**Human Rights in International & Domestic Law & Institutions**

**U6142Y**

**1999 Final Exam Model Answers**

**Question 1: Bosovo (15 points)**

When you attempt a question like this, firstly, read the whole question before beginning, and secondly, try to think of a structure to your answer - it makes things much clearer for the marker, it helps you to structure your thoughts, and it can save you time by avoiding repetition.

★ Be careful to distinguish derogations and limitations

**Part One: Human Rights issues under the ICCPR and CAT**

The division that seemed most logical was (I) before the decree (II) post decree and (III) minority issues. ★ Minorities and self-determination are not the same thing.

(I) Pre Decree

⇔ A useful rule that law students learn when trying to apply legal rules is IRAC - first state the ISSUE (eg freedom of expression), then the RULE (article 19(2)), then ANALYSIS (it seems to be violated - but does it fall within the limitations of 19(3)?) and then your CONCLUSION (there is/is not a violation). It is a bit formulaic, but it will help you to give complete answers.

★ It is not necessary to quote articles in full, nor does it impress markers. It may however be useful to quote select phrases which are especially relevant to your argument.

⇔ It is rarely possible to give a wholly comprehensive answer to such questions, so PRIORITIZE and focus on the major issues. Make sure you touch on everything explicitly raised in the question.

The issues to be addressed here are:

- Freedom of expression (art 19) } do the restrictions fall within the limitations in the definitions of each right ie necessary to protect public morals, health, public order or national security as provided for by law
- Freedom of assembly (art 21) } protect public morals, health, public order or national security as provided for by law
- Freedom of religion (art 18) { protect public morals, health, public order or national security as provided for by law
NB - Necessary means necessary to achieving the desired aim (protecting national security) and there are no less rights-restrictive ways of doing it. The limitation should also be proportional to the harm it seeks to guard against, and non-arbitrary or discriminatory.

Good answers brought up Art 20(2) - the state has a duty to prevent such propaganda/hate speech (Danchinvar is a non-state actor - it is WRONG to say that HE violates the ICCPR - rather the state would be in violation if it failed to prevent hate speech) - can incitement to violence and hatred be indirect? Also, Art 19(3) talks of duties and responsibilities in the exercise of free speech. Should “political speech” receive special protection? Or is this religious speech (“the will of Allah”) protected under Art 18?

Good answers also discussed whether the limitations were overbroad (e.g. prohibited advocacy of peaceful change of borders)

**II) Post Decree**

**Issues here are:**

- Torture  CAT, Art 7, 10 ICCPR
- Arrest, lack of a trial Art 9, 14 (15?, 16? More facts needed) ICCPR
- Solitary confinement Art 10, ICCPR

- Ethnic cleansing - if reports are true, this is a violation of Art 6 (right to life), 12 (freedom of movement and residence) 17 (privacy) (ICESCR not asked for - but obvious violation of right to adequate housing, Art 11 ICESCR). More facts needed to determine which violations are carried out in concentration camps.

- Is the state of emergency valid? If it is, which rights can validly be derogated from? Which are non-derogable? Art 4 ICCPR is quite specific - the state of emergency must be correct in form (non-discriminatory, necessary, limited to the minimum restriction, in response to a threat to the existence of the nation) and in procedure (declared in accordance with national law and notified to the parties).

- Most of you correctly stated that the prohibition on torture is non-derogable.

Good answers questioned whether the decree was discriminatory on the prohibited grounds. If Bosovars are the cause of the problem (violence) then perhaps restricting them may be dealing with the problem, not discriminating “solely” on grounds of religion (remember there are non-Muslims in the province too).
★ NB - forget political theory here - the “nation” for the purposes of international law is the state (ie Patrislavia)

(III) Minority Issues

Minorities have the same rights as everyone else, and these rights can take them a long way e.g. Arts 2 and 26 (non-discrimination, equal enjoyment of rights), Art 18 (religion - has collective aspects) and Art 25 (right to participate in govt./public life).

