INTERNATIONAL INSTITUTE OF ISLAMIC THOUGHT AND CIVILIZATION (ISTAC)

20th. February 1999

We certify that this dissertation satisfies the partial fulfillment of the requirements for the degree of Doctor of Philosophy.

Prof. Dr. Syed Muhammad Naquib al-Attas
Chairman of Examining Committee
and Founder-Director

Prof. Dr. Wan Mohd Nor Wan Daud
Member of Examining Committee
and Deputy Director

Prof. Dr. Ahmad Kazemi Moussavi
Supervisor

Prof. Dr. Muddathir Abdel-Rahim
Second Reader

Prof. Dr. Omar Jah
Third Reader

Prof. Dr. Ala'eddin Kharofa
Member of Examining Committee

Prof. Dr. Amer al-Roubaie
Member of Examining Committee

INTERNATIONAL INSTITUTE OF ISLAMIC THOUGHT AND CIVILIZATION
(ISTAC)

In the Name of Allah the Most Merciful the Most Compassionate

PROBLEMS CONCERNING THE APPLICATION OF INTERNATIONAL LAW OF HUMAN RIGHTS BY NATIONAL COURTS :

(A CRITICAL STUDY OF THE ANGLO-AMERICAN AND INDIAN JUDICIAL APPROACHES)

A DISSERTATION SUBMITTED TO THE INTERNATIONAL INSTITUTE OF ISLAMIC THOUGHT AND CIVILIZATION (ISTAC) IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF THE DOCTOR OF PHILOSOPHY

BY

ABOUBACAR ABDULLAH SENGHORE

KUALA LUMPUR, MALAYSIA

FEBRUARY 1999

This work is dedicated to my wife Khadijah Bint Ebrahima and our children Fatimah and Muhammad Amin A.A. Senghore, to my beloved sister Ajaratu Ida B. Njie Gay and to my late Mother Mariam Jameh. May my late mother's soul rest in paradise Amen.

ABSTRACT

International law of Human Rights is a branch of Modern International Law. It is therefore, inevitable that it has to inherit the traditional problems and controversies of the law of nations. The most difficult of such problems is implementation and this becomes more complicated with international law of human rights due to the absence of an International Court of Human Rights which could have been equipped with a compulsory jurisdiction. So this branch of international law relies heavily, for its implementation, on domestic machineries which often, have to overcome difficult substantive and procedural problems before they can smoothly and successfully give effect to international norms of human rights. Thus, this dissertation considers some of the most complicated practical problems involved in that process.

In the introductory part, we examine the meaning of the domestic application of international law of human rights, the theoretical foundations of law and rights in general, the socio-political importance of modern human rights, the question of international human rights between the forces of universality and cultural relativism and smilar issues of a more general nature. Some of those issues are discussed from an Islamic perspective as well. The reason why we need to discuss such questions is to expose the nature and or sources, of the controversies surrounding the concept of modern human rights in general and of international law of human rights in particular.

The first chapter is designed to provide a conceptual framework within which many of the concepts, theories, principles and doctrines constituting the backbone of the practical problems that we are looking for, have been explained i.e. the nature, origin, source, content and implementational mechanism of international law of human rights, both at the global and regional levels, the relationship between municipal law and international law, the concepts of domestic jurisdiction of and non-interference in a sovereign country's internal affairs, the obligation of contracting states with regard to international human right treaties, the issues of Islamization of some of the norms

contained in those conventions, the historical and jurisprudential background of domestic application of international law of human rights and a host of similar issues that specifically concern the practical difficulties involved in the process of nationalization of international law of human rights through the judicial process.

The remaining two chapters are meant to provide some illustrations of the practical problems already explained in chapter one. However, given that the judicial approaches of the countries selected for the purpose of this dissertation, differ to a greater or lesser extent from one another and with some systems developing new practical problems that are peculiar to the domestic judicial process, we find it necessary to make further explanations of such practical problems but this time in the context of the relationship between municipal law and international law within the domestic legal sphere of each country. Thus, the second chapter considers the American judicial approach, whereas the third chapter examines the British, and Indian judicial approaches to domestic application of international law of human rights respectively. In each country's judicial system our study has shown that the causes of the major practical problems, whether substantive or procedural ones, are either doctrinal or attitudinal or both. In the conclusion we emphasise our main argument in this thesis, namely, that member countries of the United Nations' human rights treaties and of regional instruments are under obligation in international law to give effect to such human rights norms, and that in this the role of the judge is crucial. Following a brief résumé of our main thesis a set of recommendations are suggested which, we hope, will go some way towards the better implementation of international law of human rights.

