Principles of Islamic International Criminal Law

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Principles of Islamic International Criminal Law

A Comparative Search

Second Edition

By
Farhad Malekian

BRILL

LEIDEN • BOSTON
2011

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Library of Congress Cataloging-in-Publication Data

Malekian, Farhad.
Principles of Islamic international criminal law : a comparative search / by Farhad Malekian. – 2nd ed.
p. cm. – (Brill's Arab and Islamic laws series ; v. 5)
Includes bibliographical references and index.
ISBN 978-90-04-20396-9 (hardcover : alk. paper)
1. International criminal law (Islamic law) 2. International crimes (Islamic law) I. Title. II. Series.

KBP4538.M35 2011
341.0917'67–dc23

2011012486

ISSN 1871-2894
ISBN 978 90 04 20396 9

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For my mother—the core principle of human morality

and

in memory of the Armenians, Atheists, Buddhists, Catholics, Christians, Jews, Muslims, Protestants, Zartoshties, as well as any others who have given their lives for humanising the civilisation of mankind and for not annihilating one another for theological or theoretical concepts

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GLOSSARY

Aman	immunity
Asl	original
bellum justum	just war
Caliphat	leadership
dar al-ʿahd	territories in peaceful relations in accordance with obligations of treaties
dar al-Harb	the realm of war
dar al-Islam	Islamic territories
dar al-sulh	territories in peaceful relations
de facto	by the fact
de jure	by the law
Fatwa	legal decision made by a supreme leader, collections of judicial decisions
Figh	jurisprudence
Hadith	the narrations of the Prophet conveyed to man through revelations or hearing
Hudud	fixed penalties
Ìbadat	ritual
Ijma	consensus of opinion
Ijtihad	individual judgement
Istislah	Public interest
Jihad	struggle
mu'amalat	transactions
nulla poena sine lege or *nullum crimes sine legea*	maxim embodying the basic principle of the criminal law that conduct cannot be punished as criminal unless some rule of law has already declared conduct of that kind to be criminal and punishable as such
Pacta sunt servanda	obligations of a treaty must be respected by the parties
Qadis	judges
Qital	fighting
Qiyas	analogical reasoning
Quesas	crime against a person such as murder, homicide and causingserious bodily or mental harm
Sawa	Equal
Siyar	universal law, international law, law among nations
Sunnah	the manner or mode of life of the Prophet during his lifespan.
Ulama	Islamic jurists

PREFACE

My two-volume work on "International Criminal Law" (1991) was the first comprehensive book in the field in the English language which analyzed all aspects of the subject. Other books in this arena were editorial in nature. As Professor Gerhard O.W. Mueller, a distinguished international criminal lawyer, wrote, "Your 2 volumes on International Criminal Law arrived several hours ago and I have not been able to put them down. What you have accomplished is truly remarkable: for a single scholar to have covered the entirety of I.C.L., in this day and age is a unique. You must have sacrificed a lot in order to devote years to the task. Moreover, it is a very balanced, unbiased presentation. Congratulations. Keep up the good work." Yet, many of the principal ideas of the system of international criminal law already existed within Islamic Law, which were not discussed in those volumes. The present work develops this jurisprudential academic comprehension. I would also cheerfully have written a book on Jewish, Christian or any other law or tradition if I possess enough accurate knowledge of it.

The first edition of this book has been recommended selected reading for courses in international criminal law in Great Britain and the United States since 1996. It has also been one of the major books for research. The second edition is written after an invitation by the academic publisher Brill. The book should be a part of all relevant courses in universities in order to minimize misunderstandings and contradictions and bring the level of knowledge of law to a multicultural standard. The new edition of the book on the Principles of Islamic International Criminal Law: A Comparative Search debates the substance of Islamic international criminal law and the system of international criminal law side by side and offers the message that no law is superior to justice, peace and a common understanding of the world. Western law, Middle Eastern law, Islamic Law and others are all the finding sculpture of our mind and solely symbolize the abstracts of social coexistence. The author has no personal attachment to any particular law, even Islamic law, but solely to human nature, with love and admiration for its truthful behavior towards mankind and the impressive beauty of its invaluable universal environment. Natural law may probably represent natural justice, but no law alone has the ability to achieve justice without supporting equal

prerogative of all women and men within the global civilisation of mankind. Thus, laws, courts, judges, and judgments scarcely have any significance without the aim to achieve progress of qualified justice. In addition, the equality of individuals and states as well as the respect for the system of international human rights law by all states, represent the basic constitutional doctrine of international criminal law and justice.

Farhad Malekian
Carolina Rediviva, Uppsala, April, 2011

INTRODUCTION

While the system of international law has improved extensively and certain provisions of the law have become, more or less, an integral part of the system of *jus cogens*, this body of the law has to be studied with other systems of international laws which have, basically, been effective in its evolution and development. Those systems have, in reality, been one of the essential reasons for the consolidation of the rules of law in international relations. This study should, especially, be evaluated in the case of three branches of international law which are, at present, the most authorized systems of law. These are international criminal law, international humanitarian law and international criminal justice. Today, most Islamic nations follow the principle of incorporation or adoption of the provisions of the three branches, for the purpose of the modification of their national rules. In fact, many Islamic nations have ratified the statute of the most recognized international treaty i.e. the permanent International Criminal Court. This integration is for the purpose of attaining pillars of equality, peace and justice and respecting the fundamental principles of international criminal law. Nevertheless, the pillars may be strengthened through the proper understanding of the principles of Islamic international criminal law by all parties in the world. The situation is more tenable when one examines the violation of the system of international criminal law by many Islamic and other states on our globe and accountability of their individuals before the ICC.

In addition, we should not put aside the fact that the equality and sovereignty of states, in the contemporary international relations, presents the basic constitutional doctrine of the system of international criminal law and justice. This governs a body consisting first and foremost of states having a uniform international legal personality. In other words, if we speak about the legal existence of international criminal law, humanitarian law and the ICC, then the dynamics of state sovereignty can be expressed in terms of national laws stemming from the international equal personality of states. It is for this primary reason that the principle of complementarity is created under the provisions of the system of international criminal justice in order to respect the independent character of state sovereignty. The way in which the law communicates the content of sovereignty therefore varies from one state to another

depending on the historical, political, economic and cultural factors. That is why we have different legal systems, some of which are the expression of Islamic law. However, to a great extent the problem of applying the system of criminal justice in an international sphere is related to the circulation of misunderstanding and misinterpretation of the law. Therefore, the government of states, judges and prosecutors of international courts including lawyers should be more conscious of the need to establish a productive framework for solving potential disputes between different systems of law in order to reduce international conflicts and eradicate international crimes. Consequently, a comparative study between the two legal systems is also inevitable.

The purpose of this comparative second edition is to examine the system of international criminal law and Islamic international criminal law and to observe similarities and differences between these two legal systems. The aim is to evaluate certain important provisions of the systems and examine them in the light of the growing development of international criminal law and the ICC and thereby proving that conflicts and apparent differences between these two legal systems may not be significant. They may be the result of ideological, political, procedural and more importantly, the consequence of specific misinterpretations of both legal systems. Because both systems speak of equality of arms, states, nations, individuals, religions, cultures, races, languages, traditions and ideologies. It is a well-known fact that the spirit of both systems is to release all human beings from all concepts of limitations, restrictions and superficial differences and ignorance. Simultaneously, the system of international criminal law does not ignore Islamic law and puts a heavy weight, on its concepts, in terms of the coexistence of sovereignties. This is due to the fact that it is, in the first stage, the primary rights of states to prosecute accused persons and, if this is not possible, then to notify the ICC. The purpose of the presentation of the study is thus to minimize the misunderstandings of both systems by all parties. By the above examinations, we hope to be helpful in resolving national, regional and international conflicts, arising in the international legal and political community as a whole. The hope is also to bring peace into justice and justice into peace in order to prevent violations of international human rights law and impunity all over the world.