I think everyone brought up Art 27, which gives minority INDIVIDUALS (“in community with the other members of their group”) the right to enjoy their own culture, religion and language - clearly violated. (★ ICESCR not asked for - but obvious violation of right to education, Art 13 ICESCR and CRC). Many of you used the PCIJ in the Minority Schools in Albania case to show that minorities might need extra protections in order to enjoy the same rights as everyone else.

★ As above, the relevant unit is the national state (Patrislavia) - no need to discuss whether the Bosovars are a minority as they clearly are.

U.N. Declaration on the Rights of Persons belonging to National, Ethnic, Religious or Linguistic Minorities (bonus points if you spotted it was only passed in Dec. 1992!) provides more detailed provisions on what minorities need. ★ Only a resolution therefore not strictly binding (Council of Europe Framework Convention on Minorities is a binding instrument) but certainly persuasive view of the international community.

★ Bosovar Clerical Council doesn’t seem too liberal here. The actions of the BCC are in clear violation of A. 18 (freedom of religion). How should we deal with an oppressive minority (ie, a minority that violates the human rights of its own members)? (★ NB - BCC is a non-state actor, therefore while it is violating freedom of religion, it is the Patrislavian government which has assumed the international obligation to ensure that A. 18 is respected).

Part Two: Self-determination (10 points)

There were some very good answers to this question, one of the most interesting - and difficult - ones in contemporary human rights. There are a variety of ways of organising an answer, but good answers should deal with the following:

Absolutely must mention:

(1) Common art 1 of the ICCPR and ICESCR (not in UDHR)
(2) UN Charter - which mentions both territorial integrity AND self-determination

ISSUES

1) Are the Bosovars a “people”? Traditional view (Henkin, Higgins) - a people is everyone within national boundaries, can’t be subdivided. Self-determination only exercised once, on independence of a colonized country. Other views (Franck, Tomuschat, Hannum etc) different degrees, but relevant feature include common history, language, religion, culture, within a defined geographical territory, victims of gross HR abuses/genocide…. ⇐ Minorities within existing states are not always “peoples” - in fact, they might never be.

2) What does self-determination mean? Spectrum from power sharing to secession
   Even if the Bosovars are not a people, still entitled to Art 25 participation
   • Idea of external and internal self-determination
   • Control over schools, use of language, participation in police force…
   • Great number of examples of federal states and different arrangements in the world

3) Is there a right to secession? Conflict between territorial integrity and self-determination: how should it be resolved? Legally: which principle has been given higher status? Policy terms: self-determination could lead to a “domino effect” on neighbouring (or far away) countries. Do we want a world of 200,000 monoethnic states? Or is it wrong to sacrifice vulnerable minorities in dictatorial states in order to preserve a principle of multiethnicity - especially in the event of genocide. No right or wrong answer here

   Examples of practice are particularly useful when the law is murky - Eritrea, Canadian indigenous peoples - to see how the law is interpreted in practice. Gives you a chance to suggest what some underlying criteria might be.

   • EC Guidelines on Recognition of New States in the FRY included a requirement that borders be peacefully changed
   ⇐ Might also point out that self-determination can sometimes result in fewer states, if groups join together (eg North and South Cameroons joined together on decolonization)

Part Three: Security Council and HR Commission (5 points)
The answers to this were pretty disappointing, so I suggest you read this outline fairly carefully.

A. Security Council

By Art 24 of the Charter, the Security Council (SC) has the “primary” responsibility for international peace and security (IPS).

Only definitely legal uses of force today are in self defence (collective or individual, Art 51) or when authorised by the SC under Chapter VII. (International Law is unclear about a right to humanitarian intervention - to deliver aid or to end HR abuses - hard to find a “pure” example, but sometimes states have not objected to uses of force).

First the SC must find a threat to/breach of IPS/act of aggression (Charter, Art 39) Then it can authorise sanctions short of force (Art 41) or including force (Art 42) (Can delegate to regional body under Art 53). Actions under Chapter VII have included establishment of ad hoc tribunals to try war crimes and crimes against humanity (ICTY/ICTR).