ACKNOWLEDGMENTS

In the Name of Allah the Most Merciful The Most Compassionate.

All Praise is due for Allah The Almighty, the Sole Creator and Sustainer of the entire Universe.

While all inaccuracies and shortcomings in this work are completely my own doing and responsibility the following people have greatly contributed to the successful accomplishment of this difficult task. I therefore, take the pleasure in mentioning their names.

I would like in the first place, to express my deepest thank and gratitude to our father and Sheikh Prof. Dr. Syed Muhammad Naquib Al-Attas Founder-Director of The International Institute of Islamic Thought and Civilization (ISTAC) and holder of Al-Ghazali Chair in Islamic Thought for having given me the opportunity to study in this prestigious institute. Apart from the enormous benefits I have gained from his educative class and weekly lectures as well as from his authoritative writings, Prof. Dr. Syed Muhammad Naquib Al-Attas has, on a number of occasions, granted me the unique opportunity to meet him at his office where he would thoroughly explain and remove many confusions surrounding my understanding of important concepts in Islamic Thought.

In the same way, I wish to express my sincere gratitude to Prof. Dr. Wan Mohd Nor Wan Daud Deputy Director of ISTAC for the great interest he has in me, my progress and eventual success in the Ph.D. programme.

Along the same way my deepest gratitude, appreciation and heartiest thank goes to my supervisor Prof. Dr. Ahmad Kazemi Moussavi. Right from my first moment in ISTAC to this day I have been with him either in the class room or at his office during which time, I learn many things that I never knew and might never have known without being with him. Prof. Dr. Ahmad Kazemi Moussavi has, while employing his vast

academic, legal and judicial experience, spent untold hours to check and scrutinize much of the information put in this dissertation.

While thoroughly reading the manuscript and before giving any instructions or suggestions for changes and corrections of its errors, he would weigh the ideas against the realities of international law, constitutional law and of Islamic jurisprudence. He would also concern himself with the sequence and logical connection of the ideas, arguments and counter arguments as well as the use of good English and the application of modern research techniques. Prof. Dr. Ahmad Kazemi Moussavi has been very kind, fatherly, helpful and patient with me through out the period I worked under him.

I am equally, indebted to Prof. Dr. Muddathir Abdel Rahim and Prof. Dr. Ali Safak, the second and third readers respectively. They have given me useful instructions and suggestions especially with regard to finding important and much needed sources. Prof. Dr. Muddathir Abdel Rahim did not only guide me to some relevant sources but more importantly he generously gave me access to some of his own contributions to the field of human rights. His 1968 article on the idea of human rights could not have come at a better time than when I was writing my introduction.

Likewise, I wish to express my gratitude to Prof. Dr. Alparslan Acikgenc whose lectures on the History of Medieval and Early Modern Western Thought have been tremendously useful to me. May Allah guide him to greater success, long life and good health. I am equally grateful to prof. Dr. Omar Jah for his support and encouragement. The good materials he brought for me from the Kingdom of Saudi Arabia were extremely important for my conclusion.

Other distinguished Professors and academics who have, in one way or the other contributed to the successful completion of this dissertation include Prof. Dr. Ala' Eddin Kharofa, Prof. Dr. Malik Badri, Prof. Dr. Mehmet Ipsirli, Prof. Dr. Sabri Orman, Prof. Dr. Murat Cizakca, Assoc. Prof. Dr. Mustapha Abu Sway, Assoc. Prof. Dr. Amir al-Roubaie all of them from ISTAC and Prof. Dr. Muhammad Ghouse from the state of Anata Pradish India, Prof. Dr. Muhammad Hashim Kamali and Assoc.