CHAPTER ONE

THE NATURE OF ISLAMIC INTERNATIONAL LAW

1. Introduction

This chapter deals with some of the basic principles of Islamic international law and analyses them with the principles of public international law which have long been recognised in international relations of states.[1] The nature of both systems of international law is discussed side by side to present both laws simultaneously and also to emphasize that even though their sources have different bases and methods of application, their aims, more or less, coincide with each other for the peaceful implementation of the rules of the international legal community and the peaceful settlement of international disputes.[2] The chapter is also devoted into some

[1] It may be relevant to mention here that there has, historically, been a strong connection between Islamic international law and public international law. The classical writers of the latter have benefited in one way or another from the principles of the former. Francisco de Victoria (1480–1546) and Suarez (16–17th centuries) were both Spanish nationals and were educated in the same county where Islamic theories had a potential influence on culture, jurisdiction and politics. Their work on the law of nations therefore benefited from the principles of Islamic international law, especially on the law of war. Similarly, the classical writer of international law Hugo Grotius (1563–1645) who is recognised by some European writers as the father of the law of nations in Europe, was a theologian and also studied Islamic law thereby benefited from the principles of Islam, especially concerning the law of war. In this respect one may easily compare the provisions of Islamic international criminal law governing prisoners of war and the law of armed conflict with similar provisions stated in Grotius work on the law of war namely *De Juri Belli ac Pacis Libri Tres: Classics of International Law*, translated by Francis W. Kelsey (1925). See also Louis M. Holscher and Mahmood Rizwana, *Borrowing from the Shariah: The Potential Uses of Procedural Islamic Law in the West*, in Delbert Rounds (ed.), *International Criminal Justice: Issues in a Global Perspective* (1999), at pp. 82–96. See also Montesquieu, *The Spirit of the Law*, edited by Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone (1989).

[2] The revelation of Islamic law including Islamic international law must be examined and seen in conjunction with the times in which the law was introduced. The social circumstances of the Arab life, through culture, habits and economy were effective in Islamic law which primarily aimed, at the first stage, to meet Arab requirements. Mohammad Talaat Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach* (1968), pp. 3–4. According to one writer, the most important aspects

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of the general philosophies of both systems and their jurisprudential value. It presents several significant principles of Islamic international law having important aims for the maintenance of international peace and the promulgation of justice. These include the principles of neighbourhood, regional, international and universal co-operation.[3] The chapter also has a leading function in the presentation of some of the issues arising from the misinterpretation of both systems within the international legal and political community as a whole. The study of Islamic international law does not mean and should not, necessarily, be interpreted as a state having rules and provisions of Islamic nature, but may also be cognizant of the provisions of Islamic international law for solving the contemporary issues of international relations. However, one should not ignore the fact that the studies of different laws of nations are the cornerstones of the evolution and development of the system of public international law and the way in which peace and justice may be consolidated owing to the provisions of the Charter of the United Nations. The United Nations Charter emphasizes that the purposes of the United Nations are:

1. 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 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;

---

of Arab life at the time included 'the widespread disintegration among the Arabs with every clan or tribe, as the case may be, claiming complete independence and fully independent status vis-à-vis the other clans or tribes, and … war as the ultimate resort for settling disputes. In other words, the clannish spirit was overwhelming international relations among the Arabs, if we may use the term international in this context. From this point of view we could say that the chief purpose of Muslim international law was to mitigate, if not to banish, egoistical feelings and preach—as a substitute—fraternity, peace and security. This inference might suggest that both Muslim and Western international law have common ends.' Id., p. 4. It must nevertheless be emphasised that 'Muslim history and though were not always or necessarily identical with Arab history and thought, because when the Arabs, through their conquests, came into direct contact with the Greeks and the Persians they were influenced by both … culture, and Islamic civilization reflected that influence.' Id., p. 5.

[3] These principles must be regarded as some of the most important principles in the creation of international peace, justice and security.

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to *strengthen universal peace*;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as *to race, sex, language, or religion*; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.[4]

2. The Discipline of Islamic International Law

2.1. *Siyar*

The system of Islamic international law originally evolved from *Siyar*, constituting the early system of Islamic international law governing the conduct of sovereigns. *Siyar* was a separate branch of law which was exercised in the early relations of Islamic states with other states and also between Islamic states.[5] However, to some writers, *Siyar* is exclusively confined to the intercourse between Islamic states and other states and not to the relations between Islamic states themselves. This is not however accurate. Some reasons are that certain provisions of *Siyar* arise from the basic principles of Islamic law and its sources, especially the *Qur'ān*, as were exercised in the relations of Islamic states. The sources of *Siyar* or Islamic international law and those of Islamic law do not generally differ from one another and both are the two sides of the same coin. Both concepts of laws are developed from the Islamic concept of law and extended from the concept of universality of jurisdiction of divine law and are therefore basically the presentation of the same ideology. This is what we call the evolution of the Islamic system by different methods and presentations including national and international law. The same is true in the case of public international law. This is because the original concept of public international law has been developed from the concept of national law and it is indeed very difficult to underline which concept of law is the master guide of the other one.[6] The same argument is also true

[4] See the Preamble of the Charter of the United Nations.
[5] See Muhammad Hamidullah, *The Muslim Conduct of State*, 7th ed. (1977), p. 8.
[6] Consult Hans Kelsen, *Principles of International Law* (1952).

in the case of the evolution of the concept of international criminal law. This is because the original sources and principles of international criminal law are fundamentally taken from the concept of national criminal law which not only includes the methodological approach but also the procedural one.[7]

2.2. *Universality*

While it cannot be denied that during the formation of the earlier Islamic states, there were some forms of divisions of territories, one of the chief principles of Islamic law is not to separate Islamic states from other states of our international legal and political communities. Earlier divisions[8] of territories into different categories were surely political and were not rooted in the system of Islamic international law which definitely encourages the universality principle. There were also many reasons for the earlier divisions of the world into several classes.[9] None of these divisions is valid under Islamic principles. This is because, if the Islamic system of law and Islamic international law speak of the universality principle of divine jurisdiction, such a division is theoretically invalid. Islamic and other states are a part of a universal union. Consequently, *Siyar* in the old system also meant universality. It covered the most important subjects of its time. These were the law of war, the law of peace and the law of neutrality, all of which were an integral part of *Siyar*.[10]

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[7] Examine the Statute of International Criminal Court and compare with national criminal legislations.

[8] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 156.

[9] Firstly, misinterpretations which were made in the definitions and scope of the legal terminology of jihad caused a considerable number of classes of territories. These were *dar al-Islam* meaning the world of Islam, *dar al harb* emphasizing the world of war, *dar al-sulh* denoting the world of peace and *dar al muwad'ah* or *dar al' ahd* implying the covenant world. Secondly, under the old systems of laws, there was much controversy concerning the division of the world into different stages; Like Rome and Greece who did not respect other states and recognised them as wholly uncivilized. These divisions have, even, continued during other centuries between some nations who claimed to have privileges over other nations. Even, in the twenty century, one of the authoritative writers of international law had divided the world into civilized and uncivilized nations. Oppenheim, *International Law* (1927). Thirdly, the early divisions of states into different worlds by Islamic states were to underline that there are Muslims and Non-Muslims. It may be relevant to state that the Charter of the United Nations in Chapter VII divides states of the world into at least two categories, those which are its permanent members and those which are its non-permanent members. The reason for this is to draw a clear line between two types of memberships and their jurisdictional and political powers.

