN THE UNITED KINGDOM**

American law inherited these biases against granting civil liberties to gay and lesbian people from English law, which, as previously discussed, had prohibited sexual activity between two men since 1533. Before 1533, same-sex male relations were not considered an offense against the British state, although they were prohibited by the church and were punished in ecclesiastical courts. The British legal attitude toward same-sex male relations can be precisely summed up by statements of the British jurist Sir Edward Coke, who described same-gender sexual behavior as “against the ordinance of the Creator and order of nature,” and suggested that hanging be the appropriate punishment for those convicted of this crime.<sup>612</sup> The first known trial for a person accused of same-sex relations involved the Earl of Castlehaven, who, after being convicted of sodomy with his servants, was beheaded.<sup>613</sup> By 1861, British law began to take a more humane approach to its laws dealing with homosexuality, and the “Offenses Against the Person Act” finally abolished the death penalty for the

---

<sup>611</sup>*Romer v. Evans*, 517 U.S. 620 (1996)

<sup>612</sup> “Criminalizing Same Sex Behavior”, Religious Tolerance.org, last retrieved April 29, 2011 at [http://www.religioustolerance.org/hom\\_laws1.htm](http://www.religioustolerance.org/hom_laws1.htm).

<sup>613</sup> *Ibid*.

offense of “buggery” in England and Wales.<sup>614</sup> However, same-sex relations between males were still a criminal offense, and Section 11 of the Criminal Offenses Act, reiterated the illegality of any sexual contact between two males (although females were not explicitly singled out).<sup>615</sup> During the 19<sup>th</sup> century and through the middle of the 20<sup>th</sup>, men who had sex with men were regularly charged with criminal offenses and the laws were actively enforced. Perhaps most notably, Oscar Wilde was sentenced to imprisonment with two years of hard labor in 1895, under the Criminal Offenses Act.<sup>616</sup> Famed scientist Alan Turing was convicted under the same law in 1952; he was given a choice between imprisonment and probation conditioned on his agreement to undergo hormonal therapy to reduce his libido. He agreed to the chemical castration via estrogen injections; his conviction resulted in the rescinding of his security clearance and the end of his career. In 1954, at age 41, Turing was found dead, a victim of suicide. In 2009, Prime Minister Gordon Brown called Turing’s treatment at the hands of the British justice system “appalling”, and formally apologized for his inhumane treatment.<sup>617</sup>

In 1954, in the wake of a highly publicized trial known as “The Montagu Case”, which resulted in the conviction of those accused of same-sex relations, the British government began to seriously reconsider the penalties that British law proscribed for those found guilty of homosexual conduct. A thirteen-member committee was appointed to review British laws against homosexuality, and three years were spent investigating the propriety of laws against same-sex relations. The Wolfenden report, named after the committee’s chairman, concluded that laws against homosexuality should be repealed and that such laws infringed upon civil liberties.<sup>618</sup> Progress came relatively swiftly; in 1967, private, consensual homosexual relations between men over 21 in England and Wales were decriminalized, and the landmark case of *Dudgeon v United Kingdom*, decided by the European Court of Human Rights in 1981, declared that all United Kingdom laws criminalizing same-sex relations were in violation of Article 8 of the European Convention on Human Rights.<sup>619</sup> Article 8 states “Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society.”<sup>620</sup> By 2000, the age of consent for same- and opposite-sex partners was equalized at age 16, and openly gay and lesbian Britons were permitted to serve in the British armed forces. As of this writing, marriage equality does not exist within the United Kingdom, however civil unions have been recognized since 2005, and in 2010, the Liberal Democrats became the first major political party to endorse full marriage equality for same sex couples.<sup>621</sup>

---

<sup>614</sup> “History of lesbian, gay and bisexual equality”, Stonewall.org.uk, last retrieved April 29, 2011 at [http://www.stonewall.org.uk/at\\_home/history\\_of\\_lesbian\\_gay\\_and\\_bisexual\\_equality/default.asp](http://www.stonewall.org.uk/at_home/history_of_lesbian_gay_and_bisexual_equality/default.asp)  
<sup>615</sup> 48 & 49 Vict. c.69

<sup>616</sup> “History of lesbian, gay and bisexual equality”, Stonewall.org.uk, last retrieved April 29, 2011 at [http://www.stonewall.org.uk/at\\_home/history\\_of\\_lesbian\\_gay\\_and\\_bisexual\\_equality/default.asp](http://www.stonewall.org.uk/at_home/history_of_lesbian_gay_and_bisexual_equality/default.asp)

<sup>617</sup> “Treatment of Alan Turing was “appalling” – PM”, Number10.gov.uk, retrieved April 29, 2011 at <http://webarchive.nationalarchives.gov.uk/+/number10.gov.uk/news/latest-news/2009/09/treatment-of-alan-turing-was-appalling-pm-20571>

<sup>618</sup> “1957: Homosexuality 'should not be a crime'”, BBC.co.uk, last retrieved April 29, 2011 at [http://news.bbc.co.uk/onthisday/hi/dates/stories/september/4/newsid\\_3007000/3007686.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/september/4/newsid_3007000/3007686.stm)

<sup>619</sup> *Dudgeon v. The United Kingdom*, (Application no. 7525/76)

<sup>620</sup> *Ibid.*

<sup>621</sup> “Lib Dems call for end to barriers to gay marriage”, BBC.co.uk, last retrieved April 29, 2011 at <http://www.bbc.co.uk/news/uk-politics-11380751>

## BACKGROUND OF LAWS PROHIBITING SAME-SEX RELATIONSHIPS IN FRANCE

Laws against homosexuality in France were strictly enforced before the French Revolution. In the last case of execution of homosexuals, Jean Diot and Bruno Lenoir were burned to death at the Place de Grave in Paris, on July 6, 1750.<sup>622</sup> The subsequent French Revolution brought about legal reforms, and the Penal Code of 1791, did not include the crime of sodomy.<sup>623</sup> However, homosexual relationships were still very much frowned upon, and sexual contact between members of the same sex continued to be prosecuted under the crime of “indecent behavior” and “indecent assault”.<sup>624</sup> In 1942, the Vichy government criminalized sexual relations between members of the same sex if one of the parties was younger than 21 years; this law remained in force after the French Republic was restored, and was incorporated into the laws of the Fourth French Republic as Paragraph 3, Article 331 of the Penal Code, with a sentence of six months to three years imprisonment, plus fines.<sup>625</sup> The law was not repealed until 1981 with the election of a new Socialist government.<sup>626</sup> In 1982, same-sex relations were legalized for all individuals aged 15 and over.<sup>627</sup>