Prof. Dr. Hunud Khaduff from The International Islamic University Malaysia and Mr. Darman a cultural attachee at the Embassy of the Islamic Republic of Iran.

My heartiest thank goes also to our registrar Mr. Mat Ali Mat Daud, Sister Nooraini bt. Mohd Yusoff Senior Assistant Registrar, Mr. Wan Nasruddin also Senior Assisant Registrar and Mr. Nik Roskiman an Assistant Research Fellow for their total support. Mr. Wan Nasruddin and Nik would waste no time whenever I requested them to write for me letters of guarantor to other libraries and institutions in Kuala Lumpur and Petaling Jaya. In the same connection I wish to extend my deepest thank and sincere gratitude to the dean, Chief Librarian and all members of staff of the Library of the Faculty of Law of the University of Malaya for their full co-operation, total support and endless patient.

I am likewise, thankful to the Human Rights Division at Wisma Putra and Members of staff of the U.N.D.P. Library at Wisma U.N. Damansara for the great service they have done for me.

Similarly, I am heavily indebted to Sister Norazimah bt. Abdul Latiff who is an administrative clerk in ISTAC for the vital role she has played in typing the hand written manuscript. Sister Norazimah's role as a typist has been extremely important.

Finally, I wish to thank Mr. Muhammad Adnan Holden a Senior Lecturer at the English language department International Islamic University Malaysia for the pain he has been enduring to get the whole thesis edited.

And lastly but not the least I sincerely thank the entire people and government of Malaysia for allowing me to remain and seek knowledge in their country. May Allah continue to help and guide them all.

ABOUBACAR ABDULLAH SENGHORE
On Monday September the 26th 1998.
At The International Institute of Islamic Thought and Civilization (ISTAC)
Kuala Lumpur

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LIST OF SELECTED ABBREVIATIONS USED IN THE THESIS

A.C.	-	Appeal cases (Reports)
ACC. Gen	-	Accountant General
All E.R.	-	All England Reports
A.I.	-	Amnesty International
A.I.R.	-	All India Reports
AM.J. Int. l L	-	American Journal of International Law
AM. Int. l. L.C.-		American International Law Cases
A.P.A.	-	Administrative Procedure Act
Asil	-	American Society of International law
Art./Arts.	-	Article/Articles
AT.F.N.	-	At the foot notes
A.T.C.A.	-	Alien Torts Claims Act
Att. Gen/A.G.	-	Attorney General
B. B.C.	-	British Broadcasting Corporation
BRIT Y.B. Int. I.L		British Year Book of International Law. Also B.Y.B.I.L.
Bull.	-	Bulletine
C.A.	-	Court of Appeals
CALIF.L.Rev	-	California Law Review
2nd cir/3d cir.	-	Second/Third circut courts in USA
Corp.	-	Corporation
C.M.L.R.	-	Common Market Law Reports
Comp.	-	Comparative
Const./ Cons.	-	Constitution
C.P.C.	-	Civil Procedure Code
CR.P.C	-	Crimanal Procedure Code
E.C.H.R.	-	The Europian Convention on Human Rights.
E.C.H.R.Y.B.	-	Europian Court of Human Rights Year Book.

ECOMOG	-	Economic Community Monitoring Group of Ecowas.
Ecowas	-	The Economic Community of West - African States.
Ed./Eds.	-	editor/editors
E.E.C.	-	Europian Economic Community
E.H.R.R.	-	Europian Human Rights Reports
E.L.B.S.	-	English Language Book Service (a publishing company)
E.U.	-	European Union
F. 2d.	-	Federal Reporter (second series)
F.S.I.A.	-	Foreign Sovereign Immunities Act
F.S.R.	-	Fleet Street Reports
G.A.J. Int. l & Comp. L.	-	Georgia Journal of International and Comparative Law
G.A. Reso	-	General Assembly Resolution
Harv. Int.l L.J.	-	Harvad International Law Journal
H.L.	-	The House of Lords
H.R.L.J.	-	Human Rights Law Journal
I.B.R.	-	The Indian Bar Review
I.C.C.P.R.	-	The International Covenant on Civil and Political Rights
I.C.E.S.C.R.	-	The International Covenant on Economic, Social and Cultural Rights
I.C.J.	-	The International Court of Justice. It is sometimes used to refer to the International Commission of Jurists.
I.H.L.	-	International Humanitarian Law
I.I.U.M.	-	International Islamic University Malaysia
I.J.I.L.	-	Indian Journal of International Law
Inc.	-	Incorporated/Incorporation
Int. l & Comp.L.Q.		International & Comparative Law Quorterly
Int. l L.	-	International Law
I.L.C.	-	International Law Commission
I.L.H.	-	International Law of Human Rights