[10] Historically, "Although the pre-Islamic Arabs had their own international usages,

One should, however, emphasise that with the principle of universality, we do not mean here the concept of universality which applies in the case of certain international crimes such as piracy or certain rules and provisions under public international law governing the abolition of slavery and slave trade. But, we mean that the system of Islamic international law was not defined under the principle of sovereignty and territoriality but under a single concept of one territory in the world. This meant a universal application of the theory of jurisdiction and peace as well as justice for all nations regardless of their political, juridical, cultural and religion including language and economic abilities in their social and international relations.[11]

Under Islamic international law, human activities believed to be within one jurisdiction and one universal society, even the world is in practice divided into many states. This is because the legal provisions in Islamic law have basically emerged from one constitution and there should not accordingly be any difference in the application of the law between different nations. Through the Islamic principles, all nations should be treated with equal arms, without any type of discrimination because of race, colour, language, religion, culture and political as well as military strength. The 2004 Arab Charter on Human Rights reads that:

1. Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.

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yet they could not have elaborated them into a system. When Islam cam and founded a *State* of its own, the earliest name given by Muslim writers to the special branch of law dealing with war, peace and neutrality seems to have been *Siyar* … the plural form of *Sirat*, meaning conduct and behaviour … (T)he conduct of the ruler, not only in time of war but also in peace, was referred to by the term *sirat* as early as the time of the Prophet and even in pre-Islamic times. This is according to authors of early in the third century of Hijrah. The term was adopted for 'International Law' at least a century earlier." See Hamidullah, *The Muslim Conduct of State*, pp. 8–9.

[11] According to the *Quran* 2:213 "Mankind was but one nation, then God sent prophets as bearers of glad tidings and warners, and He sent with them the truth to judge thereby between men when they differ, and none differed therein but those very people to whom it was given even after clear signs had come to them, through revolt among themselves, whereupon God guided those who believed, by His Will, to the truth about which people differed, and God guides whomsoever He wills to the Right Path."

2. The States parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enshrined in the present Charter in order to ensure protection against all forms of discrimination based on any of the grounds mentioned in the preceding paragraph.[12]

The principle of universality embodied in Islamic international law therefore opens a door to what is needed in international relations and what is not requested by the majority of states as a whole. In other words, the principle of universality solves confrontation between various legal systems and invites one exclusive legal system which should be accepted by all nations and respected within their jurisdiction.[13] This theory may be compared with the globalization of law which is a broader aspect of the internationalization of international law with certain reservations. It may also be evaluated with the theory of international village.[14]

2.3. *Equal System*

The principle of universality in Islamic international law, does not mean to empower the Islamic system in international relations of states, it rather means that states should search to achieve the implementation of one legal system, the subjects and objects of which are recognised and accepted by the great majority of states because of their given consent. This can be named a public or global international law treating all states, nations and individuals under one *equal system* and jurisdiction which is acceptable to all nations for the purpose of the cultivation of justice. Thus, *justice in the true Islamic system of international law, does not necessarily limit international rules and principles to the Islamic concept of legislation, but to the rules, norms and provisions that are concluded with free consent between various nations of the world for the purpose of peaceful implementation of international rules applicable to all states regardless of their juridical, political, economic and military strength*. In other words, justice is not imposed, but it is the circumstances of freeborn consent.[15]

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[12] Article 3.

[13] It must, however, be mentioned here that the principle of universality in Islamic international law is not, wholly, respected in the practice of Islamic states.

[14] en.wikipedia.org/wiki/Global_village_(Internet)—27k, visited on 2008-02-25.

[15] But compare also Mohammed Abdelmohcine, *Essai d'une théorie de la sanction dans la législation islamique*, Doctorat d'État: sciences criminelles, Toulouse 1, 1985; see also Sahlieh Aldeeb Abu, Awad Sami, *Les Musulmans Face aux Droits de l'homme: Religion et Droit et Politique: étude et documents* (1994).

Public international law also has similar basic theories. Its aims are the manifestation and application of the principles of equality by different means including humanitarian, human rights and other principles of equality within conventional international law such as conventions applicable to the high seas or conventions concerning the implementation of the law of armed conflicts. The most illustrative examples are, the Geneva Conventions, which are the consequences of the development of customary rules of international criminal law applicable in the time of armed conflicts. The provisions of the Geneva Conventions constitute an integral part of positive international law and a significant part of the international law of *jus cogens*. But, one problem with public international law is that its principles and rules for justice and fairness have mostly been born at a time of armed conflicts. They are the principles of the victorious states. This can be seen in the provisions of a large number of bilateral and multilateral conventions that have been signed after the end of a war such as the Versailles Treaty. Both, the League of Nations and the United Nations, are the two clear examples of this victorious justice. An examination of the Charter of the United Nations proves this unfortunate fact. The rule and provisions of Chapter seven of the Charter clearly emphasise the principles of inequalities and injustices. Although, one can scarcely reject the relevant provisions in the Preamble of the United Nations concerning the maintenance of peace, equality, justice and human rights, the concept of equal value between all nations of the world is indeed very uncertain. This is especially true, when one examines the nature of veto right that has been given to a few states in the heart of the United Nations.

The problem of both systems is not solely juridical or political, but, the manner in which the regulations of both systems are interpreted and applied by political and even juridical authorities of states or governments. In other words, Islam declares the principle of universality of international territory or the power of one legal system over one global territory which should bear equality between the subjects of the law. This is also the function of public international law which struggles for the implementation of international law under a global justice[16] and principles including certain important rules of the United Nations.[17] The fact is

[16] Benjamin B. Ferencz, *New Legal Foundations for Global Survival: Security through the Security Council* (1993).

[17] We do not analyse the value of the provisions of the United Nations and their juridical and political effect in international legal community here. See Farhad Malekian, *Monopolization of International Criminal Law in the United Nations: A Jurisprudential Approach* (1994).

that the Charter of the United Nations strongly calls on states to respect the principle of equality. In the eyes of the Charter, the principle of equality constitutes the first principle for achieving international peace, justice and human rights.[18] One cannot either ignore the fact that the Charter, simultaneously violates its own principles due to the provisions of Chapter VII. This creates a serious contradiction between its purposes. It freezes the value of equality principles within its Charter and eventually decreases its real significance between most states of the world including the Islamic nations.

3. The Origin of Both Systems

Islamic international law is, in principle, as asserted, the development of *Siyar* or the global rules, norms and principles which have come into force through the conclusions of international treaties and agreements based on Islamic sources. The same is true in the case of public international law which was originally developed from the conclusions of international treaties. The latter has also developed from the provisions of the Indian law of nations, the Persian law of nations, the Roman and Greek law of nations, the Scandinavian law of nations, the Islamic rules, the *European law of nations* and also the rules of communist countries based originally on the practices of the Union of Soviet Socialist Republics. Public international law was practised by the European states in their external conducts with one another.

There were no special differences, from the point of development, between the *Siyar* and the European Law of Nations. Both systems were extended from the law of war and the law of peace with the difference that one relied originally on the concept of divine law, and the other, was a combination of the law of man and the law of Christianity. The European Law of Nations and *Siyar*, have basically dealt with three main subjects. These are the law of war, the law of peace and the law of neutrality. This means that both systems of international law have, in their early stages

[18] The United Nations has in its preamble stated that the people of the United Nations will 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.'

of development, deatl with the same three main subjects of the time governing the most significant provisions of international laws.