While same-sex marriage is still illegal in France, a law providing for civil partnerships (PACS) was approved in November 1999. The law permits both same-sex and opposite-sex couples to enter into a civil partnership that provided many of the same legal protections as marriage, but was easier to dissolve. PACS allow for the filing of joint tax returns, exemption of spouses from inheritance taxes, and allow for one partner to assume the other’s debts.<sup>628</sup> Surprisingly, the majority of PACS are entered into by straight couples that appreciate the ease with which such arrangements can be dissolved.<sup>629</sup>

## INTERNATIONAL LEGAL APPROACHES TO THE PROTECTION OF LGBT RIGHTS

Given that the international frameworks created to ensure human and civil rights took shape after the conclusion of World War II, it is not surprising that international law emerged without explicit protections of gay and lesbian people. Even in the most tolerant and progressive countries of Europe, it was not until the 1950’s and 1960’s that serious consideration began to be paid to the injustices faced by LGBT people. However, given that the structures created to protect human and civil rights were influenced by Western notions of individual liberties with their emphasis on individual autonomy and the inherent and inviolable nature of human rights (natural law), these same international legal structures were well-suited to advance the cause

---

<sup>622</sup> “l’histoire chronologique de l’homosexualité en France”,

[http://www.devoiretmemoire.org/memoire/histoire\\_homosexualite/index.html](http://www.devoiretmemoire.org/memoire/histoire_homosexualite/index.html)

<sup>623</sup> Claudina Richards, *The Legal Recognition of Same-Sex Couples: The French Perspective*, *The International and Comparative Law Quarterly*, Vol. 51, No. 2 (Apr. 2002), pp. 305–324

<sup>624</sup> *Ibid.*

<sup>625</sup> “l’histoire chronologique de l’homosexualité en France”,

[http://www.devoiretmemoire.org/memoire/histoire\\_homosexualite/index.html](http://www.devoiretmemoire.org/memoire/histoire_homosexualite/index.html)

<sup>626</sup> Claudina Richards, *The Legal Recognition of Same-Sex Couples: The French Perspective*, *The International and Comparative Law Quarterly*, Vol. 51, No. 2 (Apr. 2002), pp. 305–324

<sup>627</sup> *Ibid.*

<sup>628</sup> “In France, Civil Unions Gain Favor Over Marriage”, *New York Times*, December 10, 2010, last retrieved April 29, 2011 at

[http://www.nytimes.com/2010/12/16/world/europe/16france.html?\\_r=3&pagewanted=1&hp](http://www.nytimes.com/2010/12/16/world/europe/16france.html?_r=3&pagewanted=1&hp)

<sup>629</sup> *Ibid.*

of LGBT rights, and many victories in the struggle for human rights have taken place under the auspices of these fora. Likewise, it is not surprising that the most far-reaching of these victories took place in areas under European jurisdiction. As noted earlier, the first of these important victories was the case of *Dudgeon v. United Kingdom*, a case before the European Court of Human Rights. This judgment found that laws criminalizing same-sex conduct between consenting adults violate the respect for private life protected by the European Convention on Human Rights.<sup>630</sup> This protection can be found in Article 8 of the Convention, which declares that

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The EHCR has relied on this protection of private life clause in much the same way that the United State Supreme Court relied on it in *Lawrence*, when it struck down sodomy laws in all fifty states. Interpreting the clause broadly, the ECHR found that European citizens enjoy a right to be free from interference by the government in the formation of their intimate relationships and partnerships. As sexuality is an integral part of the human psychology, these protections must apply equally to both heterosexual and homosexual people if Article 8 is to be applied uniformly across the population. Indeed, if the ECHR found otherwise in *Dudgeon*, and it were illegal for millions of Europeans to express intimacy with their chosen partners, Article 8 would exclude a sizable population from its protection. The ECHR also found that Article 8 imposes on states certain positive obligations to its citizens in the protection of this privacy right. This broad interpretation of the protections for individuals and obligations of the state included in the language of Article 8, coupled with a willingness to hear cases brought by gay and lesbian plaintiffs, led to a number of landmark cases which expanded the rights afforded to LGBT Europeans.

Relying on the reasoning first articulated in *Dudgeon*, the court found in *Smith and Grady v United Kingdom* that states must not exclude gay and lesbian individuals from eligibility for military service based on their sexual orientation<sup>631</sup>. The court found unanimously for the plaintiffs, arguing that British law prohibiting gay and lesbians from serving in the armed forces constituted interference in the plaintiffs' Article 8 right to respect for this private and family life. The ECHR held that in the matter of a state's interference with an intimate aspect of an individual's private life, there must exist "particularly serious reasons" before such restrictions can be found to be in accordance with Article 8 Section 2.<sup>632</sup> Applying this rule to the facts before the Court, it held that, while each State may impose restrictions on an individual's right to respect for his or her private life where there is a real threat to the armed forces' operational effectiveness, such risks must be "substantiated by specific examples".<sup>633</sup>

---

<sup>630</sup> *Dudgeon v. The United Kingdom*, (Application no. 7525/76)

<sup>631</sup> *Smith and Grady v United Kingdom* (1999) 29 EHRR 493

<sup>632</sup> *Ibid.*

<sup>633</sup> *Ibid.*

The British government did not provide such examples. Furthermore, the Court found that the British government's impositions on the plaintiffs' Article 8 interests were of a particularly intrusive character, and resulted in invasive questioning into intimate aspects of the plaintiff's sexual lives. And the expulsion of a person based on their sexual orientation would be particularly burdensome in the arena of employability, as career servicemen and women will be required to seek employment in the civilian sphere – with a negative mark on their service record as a result of the punitive nature of their exit from the armed services. Such an intrusion cannot be justified by an appeal to “operational effectiveness” when no credible examples of compromised effectiveness have been presented.<sup>634</sup> The unanimous decision by the ECHR led the British government to remove sexual orientation as grounds for expulsion in 2000, and in 2009, the Ministry of Defence apologized for its past discriminatory policies against gay and lesbian servicepersons.<sup>635</sup>