Alternatively can encourage and work with parties to find peaceful settlement (Chapter VI)

Is this a threat to IPS? Previously Art 2(7) was thought to prevent action on the basis of domestic HR abuses. Then the SC came up with the idea that destabilizing refugee flows could be a threat to IPS. And in Somalia, a purely domestic situation was found to be a threat to IPS - so the criteria can be fudged if there is political will.

But risk of veto (the 5 permanent members must not vote against a measure, and 9 of 15 members must be in favour for the measure to pass).

A. HR Commission


Body composed of representatives of states (therefore politicized) - reports to ECOSOC - which reports to GA.

- 1235 - public. Commission initiates study of situations which reveal a “consistent pattern of violations of HR”, reports and makes recommendations to ECOSOC.
• **1503 - confidential.** Working Group screens the many complaints received from NGOs and individuals, and identifies where there is evidence of “a consistent pattern of gross violations”, which it refers to the sub-Commission, which can refer it to the Commission. The Commission can dismiss it for any reason, postpone consideration (till the next annual meeting), initiate a study to report and make recommendations to ECOSOC, or, with consent of the government concerned, appoint an *ad hoc* investigatory committee.

• **Thematic rapporteur** - can receive urgent action faxes and fax governments concerned - surprisingly effective. Can study.

  Obvious weaknesses in the mechanisms, but why does China spend so much effort trying to avoid being censured by the Commission? Publicity/shame can be powerful in some cases.

  Investigative function useful - might go concurrently with SC actions, especially if war crimes/crimes against humanity trials to occur.

  ☐ Be careful to distinguish the *HR Committee*, a treaty-based body, which supervises the ICCPR, composed of independent experts, quasi-judicial, from the *Commission*, charter-based, responsible for all human rights, everywhere (not just parties), political.

A. **Genocide Convention**

  Article I imposes a very important duty on ALL states parties to “prevent and punish genocide” - which is the reason why the US State Dept shied away from calling events in Rwanda “genocide.” Art VIII authorizes parties to refer the matter to “competent organs” of the UN. ☐ Note the definition in Art II (and III) - does not need to be wholesale slaughter to be genocide. Must be directed against a group.

Q2: **UDHR Essay (15 points)**

In the interests of distributing this marking guide quickly, I will not include any substantive comments on the essay question here. To a certain extent, essay questions are subjective and this particular question gave wide scope for highly subjective answers. My aim in asking a broad question was to give you the opportunity to synthesize some of the themes of the course and to exhibit the extent to which you have understood the “deeper” conceptual and philosophical tensions in contemporary human rights debates. Of course, those essays that could tie these ideas to concrete examples or scenarios were particularly impressive. The idea is to develop your own thesis by using the two quotes as points for agreement or disagreement.
What I propose to do is to develop next week (and for next year’s class) a model essay answer that draws on the best responses this year, and which includes the ideas and themes that I had in mind in framing the question. I will email this to you at a later stage. Please make a time to come and see me if you would like to discuss your essay response.

Q3: FGM

Part One: Issues under CEDAW and CRC; Optional Protocol; Special Rapporteurs (5 points)

This is only 5 points so mention the issues briefly:

Relevant articles in CEDAW include: 2, 3, 5, 10, 12, 24.

Relevant articles in CRC include: 3, 6 (but does it apply to non-state actors?), 13, 14, 16 (?), 24 esp 24(3), 29(1)(a) (but 29(1)(c) and 30?). But the main one to focus on here is Article 24, particularly paragraph 3.

C.f. also CEDAW committee general recommendations 12, 14 and 19 for suggestions on what to do, including education

One interesting question is: how exactly is FGM (a) discriminatory and (b) violence against women? Some of you ignored this while others attempted to show that in terms of psychological and physical harm, duration of harm, and health (including reproductive health?) consequences, female circumcision is much more serious than male circumcision. A more radical argument is that FGM is intended to subjugate women in society, and as long as it is carried out, women cannot gain full equality. Also, it is based on stereotyped ideas (Art 5) of women’s sexuality.