It is important to mention here that by the system of Islamic international law or *Siyar* we do not necessarily mean that the principle of Islamic international law must prevail over or be given superiority to the system of international law. On the contrary, the purpose is to strengthen the system of international law on an equal footing by all states including Muslim nations. Again, 'In the sphere of international relations, ... the re-assertion of Islamic values does not necessarily mean the reintroduction of classical doctrines of *Siyar*; it is, rather, the reinforcement of general principles of law with ethical content.'[19] Thus, when we assert that the system of Islamic international law is the development of the principles of *Siyar*, our purpose is to examine the relevant system of international law in a contemporary mode and to draw a clear line between that part of Islamic law which exclusively deals with theological concepts, and that part which concerns the philosophy of international jurisprudence as a whole. This investigation does not suggest the implementation of the system of Islamic international law at all, but, a root for solving many international conflicts between Islamic and other states of the world. This is one of the ways to find out the origin of both systems of the law, in order to become conscious concerning the contemporary international conflicts. In other words, to assert that both systems have had different origins for their development may be true, but, it would obviously be wrong to assert that they have not historical and conceptual common values.

3.1. *Juridical Structure*

The terminology of Islamic international law consists of *Shari'ah* and *figh*. This means that Islamic international law constitutes a substantive part of Islamic law or *Shari'ah*, and from a procedural aspect, this makes the substance of Islamic law accessible. In other words, *Shari'ah* is not *figh* but *figh* is the interpretation of *Shari'ah*. One cannot, however, deny the fact that different views have been expressed concerning the meaning of

[19] Hasan Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-Operation among its Member States: A Study of the Charter, the General Agreement for Economic, Technical and Commercial Co-operation and the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the OIC* (1987), p. 18.

Shari'ah and *figh*.[20] Some are of the view that *Shari'ah* consists of both substantive and procedural parts of Islamic law, whilst others separate them in the end.[21]

Whatever the result of this analysis may be, Islamic international law comprises of both parts of Islamic law i.e. substantive and procedural parts. Both of these parts are, necessary and essential, in the definition and development of Islamic international law. Owing to this consideration, the juridical structure of Islamic law has essentially developed from various types of interpretations, presented by Islamic jurists.

However, one must not put aside the fact that any type of ideology in Islamic system, must be based on the principles of Islamic law and one should under no conditions ignore certain fundamental principles. These include the principle of equality, the principle of justice, the principle of presentation of ideology, the principle of universality, and the principle of integrity of oral or written agreements, i.e. *pacta sunt servanda*.

3.2. *Speciality of the System*

Islamic international law means rules, obligations, duties and liabilities governing international or inter-conduct of individuals, entities and states.[22] Accordingly, it is due to these principles that diplomatic inter-

[20] See, for example, the opinion of P. Nicolas, *Mohammedan Theories of Finance with an Introduction to Mohammedan Law and a Bibliography* (1916), pp. 23 ff.

[21] According to one writer "Muslim writers usually employ the terms *Shari'ah* and *figh* to identify the law, and maintain that the *figh* is a version of the *Shari'ah* if not a synonym. To use the two terms do not designate the same thing. The *Shari'ah* is the divine law which God has revealed and He alone knows best its precise meaning and commandments. *Figh* is the process of discovery and understanding the injunctions of the *Shari'ah*. Therefore *figh* is necessary speculative by its very nature. Admittedly it could be changeable according to place and time. The *Shari'ah* is the substance. The *figh* is the procedure that makes the substance accessible, presumably within the available means. Hence we are inclined to confine the term *Shari'ah* only to the Qur'ān and the *sunna* as such. Thereby the *Shari'ah* or God's will as revealed in the Qur'ān and the *sunna*, is the creative origin of Islamic law, while *figh* is the demonstrative evidence of the Islamic principles." Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, pp. 106–107.

[22] Islamic international law means the equal, mutual and reciprocal respect of obligations expressed by rules, norms, regulations, provisions, customs, including moral obligations, which prevail for one reason or another between states, states and organizations, states and groups and states and individuals in order to maintain their universal relations. In contrast to public international law, Muslim international law recognises individuals as an integral part of its anatomy. This is because in public international law the position of individuals and minor groups is unsettled. Individuals are considered as objects or

course between states is based and motivated.[23] The principle of inviolability of given consent in Islamic international law, constitutes one of the chief principles of all obligations.

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subjects and most recently because of the development of international human rights law as beneficiary subjects. Groups in the system of public international law, in particular, have no independent international legal personality as recognised for other subjects under the system and are therefore not treated equally under its provisions. In contrast, in Muslim international law there is no difference between the international legal characterization of a group and that of a state. They are all considered subjects and are consequently treated equally under the provisions of Islamic law. *See also* generally Hamidullah, *The Muslim Conduct of State*; Najib Armanazi, *Les Principes Islamiques et les Rapports Internationaux en Temps de Paix et de Guerre* (1929); Majid Khadduri, *War and Peace in the Law of Islam* (1955); Majid Khadduri, 'Islam and the Modern Law of Nations', 50 *American Journal of International Law* (1956); Majid Khadduri (ed.), *The Islamic Theory of International Relations and Its Contemporary Relevance*, see J. Harris Proctor (ed.), *Islam and International Relations* (1965). pp. 24 ff; Majid Khadduri (ed. & trans.), *Islamic law of Nations: Shaybani's Siyar*, translated with an introduction, notes and appendices (1966); Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*. Hasan Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-Operation among its Member States: A Study of the Charter, the General Agreement for Economic, Technical and Commercial Co-operation and the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the OIC* (1987); Farhad Malekian, *The System of International Law, Formation, Treaties and Responsibility* (1987), p. 8.

[23] By the phrase 'Islamic international law' we do not necessarily compare the system of international law with that of Islamic law. Our purpose is not to suggest which system of international law has historical or practical priority over the other. We present a system of law which has long existed between a number of states including Muslim and Non-Muslim and which has certain significant functions in the development and consolidation of public international law.

Islamic international law does not aim to develop its provisions into the global legal community nor suggest that the international legal order must take into recognition its provisions. One important point in introducing Islamic law is the presentation of its legal norms, levels and degrees of application in order to solve many issues relating to international conflicts. Public international law could never develop, as it does today, without considerations of the rules of civilisations. The system of public international law must be studied side by side with other legal systems if it is assumed to be enforced and respected by all nations. In principle, the law of Islam speaks of equality, justice and peace. These are the core principles, but not, exclusive principles of Islamic law. Although, we cannot deny the fact that the basic principles of Islamic law are violated in the practices of many Islamic states, this does not mean that the Islamic law permits such violations. *Islamic law has, like many other laws, been disregarded in the practice of Muslim governments and presented, partly or entirely, by obscure interpretations which are not only not accepted in international legal community, but are also, abuse of its principles. This is a common fault with the pragmatic enforcement of a legal system and should not be confused with the basic principles of the same system. A clear example is the Marx and Engels principles and their misuse and misinterpretation by the communist authorities.*

More significantly, the framework of Islamic international law has evolved and developed from the principles of the *Qur'ān*; constituting the main source of Islam. This means that Islamic international law has a central constitution legalizing interstate conduct in general and the social welfare of the international community in particular. These are some of the significant values of Islamic international law stated by Islamic writers and may also be understood from the chief principles of the law.[24]

The question whether these principles are respected in the practice of states claiming to base their constitutional values on Islamic norms, rules and obligations is another juridical and political issue and cannot easily be denied by international writers who are also familiar with the Islamic system. Thus, when we refer to Islamic international law, we do not necessarily mean that the relevant national authorities respect the purposes and obligations of Islamic or Islamic international law, rather we mean the historical existence of certain practices in certain parts of the world.[25] But, the spiritual obligations of Islamic law are obviously ignored in the practice of many Islamic states. There are several reasons for these violations. Some of them are:

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[24] Before the creation of Islamic international law, there were other forms of international law namely Indian international law. Although, the Indian law of nations was regional, it was officially practised in inter-states relations. It was very well developed in the laws of diplomatic intercourse and the law of war. Islamic international law was not only regional, but was also international. This was because Islamic law of nations was broadly extended over the world including Europe where European classical writers became familiar with the Islamic system. Islamic international law was called Siyar, which also meant regulations and rules governing the inter-relations of various nations and states with Islamic states in accordance with the principles of equality, justice and peace commanded by the law of God. Due to this significant purpose, Islamic international law was developed and consolidated by several writers among whom one can refer to Mohammed Abn Hassen Shaybani from the eighth century. Majid Khadduri, *Islamic law of Nations: Shaybani's Siyar*, translated with an introduction, notes and appendices (1966).