The same court found in *E.B. v France* that French laws that discriminated against gay and lesbian people in the consideration of their applications for adoption of children are discriminatory and violate both Article 8 (respect of privacy and family life) and Article 14 (prohibition against discrimination). By a vote of ten to seven, the court held that, while Article 8 did not confer upon individuals the right to adopt children or to start a family, the State could not discriminate against gay and lesbians who wished to adopt. France argued that the plaintiffs' adoption application had been rejected because of cited evidence that children need both a mother and a father to develop optimally, the government could not explain why the same reasoning did not prohibit single women from adopting parents. Due to this unjustified discrimination in the consideration of adoption applications, the Court found that Article 14 was implicated, which prohibited discrimination in enjoyment of the rights and freedoms guaranteed by the Convention.<sup>636</sup> Furthermore, the Court concluded that, contrary to French concerns that having a male and female parent were in the best interest of the child – it is discrimination against prospective parents that is against the best interests of children.<sup>637</sup>

Another landmark case that upheld the rights of gay and lesbian citizens of Europe was *Mouta v. Portugal*, decided by the ECHR in 1999. This case prohibited Portugal from considering a biological father's sexual orientation in determining the ultimate issue of child custody in a divorce proceeding. Using a legal analysis similar to *E.B. v. France*, the Court found that the plaintiff had a liberty interest in the respect for his private and family life, and that laws that discriminated against him in his exercise of this privacy interest were unacceptably discriminatory unless there is an objective and reasonable justification for its disparate treatment.<sup>638</sup> The Court found that the biological father's sexual orientation provided no reasonable justification for the denial of child custody, and to base a denial on such grounds constituted a violation of Article 14 in conjunction with Article 8 of the ECHR.<sup>639</sup>

All of the previous cases protected the rights of LGBT people as individuals – however, up until 2003, there were no cases favorably decided in favor of protecting

---

<sup>634</sup>Smith and Grady v United Kingdom (1999) 29 EHRR 493

<sup>635</sup>“Defence ministry apologises for gay discrimination”, *The Guardian*, 28 June 2007, last retrieved April 29, 2011 at <http://www.guardian.co.uk/uk/2007/jun/28/gayrights.military>

<sup>636</sup>*E.B. v. France* (application no. 43546/02)

<sup>637</sup>*Ibid.*

<sup>638</sup>*Mouta v. Portugal* (Application no. 33290/96)

<sup>639</sup>*Ibid.*

same-sex couples jointly.<sup>640</sup> The first time that the ECHR recognized the rights of same-sex partners was case of *Kamer v. Austria*.<sup>641</sup> This case challenged an Austrian law which allowed an opposite-sex unmarried partner to succeed to the tenancy after the death of the other partner. However the law did not allow same-sex unmarried partners this same right. Like in *Mouta*, *EB*, and *Smith and Grady*, the court advanced the rights of gay and lesbian citizens by applying a dual Article 8/Article 14 analysis – and concluded that the discrimination experienced by the plaintiff was not justified. For the discriminatory treatment to prevail, the Austrian government must have been able to advance a justification that either pursued a legitimate aim or which was proportional to the aim sought. Austria argued that this policy “protected the family unit,” but was unable to demonstrate support for the conclusion that denying succession of tenancy to unmarried opposite-sex partners furthered the interest averred.<sup>642</sup> Consequently, the Court found in favor of the plaintiffs, and for the first time the ECHR articulated protections for same-sex couples based on rights and privileges contained in the ECHR.

Given the rapid pace of the advance of LGBT rights in Europe, and the success with which gay and lesbian plaintiffs have enjoyed in cases brought before the ECHR, one would not be surprised that the Court has already decided a case which declares that gay and lesbian relationships constitute a “family” worthy of the same protections and privileges of families headed by opposite-sex partnership. The case of *Schalk and Kopf v. Austria* was decided in 2010, when the Court heard arguments brought by two Austrian men who desired to enter into a lawful marriage.<sup>643</sup>

In *obiter dictum*, the Court recognized that the relationship between the two men constituted a family worthy of the protections afforded by international human rights conventions, in particular Article 8 of the ECHR. However, the Court fell short of finding that there existed under the ECHR a right for LGBT Austrians to marry.<sup>644</sup> The Court found that Article 12 of the ECHR, which provides for the right to marry, does not extend to same-sex couples. Article 12 states, “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”<sup>645</sup> The Court noted that this language was drafted in the 1950’s, and at that time it could not be convincingly argued that the drafters intended this right to extend to same-sex couples. Furthermore, in all other sections of the ECHR, the rights and protections are offered to “everyone”, or state that “no one” may be subjected to prohibited treatment. Given that Article 12 protects “men and women”, it must be assumed that this choice of language was deliberate and could not be construed to refer to same-sex couples.<sup>646</sup>

---

<sup>640</sup> “Case-law of the European Court of Human Rights relevant to lesbian, gay and bisexual rights”, last retrieved April 29, 2011 at

[http://www.stonewall.org.uk/at\\_home/immigration\\_asylum\\_and\\_international/2681.asp#same-sex\\_partners](http://www.stonewall.org.uk/at_home/immigration_asylum_and_international/2681.asp#same-sex_partners)

<sup>641</sup> *Karner v. Austria*, no. 40016/98

<sup>642</sup> Rosenblum, Staible, and Edison, Updates From The Regional Human Rights Systems, American University Washington College of Law, last retrieved April 29, 2011 at

<http://www.wcl.american.edu/hrbrief/11/1rhru.cfm>

<sup>643</sup> *Schalk and Kopf v. Austria* (no. 30141/04)

<sup>644</sup> “Strasbourg court rules that states are not obliged to allow gay marriage “. *Guardian.co.uk*, last retrieved April 29, 2011 at <http://www.guardian.co.uk/law/2010/jun/24/european-court-of-human-rights-civil-partnerships>

<sup>645</sup> The European Convention on Human Rights, last retrieved April 29, 2011 from <http://www.hri.org/docs/ECHR50.html>