I.L.M.	-	The International Legal Materials
I.L.N.	-	Islamic Law of Nations
I.L.O.	-	The International Labour Organization.
ISTAC	-	International Institute of Islamic Thought and Civilization
K.B.	-	Kings Bench (Reports)
L.N.	-	The League of Nations
L.Q.R.	-	Law Quarterly Review
Mich. L.R.	-	Michigan Law Review
M.L.J.	-	Malayan Law Journal
N.D.	-	No date of publication
N.ed.	-	No editors name given
N.P.P.	-	No place of publication
O.A.U.	-	Organization of African Uniry
O.A.S.	-	Organization of American States
O.I.C.	-	The organization of Islamic Conference
P.C.I.J.	-	Permanent Court of International Justice
P.C.	-	The Privy Council
P.H.I.	-	Prentice Hall of India
P.J.	-	Petaling Jaya - Selangor Malaysia
P./PP.	-	Page/pages
Q.B.	-	Queen's Bench (Reports)
Rev.	-	Review
Reso.	-	Resolution
Restatement	-	Restatement of United States Foreign Relations Law
S.C.	-	Supreme Court
Sec./Secs.	-	Section/sections
S.No.	-	Series Number
U.D.H.R.	-	The Universal Declaration On Human Rights
U.I.D.	-	Universal Islamic Declaration

U.K.	-	United Kingdom
U.N.O.	-	United National Organization
U.N.G.A.	-	The U.N. General Assembly
U.N. doc.	-	U.N. Document
U.N.G. A. Reso	-	U.N. General Assembly Resolution
U.S.A.	-	The United States of America
U.S.	-	The United States Supreme Court Reporter.
U.PA. L.R.	-	University of Pensylvania Law Review
V.	-	Verse
VA.J. Int. l L	-	Virgina Journal of International Law
Vol./Vols.	-	Volume/Volumes
Vs. or V.	-	Versus
W.L.R.	-	Weekly Law Reports
Y.B.E.L.	-	Year Book of Europian Law.
Y.D.P.A.	-	Yang Dipertuan Agong (The Malaysian King).

INTRODUCTION

What follows is an attempt to explain some of the most complicated practical problems of nationalization or the domestic application of international law of human rights by national courts. By nationalization of international law of human rights, we mean a judicial process through which domestic judges may give judicial recognition and consequently may enforce any of the human rights guaranteed in international law but not found in the national constitution or legal system. This may be done in two different ways i.e. through a direct method approach by which an international right is directly enforced by the domestic courts on the ground that the country is under international obligation to give effect to such a right. Or through the indirect or interpretive method approach by which domestic courts would, through interpretation, expand the scope of a domestic human right so as to make it accommodate a similar right protected by international law of human rights but which is missing from the national instrument. In either way, the process can result in national legislation or executive acts being invalidated and overturned. Prior to our explanation of those practical problems a whole chapter has been devoted to explain the most important concepts, ideas and doctrines that form the bulk of the practical problems, we are looking for. These include the nature, origin and content of the international law of human rights. Other equally important issues like the relationship between international law and municipal law, the concepts of domestic jurisdiction and non interference in a sovereign country's internal affairs and the important role that domestic judges will have to play in that process have been explained in the same chapter. Similarly, some of those difficult concepts have been examined from an Islamic perspective as well.