[25] It must also be emphasised that violations of the principles of the law are not exclusively restricted to the conduct of Islamic states; the principles of public international law have frequently been violated in practice by many states, some of which are indeed very notorious such as the United States, China, the United Kingdom, and Israel. Islamic law obviously differs from its early and contemporary practices. When we speak about Islamic law, we do not mean its dogmatic position. Taking into consideration the time and circumstances under which Islamic law was presented, it contributed highly to common understanding, common values and common ends. It passed laws for both, individuals and social interests. Therefore, it simultaneously presented rules of law acceptable to the social interests of the time. While Islamic law does not change in substance and its principles are fixed, the law may adapt itself to new regulations or adapt other alien laws into its *status quo*.

i) Gaining political authority with those individuals who are extremely fanatical and do not wish any alteration;
ii) Those who have gained the political power of states may be highly corrupted, and use the whole machinery of the state for the satisfaction of their own interests;
iii) There exists a strong tendency in the international political community to cooperate with those individuals (i and ii), in order to have rather strong control over rich Islamic states, such as the prolonged relations between the United States and Saddam Hussein; and
iv) The imposition of Islamic law by religious authorities over certain Muslim and non-Muslim population, such as in Iran.

4. The Legal Characterization

The definitions of Islamic international law which are presented here do not necessarily represent the Islamic system practised by different existing regimes.[26] They deal exclusively with those norms of Islamic law which simultaneously present the norms of Islamic international law[27] adaptable to the norms of customary and positive international law.[28] This means that although we do not limit any of these two systems of international law to one another, we do not refute that both systems have, more or less, similar definitions and purposes either; this is in order to achieve peaceful international relations and settlements of international disputes.[29]

The concepts of fraternity, brotherhood, justice, equality, security and peace are recognised as core principles for an accurate understanding of the norms of Islamic international law. These principles constitute, the most important framework of the system, and can be examined within the content of the Qurʾān and other sources of Islamic international

[26] See also chapter on sources of Islamic international law.

[27] According to one writer "The Muslim law of nations is not a separate body of Muslim law; it is merely an extension of the law designed to govern the relations of the Muslims with non-Muslims, whether inside or outside the world of Islam. Strictly speaking, there is no Muslim law of nations in the sense of the distinction between modern municipal (national) law and international law based on different sources and maintained by different sanctions." Khadduri, *War and Peace in the Law of Islam*, p. 46.

[28] See Abdur Rahim, *The Principles of Muhammadan Jurisprudence* (1911), p. 68; Khadduri, *War and Peace in the Law of Islam*, pp. 47–48.

[29] See *infra*.

law.[30]Similar norms can also be found in the system of public international law, but, with the exception that they do not necessarily arise from divine jurisdiction, but are rather based on the position of public international law within the law of the United Nations.

4.1. *Codification*

It must be emphasised that the definitions of public international law have not always been the same and therefore they have been modified from time to time throughout the centuries.[31] But, certain definitions in Islamic law have, from the time of its revelation, been fixed. While the law has been developed and interpreted by different theological and juridical groups, the basic principles of the law have remained unchanged since the time of creation. This means that the legal structure of the law including its purposes and functions are not a manifestation of the twentieth centuries as is the case in the system of public international law.

Strictly speaking, most radical and practical aspects of public international law are innovations within its system and are based on the evolution, development, codification, re-codification and acceptance of a large number of rules and obligations after the establishment of the United Nations. Therefore, the majority of the rules of public international law were created during the twentieth century, while those principal rules of Islamic international law belong to the century of its formation. For instance, the principles of human rights under Islamic international law

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[30] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, pp. 4–5.

[31] For example, Professor Parry states that "'International law' is a strict term of art, connoting that system of law whose primary function it is to regulate the relations of states with one another. As states have formed organizations of themselves, it has come also to be concerned with international organizations and an increasing concern with them must follow from the trend which we are now witnessing towards the integration of the community of states. And, because states are composed of individuals, and exist primarily to serve the needs of individuals, international law has always had a certain concern with the relations of the individual, if not to his own state, at least to other state. Because in relatively in recent times states have accepted, in their agreements with each other, various duties towards all individuals within their respective jurisdictions, even the relations between the individual and his own state have come to involve questions of international law in a more direct fashion than that which comes in question when a state applies, as it often does, international law, or a species of reflection of it, as part of its own internal legal system. Nevertheless, international law is and remains essentially a law for states and thus stands in contrast to what international lawyers are accustomed to call municipal law—the law within the state." Clive Parry, *The Function of Law in the International Community*, in Max Sorensen, *Manual of Public International Law* (1978), pp. 1–2.

(although these are not respected in most Islamic nations) are, in some way, similar to the principles of human rights formulated in the 1948 Declaration of Human Rights. The Islamic principles of human rights are the most significant facet of the law, declared fourteen hundred years ago.[32]

[32] One of the chief differences between Islamic international law and public international law is that the former presents both municipal and international law within one framework, while the latter does not. The system of public international law has basically differed from the municipal laws of most states and this has created the possibility of partly rejecting or accepting the system. States are, to a large extent, free to select between the relevant rules of international law by entering or not entering into international conventions and this opens the possibility of violating the international legal system. It is important to note here that the system of public international law has, fourteen centuries after the rise of Islamic international law, developed the idea of a world legal system which is directed primarily by the United Nations, and enforcing on internal systems, the concept of international law in accordance with the provisions of declarations, conventions, agreements and treaties. A similar method to the Islamic international law is being developed in Europe by the enforcement of the European Union legal system on its members. This is a new achievement in Europe and is, largely, affecting on most European systems of internal laws. Similar ideas to Islamic thought and ideologies concerning one world under one law, of course different in character, were also developed by the former leaders of the Soviet Union. Their whole concept was based on the fact that public international law would only have temporary effects on internal laws, until it could achieve the principles of communism. T.A. Taracouzio, *The Soviet Union and International Law* (1935), p. 10.

The aim of Islamic international law concerning the creation of a world legal order under the provisions of one legal system of law is expressed by Khadduri. According to him "The rise of Islam, with its mission to all people, inevitably raised for the Islamic state the problem as to how it would conduct its relations with the non-Muslim countries as well as with the tolerated religious communities within its territory. The ultimate aim of Islam was, of course, to win the whole world, but its failure to convert all people left outside its frontiers non-Muslim communities with which Islam had to deal throughout its history. Thus in its origin the Muslim law of nations, in contrast to almost all other systems, was designed to be a temporary institution—until all people, except perhaps those of the tolerated religions, would become Muslims. It follows, accordingly, that if the ideal of Islam were ever achieved, the *raison d'ĕtre* of a Muslim law of nations, at least with regard to Islam's relations with non-Muslim countries, would be non-existent. The wave of Islamic expansion, however, could not continue indefinitely, so some law to govern the relations of Muslims with non-Muslims will remain so long as Muslims live in the world with non-Muslims." Khadduri, *War and Peace in the Law of Islam*, p. 44.