<sup>646</sup> *Schalk and Kopf v. Austria* (no. 30141/04) at 54

Not surprisingly, the plaintiffs advanced a similar legal argument which had worked for gay and lesbian plaintiffs previously – they argued that Article 8’s protections, read in conjunction with Article 14’s prohibitions on discrimination, compelled Austria to allow them to join together in lawful marriage. The Court disagreed, however, arguing that Article 8’s protections are more general in scope, and in conjunction with Article 14 cannot be construed out of “harmony” with the right and protections provided by Article 12, which is very specific and clear in its scope.<sup>647</sup> The plaintiffs asked the Court to consider the meaning of Article 12 in light of changing laws and attitudes toward same-sex people throughout Europe and the world, and to consider that these rapidly-changing attitudes could provide an expanded interpretation of Article 12 that would be favorable to the plaintiffs. The Court found that there was no current European consensus on the issue of same-sex marriage, and that it remained up to each state to determine whether or not to extend these rights to same-sex couples -- the Court would not "rush to substitute its own judgment in the place of that of national authorities."<sup>648</sup> However, the Court also examined Article 9 of the Charter of Fundamental Rights of the European Union, which provided a right to marriage without reference to gender, and through ambiguity left the matter up to states to decide that marriage should be available to same-sex couples.<sup>649</sup> Given that Article 9 of the EU Fundamental Rights Charter was silent on the issue, the Court declared in *obiter dictum* that, henceforth, it “would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex.”<sup>650</sup> The complicated reasoning used by the Court in this case, coupled with the various dissents, concurring opinions, and ample dicta issued along with the judgment, indicate that the Court struggled with the case and seemed to be generally sympathetic toward the plaintiff’s claims. And perhaps most shocking, the Court indicated that in future cases, it would no longer consider the language of Article 12 a limitation on the rights of same-sex couples to marry – potentially leaving the door open to the availability of same-sex marriage at some point in the future. The key determinant in when that may occur, seems to revolve around the issue of a general consensus emerging. Although the Court has acknowledged that a consensus has emerged regarding the legal recognition of same-sex couples’ partnerships, it is not yet clear that a consensus has emerged around the issue of marriage. The Court left itself plenty of room to find this right in Article 12, provided that an “an emerging European consensus” concurs in the court’s assessment.<sup>651</sup>

While the European Court of Human Rights, reflecting European progressive attitudes, has been at the forefront of advancing LGBT rights worldwide, supporters of equality for gays and lesbians have found less satisfying results working through the auspices of the United Nations. This is not surprising given the fact that homosexuality remains illegal in 76 countries, and in five, gays and lesbians are subject to the death penalty.<sup>652</sup> There remains a huge chasm between Western

---

<sup>647</sup> Schalk and Kopf v. Austria (no. 30141/04) at 101

<sup>648</sup> “Strasbourg court rules that states are not obliged to allow gay marriage “. Guardian.co.uk, last retrieved April 29, 2011 at <http://www.guardian.co.uk/law/2010/jun/24/european-court-of-human-rights-civil-partnerships>

<sup>649</sup> Schalk and Kopf v. Austria (no. 30141/04) at 61

<sup>650</sup> Ibid.

<sup>651</sup> “ECHR Says Same Sex Marriage is Not a Universal Human Right”, impunitywatch.com, last retrieved April 29, 2011 at <http://impunitywatch.com/?p=12595>

<sup>652</sup> "State-sponsored Homophobia". The International Lesbian, Gay, Bisexual, Trans and Intersex

countries, on the one hand, who have generally been more accepting of gay people's human rights, and Asian and African countries, where severe taboos remain against a "behavior" that many attribute to colonialism and foreign influences. The Vatican has also used its influence to deny gay people civil and human rights protections.<sup>653</sup> For this reason, it has been very difficult to foster a broad, global consensus on the issue of LGBT rights.

Nevertheless, some success has been achieved through enforcement of the International Convention on Civil and Political Rights, a multilateral treaty that commits its signatories to the protection of civil and political rights such as freedom of speech, religion, assembly, and the right to due process. Currently 167 countries are a party to the ICCPR<sup>654</sup>, and a further 113 are parties to the First Optional Protocol, which establishes a complaints mechanism by which individuals can bring complaints to the United Nations Human Rights Committee.<sup>655</sup> It is through this mechanism that human rights for gay and lesbian people were advanced through a body of the United Nations in a groundbreaking decision, that of *Toonen v. Australia*.<sup>656</sup> Nicholas Toonen, a gay Australian from the state of Tasmania, brought this complaint to challenge Tasmania's statutes criminalizing sex between consenting adult men.<sup>657</sup> He alleged that these statutes violated his right to privacy, protected by Article 17 of the International Covenant on Civil and Political Rights, and his right to equal protection and freedom from discrimination, protected by Article 26 of the ICCPR. This legal strategy – finding protections for gay people through a concurrent reading of the rights to respect to privacy and freedom from discrimination – is the same that was used by petitioners in *Karner v. Austria*, *E.B. v. France*, and other gay rights cases that were successfully decided before the ECHR. The Human Rights Committee, however, did not even implicate Article 26, finding that Tasmania's statutes criminalizing male homosexuality were a violation of Toonen's right to privacy under Article 17.<sup>658</sup> Furthermore, the Committee found that the reference to protections against discrimination on account of "sex", in Article 26 of the ICCPR is to be taken as including "sexual orientation".<sup>659</sup> This was a significant development, because it ensured that future cases brought before the Committee would consider sexual orientation a protected status under the ICCPR.<sup>660</sup> As a result of this decision, the Australian Parliament passed the Human Rights (Sexual Conduct) Act 1994.<sup>661</sup> The pertinent section of the statute – Section 4 – prohibits any law that interferes with

---

Association. May 2010.

<sup>653</sup>"Vatican criticised for opposing gay decriminalization", *irishtimes.com*, last retrieved April 29, 2011 at <http://www.irishtimes.com/newspaper/breaking/2008/1202/breaking62.html>

<sup>654</sup> International Covenant on Civil and Political Rights, retrieved April 29, 2011 at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en)

<sup>655</sup>OP1-ICCPR, Article 1.