★ This is an important issue for CEDAW as it is premised on the idea that the ideal thing is for women to become equal to men ie equality with a male norm. The only express exception is pregnancy - obviously men cannot become pregnant so there is no meaningful comparison (although many domestic courts, in dealing with pregnancy discrimination cases did compare pregnant women to ill men!) Many feminists say it is a bad idea to aim for this type of equality, since men and women’s experiences are so different, and perhaps some of the differences are worth preserving.

Here are some suggestions, but there are many more things one could say.

Weaknesses of CEDAW

- doesn’t explicitly mention FGM or violence against women
- weak enforcement provisions (reporting every 4 years - but possibility of “constructive dialogue”)
- too many reservations to it, lacks prestige in UN system.

**Strengths**

- Committee drawn from various disciplines
- does deal with private actors, custom etc. Very detailed treaty

**Weaknesses of future Optional Protocol**

- confrontational (linked to part 3),
- doesn’t get at reasons for practice of FGM, FGM very culturally sensitive,
- expensive, time consuming, procedural restrictions (exhaustion of domestic remedies).
- who would bring case on behalf of minors, especially since parents are perpetrators? Women and girls less likely to be literate, have access to such legalistic mechanisms Ambiguity of what are violations.

**Strengths**

- one of the few mechanisms available
- sometimes international input is helpful, publicity etc

**Weaknesses of Rapporteur on Violence against Women**

- underfunded, part-time, virtually no support staff etc,
- no competence to deal with and respond to individual cases.
- requires state consent to visit

**Strengths**

- field missions useful investigative function, less confrontational
- anyone can communicate, including NGOs - useful in light of problems with FGM especially.
- reports can shame states.

★ There is already a Special Rapporteur on Traditional Practices Affecting the Health of Women and Children, as well as the study of the Special Working Group on Traditional Practices

**Part Two: Reservations to treaties; public-private divide**
Object and purpose of CEDAW found in the preamble and title - ie. Elimination of all forms of discrimination against women.

Article 19 of the Vienna Convention on the Law of Treaties (also Art. 28 of CEDAW itself) forbids reservations incompatible with the object and purpose.

As CEDAW does aim to deal with non-state actors, and break public-private divide in order to eliminate all forms of discrimination, wherever found, it is hard to say that Sudan’s reservation is acceptable.

Cultural practices clearly excluded where harmful (particularly, you might argue, in the case of physical harm). Religion is less clear, but it has limits too - c.f. 18(3) ICCPR, where necessary to protect the rights of others, public health etc.

Good answers might mention ICJ case on reservations to Genocide Convention

**Part Three: Principled, Balancing or Dialogue?**

Some of the answers to this question were very thoughtful. Clearly there is no right or wrong answer, but you should at least identify all three approaches in your answer and briefly explain what they are and how they would work in the context of FGM in the Sudan, before answering the question, and adding your own conclusion.

Here are some points to consider.

**Principled:** stick to the letter of the law

+ sends a clear message about the value of women and their full rights
+ accords well with international HR law (but balancing too?)
- very conflictual - antagonises powerful
- unintended consequences e.g. girls might be withdrawn from school if FGM education is provided there against parental wishes
- cultural imperialism ?(but HR does not belong to one culture) - ignores causes of FGM and any positive features of it.

**Balancing:** balance women’s rights against other rights (religion, culture)

+ recognises women’s rights to religion and belief too, and their autonomy to choose (but how educated are their choices?)
+ recognises the interests of everyone involved - opportunity to reach most favorable solution to all
- doesn’t provide clear answers about how much weight to put on different rights, nor where to strike the balance
- too complex? Requires judges/quasi-legal mechanisms - who may not have the same legitimacy as community members?

Dialogue: have everyone talk about it

+ possible to get the powerful on the same side as women - more likely to be successful in the long run
+ can empower women and encourage their participation
+ allows solution best suited to each community’s needs/situation/culture
- there is nothing to dialogue about - this sacrifices the rights of women and girls for political convenience
- too slow
- women’s voice in the dialogue is weak because of existing structural impediments
- lack of education, poverty, structural oppression…..