It must, however, be emphasised that the division between Muslim and Non-Muslim is only linguistic and has nothing to do with their spiritual nature. All are equal before Islamic law when it is practised accurately. The origin of Islamic law fully respects other theories of law as well as religions. This is however under reciprocal conditions. It is even noted that the Islamic system was the first system in the world which gave special support to foreigners, respecting their laws and religions. Accordingly, "The basic principle of the system of international relations in Islam is, in the words of jurists, that 'the Muslim and non-Muslims are equal (sawa') …' In antiquity, the Greeks, for instance, had the

Consequently, with the term codification we mean that the Islamic system of international law, does not, as does the public international law, provide rules and norms for conducts of states in their international relations. This is because the provisions of Islamic international law are mostly for the conducts of individuals, even though individuals are controlled by states conducts. Despite this difference between these two systems of international laws, one must accept that Islamic international law may also be codified in certain situations. This may be acceptable, if the new rules of codifications are not against the fundamental principles of Islamic law. For instance, the regulations of Islamic principles of human rights into a number of human rights instruments are a form of codification of Islamic principles. This is also true in the case of the ratifications of other international conventions by Islamic states.[33]

Thus, new rules, provisions, norms and certain juridical formulations may be adopted within the system of Islamic international law, without any particular need for internal codifications. This means that the content of an international agreement may be ratified by Islamic nations for the purpose of establishing certain rules concerning their future international relations. An agreement should not however be against the principles of the Qurʾān and the customary rules of Islamic law.

According to public international law, ratification is a process under which states have adequate time to examine different aspects of an agreement which has been negotiated and signed by their authoritative representatives. The notion of ratification is thus the notion of the re-examination, re-consideration and re-assessment of the rules of an inter-

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conception that there is an international law which regulates the relations amongst only the Greek city-states; as for the Barbarians, nature had intended them, as was said by Aristotle, to be the slaves of the Greeks. Therefore it was an arbitrary conduct, and no law, which was the rule with regard to relations with them. The Hindus had a similar notion, and the dogma of the division of humanity into castes together with the notion of untouchability rendered the fate of the defeated still more difficult. The Romans recognised a few rights in respect of foreign friends; yet for the rest of the world there was nothing but discretion and arbitrary rule, changing with the whims and fancies of individual commanders and ages. The Jewish law believed that God had ordained the extermination of the Amalecites (ʾAmaliqah, inhabitants of Palestine); the rest of the world could be allowed to live on payment of tribute to and servants of the Jews. Until 1856, the Westerns reserved international law to Christian peoples, and since then they make a distinction between the civilized and non-civilized peoples, these latter having still no rights. In the history of International law, Muslims have been the first—and so far also the only—to admit the right of foreigners without any discrimination or reserve." *Publications of Centre Culturel Islamique—Introduction to Islam* (1957), pp. 94–95.

[33] See the following paragraph.

national agreement for the future conduct of the parties. This is in order to avoid any conflict between the new and the prevailing domestic provisions. The Qurʾān has the function of the Islamic nation's permanent constitution dealing with different matters of jurisdiction.[34] When Islamic states have ratified an international convention, they are bound by its provisions and should not resort to pleading for the adoption of its provisions under their national systems. This is because, as a whole, Islamic states cannot ratify a convention which is in principle against the whole or part inspiration of the Qurʾān. In other words, if an Islamic state goes against the basic principles of a ratified agreement and violates its objects or purposes, it has also violated promises arising from the original constitution of Islam. Thus, the ratification of a treaty constitutes, at the same time, codification of certain Islamic rules of conduct at international level. Those ratifications denote the codification of many provisions of Islamic international law and international criminal law.

4.2. *Self-Conductive Value*

The system of Islamic international law principally bases its jurisprudential value on individual contract, which does not bear the legal character of definition of international contracts under public international law. The former is self-conductive and is based on moral values and a universal legal standard based on divine law while the most central norms of public international law are based on rules governing conventional laws.[35] By individual contract we mean obligations which are accepted

[34] It must even be added that in Islamic states, the constitutional rules should not be against the principles of the Qurʾān.

[35] It is important to note here that there is a difference between the concept of universality in Islamic international law and public international law. According to the latter the principle of universality cannot, widely, be employed in international legal matters—including criminal cases. This is because the principle of universality in public international law governs certain international norms which are universally accepted in the practices of states. For instance, under the provisions of the law of nations and international criminal law, piracy, war crimes and genocide are treated under the principle of universality. Those who commit these international crimes are considered enemies of mankind and therefore, all states have an international right and duty to bring the perpetrators of these international crimes under their criminal jurisdiction for prosecution and punishment. These international crimes are crimes which have consolidated character, being recognised as crimes against civilisation and jeopardizing the security of international legal and political community as a whole. The word universality in public international law is limited to certain international matters which are relatively more important than any other criminal matters. It is for this reason that under the principle of universality in public international law, all states are under

by an individual to be respected during his lifespan and are to be fulfilled in order to achieve social, political, economic and humanitarian values in a wider perspective.

A breach of an obligation within public international law constitutes a violation giving rise to the concept of civil or criminal responsibility of the violator. This is in order to protect international legislations. On the contrary, under Islamic international law, the purpose is not necessarily the protection of a legal value which is recognised by Islamic states. Accordingly, the spirit of human nature should be controlled by human beings themselves, through moral standard based on the jurisprudence

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an international duty to establish jurisdiction over perpetrators of international crimes. Furthermore, states should not only arrest individuals who have committed international crimes under their own territorial jurisdiction, but, they should also arrest individuals who have committed international crimes under the jurisdiction(s) of other states and have, in one way or another, come under their territorial jurisdiction. This right of states also extends to the High Seas—formerly called Open seas. The most important point governing the principle of universality is that the principle has, basically, been limited in the case of applicability to international civil or criminal violations and therefore all norms of public international law and international criminal law cannot be treated within this principle. There is therefore a very serious conflict under the system of public international law or international criminal law when considering which norms constitute an integral part of these two legal systems.

However, the principle of universality has quite different value under Islamic international law including Islamic international criminal law. This is because, according to Islamic international law, all norms of international law should have universality character and should not be divided into different international values. The reason for this is that Islamic law has basically a universal character which means its norms and provisions are binding in all nations that have adopted Islamic principles of jurisdiction. It treats all its norms under the principle of universality and for this reason, Islamic states are tied up by its provisions. This means that all international crimes which are documented under Islamic international criminal law may be treated under the principle of universality based on the principle of reciprocity.

Islamic international law does not, in principle, impose obligatory rules on states without their given consent. But, whenever states have given their consent to its principles, they are obligatory. They should implement those principles under the concept of universality. Thus, a perpetrator of an international crime under Islamic law is treated under the principle of universality and Islamic states are under a legal duty to arrest all those who commit international crimes under their territorial jurisdiction. One may therefore assert that the principle of universality under public international law has a very limited scope while the whole system of Islamic international law is based on the universality principle of the law. By the same token, *Islamic international law does not impose its principle of universality on non-Islamic nations or states. This is for two essential reasons. Firstly, Islamic law is not obligatory and its rules and obligations are based on the principle of mutual consent and reciprocal understanding. Secondly, Islamic law respects all other laws which do not impose their principles on other states. Equality between laws is the chief principle of Islamic and Islamic international law. However, this principle is frequently violated by the Islamic states, even under their own territories against different groups.*

of divine law, and international relations of states should also benefit the similar standard. This does not necessarily mean that Islamic divine law has to get priority to other laws, but, an understanding of human nature and the protection of their natural or universal rights must not be superficial or documentary but practical and effective.