<sup>656</sup>*Toonen v. Australia*

<sup>657</sup> Tasmanian Criminal Code Sections 122(a) and (c), and 123

<sup>658</sup> "Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights", Para 11., <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5>

<sup>659</sup> "Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights", Para 8.7., <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5><http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5>

<sup>660</sup> Stadler, "A Right to Same-Sex Marriage Under International Law: Can It Be Vindicated in the United States?", *Virginia Journal of International Law Association* 40 *Va. J. Int'l L.* 405

<sup>661</sup> Commonwealth Consolidated Acts, Human Rights (Sexual Conduct) Act 1994 – Sect 4, last retrieved April 29, 2011 at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/hrca1994297/s4.html](http://www.austlii.edu.au/au/legis/cth/consol_act/hrca1994297/s4.html)

the right of consenting adults to private sexual conduct, and specifically mentions the right to privacy protected by the ICCPR Article 17.<sup>662</sup> The inclusion in the statute by reference of Australia's international treaty obligations in this manner is a heartening and hopeful development for those who seek to guarantee civil, political, and human rights across the globe. However, it must be kept in mind that many states are not parties to the First Optional Protocol, and thus, individuals cannot bring complaints against states parties to the Human Rights Committee. Some of the states that are not party to the First Optional Protocol include the United States, United Kingdom, China, and India; as well as countries where horrendous and widely-tolerated acts of state-sponsored violence against LGBT people have been committed, such as Iran, Egypt, and Saudi Arabia. When abuses such as these take place in states that aren't parties to the First Optional Protocol, proponents of human rights for LGBT people must rely upon the Human Rights Committee's annual reporting of the status of human rights in countries party to the ICCPR.

The Human Rights Committee in 2002 heard that case of *Ms. Juliet Joslin et al. v. New Zealand*. The plaintiffs, two lesbian couples from New Zealand, brought the complaint after their notice of intended marriage was refused by their local Registry Office.<sup>663</sup> They argued that the refusal to issue marriage licenses violated New Zealand's obligations under the ICCPR in Article 16 (recognition as a person before law), Article 17 (interference with privacy), Article 23 (the right to marry and form a family), Article 26 (freedom from discrimination). The Human Rights Committee did not find that New Zealand's refusal to allow same-sex marriages violated its obligations under the ICCPR. The Committee stated that "marriage," as it is understood in the Covenant, is meant to be understood "as being between a man and a woman."<sup>664</sup> Like the ECHR in *Schalk and Kopf v. Austria*, the Human Rights Committee noted that the ICCPR Article 23 was the only is the "only substantive right protected under the Covenant expressed in the gender-specific terms of 'men and women', with all other rights expressed in gender-neutral terms."<sup>665</sup> The Committee also rejected the plaintiffs' Article 16 claim, stating that this protection was intended to prohibit states from acting to deny individuals the ability to enjoy their rights; this protection did not extend to groups of people, nor did it cover an individual's attempts to acquire a legal status under law.<sup>666</sup> The Committee rejected the plaintiffs' allegation of violation under Article 26, which protected an individual from discrimination, by arguing that what the plaintiffs' were seeking was not non-discrimination but equal treatment, which was not provided for by this Article.<sup>667</sup> And finally, the Committee rejected the plaintiffs' assertion that their Article 17 rights to freedom from interference in family and privacy matters – instead, it was held that, unlike the issue at stake in *Toonen v. Australia*, the denial of marriage to gay and lesbian people did not authorize intrusions into their personal lives, nor did it target LGBT people as a specific group.<sup>668</sup> Thus, the Committee refused to find that same-sex relationships are worthy of legal protecting, leaving that decision to the particular state parties. And unlike the ECHR in *Schalk and Kopf v. Austria*, the Committee

---

<sup>662</sup> Ibid.

<sup>663</sup> *Ms. Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

<sup>664</sup> Ibid.

<sup>665</sup> Ibid at 11.

<sup>666</sup> Ibid at 16.

<sup>667</sup> Ibid at 20.

<sup>668</sup> Ibid at 16.

refused to contribute sympathetic dicta in regards to the plaintiffs' claims, nor did the Committee offer a recognition that same-sex couples constitute families worthy of protection under international law. The Committee's reluctance to find for same-sex couples seeking legal recognition of their partnerships, and its simultaneous willingness to find that gay and lesbian individuals have a right to private, consensual intimate relations, is a reflection of where opinion currently stands and is a statement about what is currently practical, given that the Human Rights Commission reflects a global aggregate attitude toward gay rights, and not a European or Western consensus.

Given the past history of prejudice and state-sanctioned discrimination against gay people in the United States, the United Kingdom, France, and other Western countries, and the current state of such discrimination and violence in other states across the world, it is not surprising that most successes for proponents of gay rights have taken place in international adjudicative bodies such as the ECHR, with slower progress being made through application of the ICCPR and adjudication through the Human Rights Council. I attribute this phenomenon to two factors. First, bodies such as the ECHR are insulated from immediate popular caprice and anger, and secondly, while worldwide adjudicative bodies such as the Human Rights Committee struggle face problems of credibility and legitimacy, the ECHR is linked to membership in the Council of Europe, where support for international authoritative bodies have more support. Support for the European project is relatively strong among the population – particularly so in the states of Eastern Europe, where, incidentally, discrimination against gay people is more tolerated. It is likely that these countries will see the liberalization of their laws against gay people as a small price to pay for membership in exclusive supranational European bodies. No such inducement works to the advantage of the United Nations bodies, and, representing as they do a wider range of opinions, it is likely that the UN will continue to follow, and not lead, the struggle for human rights for gay and lesbian people.

## CASE COMMENT

### SOME THOUGHTS ON THE BROADER THEORETICAL BASIS FOR INCLUDING

### POLITICAL PURPOSES WITHIN THE SCOPE OF CHARITABLE PURPOSES:

### THE AID/WATCH CASE<sup>669</sup>

BY DR MATTHEW TURNOUR  
MANAGING DIRECTOR, NEUMANN & TURNOUR LAWYERS

In the decision in *Aid/Watch*<sup>670</sup> a majority in the High Court of Australia found that the pursuit of political purposes could be charitable. The decision was based broadly on the notion that political purposes could fall within the fourth catch-all provision – purposes beneficial to the community. In this paper, I argue that theoretically the parallels between the pursuit of political purposes and the pursuit of religious purposes are such that thought should be given to expanding conceptually the advancement of religion head of charitable purpose to include the advancement of political purposes.<sup>671</sup>