To narrow down the scope of our study we have selected the judicial systems of three of the major countries following the common law jurisdiction i.e. India, America and the United Kingdom as they share the same system of law with my own country. Although the practical problems are largely common to all those countries, we have tried to study them separately in each and every country's judicial system and see how they peculiarly function to hinder the process of nationalization of international law of human rights in each country's judicial process. Prior to all this, a brief overview is given of other issues of a more general nature in this introductory part. Such issues include, the theoretical foundations of law and rights in general, the socio-political importance of modern human rights and human rights in national and international law.

Law and Rights in General : Some Theoretical Foundations.

One of the most obvious features of the seventeenth century natural law philosophy, which has largely influenced the modern concept of law and rights in the West, was the detachment and separation of law from theology and religion. This was accompanied by a great emphasis on the power of reason as one of the distinctive characteristic of man.

Hugo Grotius (d. 1645), one of the most prominent jurists and legal philosophers of the time who is generally regarded as having prepared the ground for the secular and rationalistic version of modern natural law, believed that natural law is a dictate of right reason which measures the quality of moral necessity and legitimacy of an act by the extent of its conformity or otherwise with the rational nature of man. So for him the state was an association of free men who agreed to come together for the enjoyment of their rights and common interests. Thus the sole purpose behind the creation and formation of the state was to promote, protect and enjoy the natural rights of men who submitted their sovereign power to a ruler. Some of the dictates of natural law in the view of Grotius include the following :

> To abstain from that which belongs to other persons, to restore to another any goods of his which we may have, to abide by pacts and to fulfill promises made to other persons, to repay any damage done to another through fault and to inflict punishment upon men who deserve it.[1]

These, in brief, are the basic moral foundations of modern international law in general and international law of human rights in particular.

For John Locke (d. 1704), the renowned English philosopher and another believer in natural law, what existed prior to political and any form of social organization or institution was a state of nature under which men lived together according to reason without any common superior authority on earth. He believed that in this state of nature men lived together under the guidance of the law of nature by which their rights and responsibilities were determined. Like Grotius and many other natural law philosophers of the same age, John Locke, it appears, did not recognize the importance of divine revelation to law and to the determination of the rights and duties and responsibilities of individuals vis-a-vis one another and society as a whole. This is because the law of nature according to him was an objective rule and measure emanating from God but ascertainable by human reason.[2] Thus Locke, whose political writings, especially the Two Treatises on Civil Government, are believed to have largely influenced the English Revolution of 1688 which gave birth to the 1688 Bill of Rights and subsequently influencing the American and French revolutions of 1776 and 1789 respectively,[3] was a strong advocate of the natural and inalienable rights of man. He argued that even before government existed, men were free, independent and equal in the enjoyment of those natural and inalienable rights. In his opinion, the most important of such rights were, the rights to life, liberty and property. He, however, appeared to have acknowledged the existence of a serious weakness in that state of

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1 Bodenheimer, *Jurisprudence - The Philosophy and Method of the Law* 36 (1974). For further detail see Ibid., 37-59.

2 Locke, The *Second Treatise of Government* 4-11 (1952).

3 Abdal Rahim, "Fikrat Ḥuqūq al-Insān", *Ḥuqūq al-Insān Bāyn al-Mabd'a wa'l Taṭbīq* 11-26 (1968).

nature he was talking about. In other words, Locke realized that the state of nature lacked some central and common authority and machinery. So there was the tendency that everybody would have executive power of the law of nature and this made the whole system prone to injustice and partiality or biasness especially when one was to become a judge to one's own case and to those of his friends. So for these obvious weaknesses and inconveniences of the state of nature, Locke suggested that civil government was the best and the most proper remedy or solution for that problem.[4]

Sir William Blackstone (1723 - 1780), another English devotee to the theory of natural law, wrote that the law of nature is that which could properly be thought of as human law. He ruled out any role for human beings in making this law. Instead, Blackstone argued that the law of nature was dictated by God and for that reason it was binding over all the globe in all countries and for all time. He further argued that the role and task of the judge was to try to discover or find out, and apply, but not to make and create this law, and that human laws contrary to the law of nature are invalid, while the valid human law derived its force and authority either mediately or immediately from that original law.[5] I have not been able, however, to detect or even sense throughout his discussion of the law of nature, any inkling of recognition by Blackstone of the importance of divine revelation or prophethood to the process by which the law of nature was sent down to man. Blackstone who believed in the existence of natural law and therefore natural rights, divided rights into two types namely : Absolute and Relative rights. The relative rights are incident to and due to individuals by virtue of their membership of society. While the absolute rights are those claims, entitlements and privileges that the individual is entitled to by virtue of being a human being. This is what is meant by natural rights. In other words, they are invested in human beings by the immutable laws of nature. The English jurist and political philosopher thought that the principal aim of society and the principal view of