This is because Islamic international law is, mostly, based on individual protection and the way in which activities of individuals are extended or limited.[36] Every individual has, a great responsibility, to fulfil his/her duties and not violate them. Thus, the provisions of the law must be respected fully in order to maintain the purposes of the law and achieve its self-conductive value in national and international relations. The principle of self-conductivity can, for example, be seen within the provisions concerning the duties to pay taxation and norms of human rights. However, in public international law, human rights provisions have mostly the character of law creating norms. They have first to be formulated, accepted, adopted, and later to be implemented by the states parties. This means that rules of human rights in public international law are not necessarily self-conductive. Their real nature has to be propagated by state authorities. For instance, states are under international legal duties to adopt the provisions of their international treaties into their national legal systems, but they are, unfortunately, very sluggish regarding this matter and sometimes even conservative. A clear example is the Convention on the Rights of the Child and its purposes of protection of children. The treaty and its Protocols have long been ratified by the Swedish democratic government; however it is not yet entered into its internal law. The bureaucracy is very complicated and crippled. That is why the acceptance of norms of international human rights law and its implementation varies from state to state. In other words, Islamic international law has, largely, normative self-conductive values, but, public international law bases its values, on legal legislative mechanism. The examples are many. The Nuremberg Tribunal, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and Sierra Leona Court are some of the recognised courts which have tried to bring the violators of the principles of human rights law and

[36] As it is stated 'Islam is a religion of unity and action which safeguards individual rights and liberties and provides at the same time for collective welfare … And as its call was not meant, from its very inception, for an particular country, it was an advance over what had hitherto been done to internationalise human society.' Hamidullah, *The Muslim Conduct of State*, pp. 40–41.

humanitarian law of armed conflicts under international criminal trials and justice. Thus, the function of international human rights law is, to put a certain limit, and restrict the unlimited international legal personality of states. This is in order that the principles of natural and positive law to be respected by the authorities of states.

The individuals under public international law are invited by legal forums to respect the provisions of international human rights, of course, depending on the nature of the provisions. This means that the system of international law has scarcely any enforceable machinery regarding the prevention of the violation of international human rights law. Concerning those very serious provisions of international human rights and humanitarian law, the system has often been violated. That is why we have created a number of international criminal courts for the prosecution of those who have seriously infringed the legal body of international human rights law.

But, one serious problem with the self-conductive value of Islamic law is that its enforcement is not necessarily required by law. Many individuals violate the Islamic human rights and go without punishment. Of course, if one believes in the theory of punishment as a method of enforcement. Moreover, Islamic states seriously violate the provisions of Islamic human rights law. They even violate those provisions which have been adopted in their own international conferences. The problem is that certain Islamic states such as the Iranian regime do not have any respect for human rights values and their implementation in national, regional or international courts.[37] Certain Islamic states have even compared, their own violations, with the serious violations of human rights law by western states within the territories of other states, and therefore, excusing different argumentations, their own human rights' violations under their own territories.[38]

4.3. *Moral Values of the System*

The system of public international law is, principally, a law for states, the duties and obligations of states and the way in which they must be fulfilled. Duties and obligations under Islamic international law belong, in contrast to public international law, to individuals. If states are recognised

[37] See also Ebrahim Ghodsi, 'Legitimate Defence in the Criminal Law of Iran and Islam', 67(4) *The Journal of Criminal Law* (2003) 349–357.

[38] A clear example of this is the Iranian authorities.

as subjects of Islamic international law, this only has a temporary nature for the purpose of the implementation of the law. Otherwise, the basic rules of Islamic law are, exclusively, based on individual values, and any entity under the law has to be motivated by individual wills and interests, with due regard to common values.[39]

One of the most specific values of Islamic international law is that all norms, rules and obligations should be implemented with due regard to the moral values of the law. This means that even in the case of war and defensive war, one must maintain humanitarian values and no rule of

[39] Although, Islam places a high value on individual rights and duties it expresses significant values for common ends or effective welfare simultaneously. This is the basic virtue of Islam which treats *common values as an integral part of individual values, and individual values, as the most fundamental element of common values*. Both values are, therefore, inter-related and cannot be treated in isolation. This is because, on the one hand, Islam encourages individual benefit regarding various trades, but it places, on the other hand, a heavy legal, religious and moral responsibility on individuals to fulfil their duties towards common ends for the purpose of social welfare. Social interests are, therefore, an integral part of individual duties.

For the above reasons, Islam has established two significant institutions, without which the whole theory of individual rights and duties is meaningless. These are *Zakt* as well as *Baitul-Mal*. They lay down the most practical and invaluable system of taxation under the principles of Islamic law. The institutions of *Zakat* encourage by way of legal, moral and religious duties, the individuals who have a good economic income to pay taxations. Individuals may, therefore, pay particular regular taxation to social authorities. The *Zakat* is also called *ibadat maliyah* by Islamic jurists—constituting a worship of God by means of property. *Zakat* is the social income of a community contributed by all Muslims to institutions of taxation without which the social or common values of Islam may lose, their spiritual effect. It is for this reason that *Zakat* constitutes one of the four basic rites of Islamic religion or divine prescription. *Zakat* was therefore raised by the Prophet, as a dignity of faith to divine jurisprudence. In his time, there was therefore no tax apart from that of *Zakat* paid to Muslim States. The institution of *Zakat* circulates national wealth and is therefore necessary and essential for all Muslims who have the relevant conditions for the payment of taxation. They should not therefore avoid their duties in this matter.

Non-payment of *Zakat*, not only violates the social standards of a relevant community, but is also, against the jurisprudence of divine law. Obviously, the poor are exempt from taxation, and have no basic responsibility to this Islamic taxation system. In contrast, they are protected by *Sadaqat* which is not only for the poor, but also for the poor among non-Muslims recognised as protected persons within Islamic territories. It must be noted here that *Sadaqat* is an integral part of *zakat*.

Baitul-Mal constitutes another Islamic institution which helps the poor and social services. This institution belongs to all Muslims. As a whole, the Qurʾān constantly supports, by various means, both institutions of taxations. For example see the *Qurʾān* 9:69. The Qurʾān is, in general, silent concerning items and rates of taxation. The Prophet of Islam increased, on occasion, the rate of the taxation in extraordinary situations such as in the defence of the Islamic state. This means that in special situations, an increase in taxation is permitted for the purpose of common values.

war should be violated. Furthermore, giving mercy to the vanquished should be a basic principle of the victor.[40] Thus, Islamic international law promotes and extends the principles of human morality, even in the circumstances such as war, where human integrity may easily be violated. It is for this reason that Islamic international law bases its legal values, on moral standards of the law and not exclusively on strict juridical consideration. Therefore, according to Islamic international law, there must be a harmony between juridical norms and the moral standard of an international community of nations as a whole. This means the law ought to be of two natures i.e. *moral* and *legal*.

Now, what the definition of these terms is, is also another philosophical question in the system of Islam. Juridical norms within Islamic international law are of various characters. These can be, for example, i) norms arising from the main source of Islam i.e. the Quran; ii) norms arising from other sources of Islamic law such as *sunnah*; and iii) norms arising from conventional provisions concluded between two or several states. The moral standard of international community refers to prevailing attitude and the way of understanding of social relations between men and men and his universal formation. It is the unconditional respect allocated to every human being. The term 'moral standard of international community' also refers to the degree and level of mutual and multilateral cooperation between nations for the solving of international issues and conflicts, but not only with the terms of law, but also, with the terms of love to the nature of mankind. The same is true in the case of certain provisions of international law dealing with the questions of human rights law. For instance, the 2000 United Nations Millennium Declaration has double characteristics. Firstly, it is an integral part of international human rights law. Secondly, it simultaneously presents the moral attitudes of international community as a whole.[41]

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[40] Humanitarian law constitutes one of the most important parts of Islamic international law. For this reason, during a war, certain regulations have to be respected by conflicting parties. Soldiers were not allowed to violate the provisions of the law and were therefore prohibited to use certain methods during a conflict which was against the moral value of human nature such as attacking old and handicapped, targeting hospitals, refugees' shelters or killing children and raping women.