If the advancement of religion is charitable and a broad construction of religion is appropriately based on the foundational role of freedom of religion in society,<sup>672</sup> then why are other purposes that contribute to the foundations of society not also favoured at common law in a way similar to charities? Political parties, lobby groups and other institutions whose purposes commit them to the expression of fundamental freedoms and even the promulgation and maintenance of these fundamental freedoms have been expressly excluded from the class of organisations pursuing charitable purposes.<sup>673</sup> The door into charitable purpose has been bolted shut against them – until the High Court decision in *Aid/Watch*. This has been so, irrespective of any contribution they make to the public good. The common law, perhaps surprisingly, justified this exclusion on a similar basis to the embracing of advancement of all religion. Just as the courts do not wish to arbitrate between religions, and consequently place a broad reading upon ‘religion’, according charitable purpose status to all; so, when it comes to choosing between political purposes, courts have not wished to be seen to be favouring any political activity (or perhaps cannot make an informed choice) and therefore, have denied charitable status to all political purposes.<sup>674</sup> The problem is, though, that ‘it is still not clear whether jurisprudential rationales are able to explain the fact that only common law countries constrain charitable campaigning’.<sup>675</sup>

---

<sup>669</sup> This paper was presented at the Colloquium on the *Aid/Watch Case* held at Melbourne University on 10 February 2011.

<sup>670</sup> *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 (1 December 2010).

<sup>671</sup> The ideas are drawn from Dr Turnour’s PhD thesis and form part of a broader argument for the development of charity law jurisprudence. The PhD is available at [http://eprints.qut.edu.au/31742/1/Matthew\\_Turnour\\_Thesis.pdf](http://eprints.qut.edu.au/31742/1/Matthew_Turnour_Thesis.pdf).

<sup>672</sup> *Holland v Peck* (1842) 37 NC 255, 258; *Gass v Wilhite* (1834) 32 Ky 170, 180; *People ex rel Seminary of our Lady of Angels v Barber* (1886) 3 NY St Rep 367 affirmed in (1887) 13 NE 936.

<sup>673</sup> *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31. For an example of statutory amendments see the *Charities Act 2006* (Eng.&W) c 50.

<sup>674</sup> Stephen Swann, ‘Justifying the Ban on Politics in Charity’ in Alison Dunn (ed), *The Voluntary Sector, The State and the Law* (2000) 161, 161–75.

<sup>675</sup> Perri 6 and Anita Randon, *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (1995) 105.

This reasoning compounds the problem and weaves the puzzle into a Gordian knot. Religion, at least in its organisational expression when it acquires the power that attends having many adherents, is fundamentally political. As de Tocqueville observed:

Every religion has some political opinion linked to it by affinity. The spirit of man, left to follow its bent, will regulate political society and the City of God in uniform fashion, it will, if I dare put it so, seek to harmonize earth with heaven.<sup>676</sup>

The Ontario Law Reform Commission also declared that at ‘certain times in Anglo-Canadian legal history, the dominant regulatory concern has been the fear that charitable organisations would grow to the point where they would begin to usurp the functions of the state or the commercial economy’ and that ‘[h]istorically, this concern applied almost wholly to religious institutions’.<sup>677</sup> Anglicare Australia, which is the welfare arm of the Anglican Church, one of the largest religious denominations in Australia, submitted to the Australian *Charities Definition Inquiry* that advocacy was integral to its functioning.<sup>678</sup> It would be less than completely honest for this power of religion not to be acknowledged.

Religion has persuasive power that can rival, and indeed trump, the coercive powers of the state. It should not be forgotten that at one time in common law history ‘the majority of its activities were funded by taxation’.<sup>679</sup> Richardson, drawing lessons from the Reformation for the present day, concluded:

that non-economic cultural beliefs can influence the structure of economic institutions and efficiency of the economy by changing the structure and equilibrium of the collective action game. In addition, the realization that Reformation represented a large scale transformation of European society from a collectivist to an individualistic framework suggests that exogenous changes in beliefs, such as beliefs about the afterlife, that alter the relative costs and benefits of individualistic and collectivistic organisations, can alter the trajectory of societal organisation.<sup>680</sup>

The place of religion in Czechoslovakia’s ‘velvet revolution’, that brought down communism and swept Vaclav Havel to power, is a potent recent reminder of this power.<sup>681</sup> Further, engagement by citizens in the development of law is almost always likely to be good for that society and generally healthy for democracy. In the rare situations when it is not, it is probably a criminal offence, such as treason, and can be addressed in that context. Anticipating the Aid/Watch decision Garton pointed out in 2005 that accepting political purposes as charitable purposes is not hard:

---

<sup>676</sup>Alexis De Tocqueville, *Democracy in America*, Great Books of the Western World (George Lawrence trans, first published in 1835, 1992 ed) 150.

<sup>677</sup>Ontario Law Reform Commission, *Report on the Law of Charities* (1996) 16.

<sup>678</sup>Inquiry into the Definition of Charities and Related Organisations *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) 214.

<sup>679</sup>Jonathan Edward Garton, *The Regulation of Charities and Civil Society* (D Phil Thesis, University of London, 2005) 15.

<sup>680</sup>Gary Richardson, 'Craft Guilds and Christianity in Late-Medieval England' (2005) 17(2) *Rationality and Society* 139, 177.

<sup>681</sup>See John Ehrenberg, *Civil Society — The Critical History of an Idea* (1999) 186–96.

In fact, if the courts were of a mind to tolerate greater political action by charities, it is submitted that it would be a simple matter to find that there is significant public benefit inherent in pursuing a charitable purpose (or some other social good, for that matter) through political means.<sup>682</sup>

From Garton's perspective this is the only logical development, for in his view 'it is clear ... the politically active [civil society organisations] are structurally synonymous with charitable [civil society organisations]'.<sup>683</sup> In his view 'there are no theoretical grounds on which to differentiate between the charitable sector and organised civil society when justifying and designing a regulatory strategy'.<sup>684</sup>

If it 'is still not clear whether jurisprudential rationales are able to explain the fact that only common law countries constrain charitable campaigning'<sup>685</sup> and if as Garton contended – and his arguments are compelling – there is no reason justifying exclusion of organisations pursuing political purposes from the sector which includes charities, a way must be found to bring these organisations within the one theoretical framework.