4 Locke, Second Treaties, 15-30.

5 1 Blackstone, *Commentaries on The Laws of England* 38-39 (1979).

human laws was to recognize, protect and enforce such rights and their full enjoyment by every individual member of society.[6]

James Wilson, (d. 1798), an American jurist of the late 18th century and a former associate justice of the United State Supreme Court, was another advocate of the theory of natural law and therefore natural rights of men. He argued that the main function of the law was to guarantee i.e. safeguard and protect the natural rights of the individual against any encroachment by the government. To him, natural law which provides a basis for natural rights and illuminates the ends of government, was a God-created absolute standard against which individual and community acts must be measured. The American natural law advocate then defined what he meant by natural rights as the right of the individual to his property, to his character and reputation, integrity and honour, his right to liberty and safety.[7] All of the above concerns the theory of natural law and natural rights. Let us now consider other theories of law and rights.

As for the Utilitarian theory of law, Jeremy Bentham (d. 1832) held that law is a human creation and that a good deal of law is made by judges. According to his utilitarian theory, law whether made by the judge or the legislature should be in accordance with the Utility Principle and the notion of usefulness, happiness and goodness to society as well as to the individual.[8]

So for the utilitarians, every right is an ordinary one. In other words, for the utilitarians, who set out one supreme goal of happiness and preference maximization, they would accept, recognize and respect rights only if they are able to bring about their goal of the maximum satisfaction of preferences or happiness. Thus, under the utilitarian construction, an act of torture might be accepted so long as torturing suspects could bring about happiness to society.[9] On the other hand, the Austinian theory of

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6 *Ibid.*, 119-121.

7 Hall, *The Political and Legal Philosophy of James Wilson* - 1742-1798 pp. 35-36 (1966).

8 Bentham, "From An Introduction to the Principles of Morals and Legislation", *Utilitarianism And Other Essays* 62-63 (1987).

9 *Ibid.* Also see Fenwick, *Civil Liberties* 6-7 (1995).

legal positivism emphasizes the aspect of command and sanction in positive law or the command theory of law and sanction theory of duty. The positivists believe that the notion of command implies a relation of superiority and inferiority, i.e. law "Properly so called" is a command from political superiors to political inferiors which, sanctioned with a threat of evil, has to be complied with or obeyed.[10] Thus, under the Austinian doctrine of legal positivism which he developed in his school of analytical jurisprudence which strictly separates law from ethics and morality, the emphasis is on legal rights and there is no talk of any rights in the absence of clear black letter law giving such rights to the individual. This is because legal rights are conferred by statutes and by the decisions of courts. So in order for such claims, moral or otherwise, and entitlements and privileges to be given legal force there has to be an enactment of specific legal rights sanctioning or legally recognizing such claims or rights.[11] So legal rights, according to the legal positivists only exist when there is a specific black letter provision guaranteeing them.

Furthermore, somewhere near the positivist construction, but far away from the naturalist theory of law, stands the American theory of legal realism. This theory rejects the idea that there are rules of law that have weight, authority and bindingness in the law which the judge should look for and apply in any case before the court. Instead, the legal realists have placed judges at the center of law making. They maintain that judges do legislate and that the judicial decision making process is a creative rather than a mechanical activity. Obviously, the realists would reject the idea of natural and divine law. Rather, they hold the view that judges are not bound by any existing rules, but that a rule of law is made as soon as the judge announces his/her decision. So the law of a state is that body of rules laid down by judges in the course

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10 Austine, *The Province of Jurisprudence Determined* 35-38. For further detail see 39 - 102 (1911).

11 *Ibid.*