As a result of the decision in *Aid/Watch* the High Court has achieved this by including the pursuit of political purposes within the broad fourth head of *Pemsel's case*. It is implicit from the discussion so far, though, that it may be possible to theorise that the advancement of religion head could be expanded to include other purposes that build social cohesion. A paradigm for that discussion is now proposed. I theorise that advancement of religion — the third head of charitable purpose as stated in *Pemsel's case* — could be expanded conceptually to include other civil society organisations that *similarly* contribute to the common weal. This argument — that it is possible to move beyond advancement of religion to a broader class of organisations that contribute to the common weal by fortifying the foundations of society — is developed from the role of religion in society. As de Tocqueville observed with reference to the role of religion in the United States: 'Thus, while the law permits the Americans to do what they please, religion prevents them from conceiving, and forbids them to commit, what is rash or unjust.'<sup>686</sup> His point was that religion operated as a moral restraint on unbridled freedom to ensure that people in that newly democratic nation exercised their liberty as they should; that is, having regard to others.

Three nineteenth century American cases discussed by Picarda<sup>687</sup> ground the charitable function of advancement of religion and the role religion plays in encouraging concern for others and self-restraint. This is because these qualities are essential to civilisation and the welfare of society. In *Holland v Peck* the court held that religion was 'the surest basis on which to rest the superstructure of social order'.<sup>688</sup> In *People ex rel Seminary of Our Lady of Angels v Barbe*, religion was described as necessary to the advancement of civilisation and the promotion of the welfare of society'.<sup>689</sup> In *Gass and Bonta v Wilhite* it was held that religion is a 'valuable constituent in the character of our citizens'.<sup>690</sup> In such a context,

---

<sup>682</sup>JE Garton, *The Regulation of Charities and Civil Society* (D Phil Thesis, University of London, 2005) 198.

<sup>683</sup>Ibid 201.

<sup>684</sup>Ibid.

<sup>685</sup>Perri 6 and Anita Randon, *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (1995) 105.

<sup>686</sup>Alexis de Tocqueville, *Democracy in America*, Great Books of the Western World (George Lawrence trans, first published in 1835, 1992 ed).

<sup>687</sup>H Picarda, *The Law and Practice Relating to Charities* (3<sup>rd</sup> ed, 1999) 84.

<sup>688</sup>*Holland v Peck* (1842) 37 NC 255, 258.

<sup>689</sup>*People ex rel Seminary of Our Lady of Angels v Barber* (1886) 3 NY St Rep 367 affirmed in (1887) 13 NE 936.

<sup>690</sup>*Gass and Bonta v Wilhite* (1834) 32 Ky 170, 180.

advancement of religion is recognised as a charitable purpose enjoying the favour it does because of its role in underpinning the social order and creating social cohesion.<sup>691</sup> These charitable purpose cases, read in the context of the common law history, point to advancement of religion cases forming part of a wider stream of common law jurisprudence related to the foundations of society. It is not just the American judges and Picarda who draw this connection.<sup>692</sup> Chief Justice Gleeson of the High Court is reported to have declared similarly that ‘religion continues to be relevant in Australian society because it provides a bridge between “private conscience” and “the general acceptance of values that sustains the law and social behaviour”’.<sup>693</sup> In the UK, the *Nathan Report* of 1952–53 pointed to a similar connection.<sup>694</sup> Analogous observations were made in Australia by the *Charities Definition Inquiry*.<sup>695</sup>

That religion operates as a force obliging people to be good and thus underpins society is anchored in a widely accepted proposition that even though there is a great diversity of belief amongst religions, in the out-workings of behaviour, all of the major religions teach the equivalent of what is known in most common law countries as the golden rule. Often articulated as, ‘do to others as you would have them do to you’,<sup>696</sup> the golden rule exhorts adherents to behave altruistically. The consequence is an argument that religion provides a glue that binds society together voluntarily into a community of citizens – a *polis* in the classical Greek sense or *civitas* in the Latin expression. The effect of such a voluntary binding together is that it reduces the need for coercive compliance though enforced law. It also provides the substrate for voluntary concern for others as religious messages ‘conveyed from pulpits and in numerous publications’ are effective at ‘invigorating ... informal giving and support’ even if ‘not wholly consistent’.<sup>697</sup> Focused on guilds in the Middle Ages, but with an eye to the present, Richardson has underscored the role religion plays in ‘bringing individuals together’ in voluntary associations that ‘fostered trust’ and ‘cooperation’. In such a context, ‘[c]oercion hovered in the background to force the recalcitrant to contribute their share and to reassure the compliant’, but it was the religion that unified.<sup>698</sup>

This role of religion arguably underpins the judicial pronouncement by Lord Cross, that the law ‘assumes that any religion is at least likely to be better than none’.<sup>699</sup> This role for religion also seems acknowledged by the famous humanists Ariel and Will Durant, who observed that no society has yet formed a way of developing morality without reference to religion.<sup>700</sup> In a legal context Lord Devlin,

---

<sup>691</sup>Patrick M Garry, 'Religious Freedom Deserves more than Neutrality: The Constitutional Argument for Non-Preferential Favouritism of Religion' (2005) 57(1) *Florida Law Review* 1, 12.

<sup>692</sup>H Picarda, *The Law and Practice Relating to Charities* (3<sup>rd</sup> ed, 1999) 84.

<sup>693</sup>H R Sorensen and A K Thompson, 'The Advancement of Religion is Still a Valid Charitable Object' (Paper presented at the Charitable Law in the Pacific Rim Conference, QUT, October 2001) 15.

<sup>694</sup> See Charitable Trusts Committee (UK), *Report of the Committee on the Law and Practice Relating to Charitable Trusts*, Cmd 8710 (1952-53).

<sup>695</sup> See Gino Dal Pont, *Charity Law in Australia and New Zealand* (2000) 148, adopted by: *Inquiry into the Definition of Charities and Related Organisations, Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) 175.

<sup>696</sup>*The Holy Bible New International Version* (1984) Luke 6:31.

<sup>697</sup>Ilana Krausman Ben-Amos, *The Culture of Giving: Informal Support and Gift-Exchange in Early Modern England* (2008) 14 and chapter 7.

<sup>698</sup>Gary Richardson, 'Craft Guilds and Christianity in Late-Medieval England' (2005) 17(2) *Rationality and Society* 139, 177.

<sup>699</sup>*Neville Estates Ltd v Madden* [1962] 1 Ch 832, 853.

<sup>700</sup>Will Durant and Ariel Durant, *Rousseau and Revolution: A History of Civilization in France, England and Germany from 1756 and in the Remainder of Europe from 1716 to 1789*, (The Story of Civilization series, pt 10, 1967) 184.

has noted that no society has yet solved the problem of how to teach morality without religion.<sup>701</sup> My point in setting this out is not to argue the polemic point over the virtue or otherwise of religion, but to anchor advancement of religion as a purpose warranting favour upon its intangible but integral contribution to public benefit. Further, it is to argue that that contribution is fundamentally rooted in its role as a moral restraint upon licence so that people voluntarily choose to be good and do good. This increases liberty because fewer coercive laws are required, resulting in greater freedom. If this proposition is accepted – that advancement of religion is favoured at least in part because advancing religion facilitates the freedom that underpins modern democracies – it is the facilitation of freedom that is favoured not just the advancement of religion.

Now it might be that a common law country takes the view that the two are coterminous. That is that the whole space for facilitating freedom is occupied exclusively by advancement of religion. It might be thought, that without the centrality of piety and other-centredness taught by (the Christian) religion that underpinned the common law, there would not be a justification for extending benefit. But that need not be so. For present purposes, it is enough to suggest that the concept of advancement of religion can be expanded to a broader concept. If this is accepted then the following purposes defined as charitable by section 2(2) of the *Charities Act 2006* (Eng. & W) could be said to fall within this broader class:

1. the advancement of citizenship or community development; and
2. the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity.

As these two examples from the UK illustrate, common law countries do favour organisations other than religious organisations that help build and sustain the infrastructure of democracy. Political parties are also favoured across the world with benefits similar to those of charities and in Australia in like fashion enjoy both exemption and limited deductibility for donations.<sup>702</sup> Given this broader classification, I contend that the simpler way to address the challenges discussed at the outset, regarding the impossibility of rationally distinguishing political parties and religious charities, is to accept that they both belong to this one broader class of organisations that facilitate freedom and in so doing underpin and uphold the infrastructure of a democracy.

This understanding of the basis for favour that is founded upon, but goes beyond, the favour granted at common law to charitable trusts for the advancement of religion is supported by the Roman root of the word. Etymologically has its root in ‘ligare’ — that which binds together — from which the English word ligament is derived.<sup>703</sup>

What though, of vague and even foolish contributions to public political discourse? I suggest that just as this has not prevented cases being accepted as charitable as advancement of religion, similar principles may apply to advancement of political purposes, unless something is adverse to the foundations of society or fundamentally immoral or illegal. My reasoning is that it can be said, following *Cocks v Manners* that organisations that are ‘adverse to the very foundation of all religion’,<sup>704</sup> or

---

<sup>701</sup>Patrick Devlin, *The Enforcement of Morals* (1965) 42.

<sup>702</sup>Richard Steinberg, 'Economic Theories of Nonprofit Organisations' in Walter W. Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (2<sup>nd</sup> ed, 2006) 117, 123.

<sup>703</sup>Oxford English Dictionary, Definition of 'Ligament', *Oxford English Dictionary* Online <<http://dictionary.oed.com>> at 7 June 2008.

<sup>704</sup>*In Re Watson, Deed Hobbs v Smith and Others* [1973] 1 WLR 1472, 1473.

‘subversive of all morality or religion’<sup>705</sup> are not charitable. This reasoning can apply equally to political purposes.

Second, as the advancement of religion can be recognised as a charitable purpose, without demonstrating public benefit as tangibly as the advancement of education, so the public benefit of political purposes is more ephemeral but should enjoy similar status. This is illustrated by comparing the following cases. In *Re Watson*,<sup>706</sup> the foisting on the public of religious views the value of which seemingly was ‘nil’, was a charitable purpose but in *Re Pinion*, the ‘foisting upon the public of [a] mass of junk’ was not.<sup>707</sup> It seems that the common law freedom to articulate views which are ‘in a great measure incoherent and confused’,<sup>708</sup> is something warranting charitable status provided there is some contribution to the social and political infrastructure that sustains society in the common law country. Lord Herschell, in particular, commented on the danger of endeavouring to find a consensus on demonstrated public benefit in this context.<sup>709</sup>

Finally, with religious organisations, the number of people gathered into the relevant association can be very small and yet, it would seem, there can be public benefit flowing from the association, provided the congregations disperse and ‘mix with their fellow citizens in the world’.<sup>710</sup> I suggest the same principles might apply to organisations pursuing political purposes. Chief Justice Barwick explained why this might be so when holding that the publication of law reports was a charitable purpose. He held that the ‘public benefit lies in fortifying the foundations because a society cannot exist as such if it is not based upon and protected by justice under law: and nurtured by obedience to law’.<sup>711</sup> The law in this area arguably begins from the premise that all gatherings for social engagement are for public benefit unless it is clear that there are grounds evidencing they are not.

In summary then, this reasoning builds from and repositions the developments in the law made by the decision in *Aid/Watch*. It suggests new directions for theory development. The ideas are contributed to this discourse with a view to carrying forward a discussion which is rich in possibilities and important to the development of law for the voluntary sector.

---

<sup>705</sup> *Thornton v Howe* (1862) 31 Beav. 14.

<sup>706</sup> [1973] 1 WLR 1472, 1478-1479.

<sup>707</sup> Lord Harman summarised the facts: ‘[Mr Pinion] sought to devote almost the whole of his not inconsiderable estate to a project designed to keep himself and his family for all time before the public eye by allowing the public to view without cost his studio situate at 22a Pembridge Villas, Notting Hill, intact with its entire contents.’ *Re Pinion* [1965] Ch 85, 104.

<sup>708</sup> *Thornton v Howe* (1862) 31 Beav 14, 20.

<sup>709</sup> See *Pemsel’s case* [1891] AC 531, 572 (Lord Herschell).

<sup>710</sup> Peter Luxton, *The Law of Charities* (2001) 179 citing *Neville Estates Ltd v Madden* [1962] Ch 832.

<sup>711</sup> *Incorporated Council of Law Reporting of the State of Queensland v Federal Commissioner of Taxation* (1971) 125 CLR 659, 669.