[41] General Assembly Resolution 55/2 of 8 September 2000. The Millennium states that "We recognize that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and

4.4. *Integration of Values*

Islamic international law is supposed to be a combination of universal law with the moral standard of international community as a whole. Both of which have important values for the development of the community and for a better understanding of the international problems arising from the misinterpretation of different systems. Due to this basic discipline, legal order constitutes also moral order and these cannot, principally, be isolated from one another. They serve as human values and are the necessity for the understanding of each other. Based on this principal reason Islamic international law, contrary to that of classical public international law, does not necessarily separate legal values from those of moral values and treats them with the same basic values, within the philosophy of the system.

However, public international law has, due to the circumstances of its development and evolution, treated legal and moral values differently. There has always been a discussion between natural law and positive law and the way in which they express their argumentations. The positivism did not put especial value to the naturalism point of views. They argued that legal order must be the consequence of legislation authorized under the power of state. For them, natural law could not create legal order, since it stemmed from the theological concepts or rules which came from the natural existence of man having hypothetical foundations.[42]

The newest development in international law is to combine these two values and not separate them from one another. Clear examples may be found in the system of humanitarian law of armed conflicts. The system has, essentially, been based on the moral value of humankinds and not exclusively on the legal value of relevant norms. The system in international law has most effectively been developed since the establishment of the United Nations and is basically the consequence of the brutality during the Second World War. Legal and moral values are treated equally and together have presented one of the most recognised standards of international community of nations regarding certain matter of international interests.

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equity at the global level. As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs."

[42] See Farhad Malekian, 'The Miserable Wedding of Naturalism into Positivism', Issue 2—April *ID EST Journal* (2009), 139–151.

The purpose of humanitarian law in public international law has been, as far as possible, to prevent inhuman suffering during a war and to encourage humanitarian conduct between those who are involved in an armed conflict. Here, humanitarian conduct in another word can be interpreted as moral value during the war and of the law which has privileged any other material interests.[43] Thus, it is the legal and moral values of the system of international humanitarian law of armed conflict which gives it international standard, or, as we have spoken in the case of Islamic international law, the moral standard of international community, as it is accepted, formulated and recognised within the relevant international conventions.

4.5. *Similar Weight*

An investigation into juridical and moral value in the relevant areas of both systems of international law demonstrate that they put a similar weight on the respect of law and man but based on different sources. The Islamic international law relies on the inspiration of divine jurisdiction and therefore concentrates on human substance and the moral standard of the given community. Public international law relays heavily on treaty laws which combine, in especial areas, with the questions of human rights or the moral standard of the provisions of the relevant convention. Both systems, obviously assimilates to one another in certain basic questions such as the moral value of a given regulation or the moral standard of a community of nations. In other words, public international law speaks of civilisation in the meaning of jurisdiction by man for man. Islamic international law speaks of the divine fixed universal jurisdiction in the form of morality, humanity, brotherhood, equality, mercy, compassion and the democratization of international relations of states on equal footings. Unfortunately, it is, in practice, a fact that none of the above systems creates equality between its subjects and the question of equality varies in accordance with international economic, military and political strength.

[43] "Who spend (for the sake of man) in both prosperity and strain, and who restrain their anger and forgive the faults of men; God loves those who do good (to others)". "This is a clear statement for mankind, a guidance and admonition for the pious." "Do not lose heart, and do not grieve, for you shall gain the upper hand if only you truly believe." The *Qur'ān*, 3:134, 138 and 139.

CHAPTER TWO

PRINCIPLES OF ISLAMIC INTERNATIONAL LAW

1. The Principle of Equality

1.1. *Equality before the Law*

The principle of equality constitutes one of the most important principles of Islamic international law.[1] The definition of the principle of equality in Islamic international law is, to some extent, different to that of public international law. The principle of equality is, in the latter, an innovation and was not therefore dealt with in its early history.[2] Equality in the system of public international law is, basically, used in two connections. One is in the case of states and their equality under the system and the other is expressed in the instruments of international human rights law and mostly refers to equality between individuals or groups.

Islamic international law basically uses the word equality in connection with individual equality and the use of the word in the case of states is only an exemption.[3] This is because Islamic international law places, a heavy weight and full respects, on individual rights and duties and for these reasons, individuals constitute the most important subjects of its system.[4] According to Islamic international law, no individual is above

[1] The *Qur'ān*, 49:13.

[2] Historically, the system of public international law did not accept states and nations on equal footings and categorized them due to the circumstances. Some states were recognised as full sovereign, some half sovereign and certain others as barbarous. Yet, colonialization of states and nations was one of the consolidated subjects dealt with in the law of nations. Even a considerable number of the rules of the United Nations deal with colony states and eventually the way in which they may receive freedom due to the conditions of the colonial powerful states. This has however, juridically, been settled. Philosophically, the situation is different.

[3] It is therefore the basic idea of Islam to develop the personality of an individual and his/her responsibility before the creator.

[4] According to one writer, 'The modern law of nations presupposes the existence of a family of nations composed of a community of states enjoying full sovereign rights and equality of status. The Muslim law of nations recognises no other nation than its own, since the ultimate goal of Islam was the subordination of the whole world to one system

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another, and any priority given to individuals in this world is superficial, and has no spiritual value. It is on this basis that the principle of equality in Islamic international law, contrary to that of public international law, is in essence, the expression of equality of rights between individuals. In other words, since the establishment of the United Nations, the use of the term equality within public international law has been to express equality between states (and within the area of human rights law for individuals and groups) while the principle of equality in Islamic international law is a legal right of individuals and not a right which has been given by the state. This right to equality has been established since the revelation of Islamic jurisdiction.[5] The equality between subjects of the law also constitutes one of the main elements of Islamic international law. This original legal theory of Islamic law and Islamic international law has also been greatly effective in the Western concept of international law.[6] Moreover, 'it was the Muslims who … not only developed international law, the first in the world, as a distinct discipline, but also … made it form part of the law instead of politics.'[7]

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of law and religion. Furthermore, the Muslim law of nations was ordinarily binding upon individuals rather than territorial groups. For Islamic law, like all ancient law, had a personal rather than a territorial character and was obligatory upon the Muslims, as individuals or as a group, regardless of the territory they resided in.' Khadduri, *War and Peace in the Law of Islam*, pp. 44–45.

Contrary to the above conclusion, it is to be noticed that Islamic international law recognises other nations and this is clearly stated in the *Qur'ān*. It reads that 'We created you from a male and female, and formed you into nations and tribes that you may recognise each other.' The *Qur'ān*, 49:13.

[5] Khadduri, *War and Peace in the Law of Islam*, p. 46.

[6] There are, in fact, different opinions concerning the legal and political effect of Islamic law on Western international law in general and the Western legal system in particular. On the positive effect of Islamic law in various Western legal systems see C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988), pp. 149–158. According to Professor Weeramantry, for example, "In relation to the vital discipline of international law there was no literature from Greece and Rome comparable to their literature in private law. We do not have treatises dealing with such questions as the binding force and interpretation of treaties, the duties of combatants, the rights of non-combatants or the disposal of enemy property. The only body of literature in this discipline was the Islamic." Moreover, "Arabic literature was … not a great unknown in the days when the first seeds were being sown of what was to become Western international law." Id., p. 150. On the impact of Islamic international law upon Grotius thoughts see id., pp. 150–158. See also Justice Jackson, forword to *Law in the Middle East*, edited by Majid Khadduri (1955).

[7] *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 94.

1.2. *The Basic Source of Equality*

The basic source of equality under Islamic international law is different from that of public international law. According to the latter, the theory and norms of equality *extend from states to individuals whilst in Islamic international law from individuals to states*. The effect of this difference is that in public international law, equality between individuals widely depends on the existence of equality between states, and if we suppose that states are not willing to accept one another on an equal footing, the concept of equality between individuals of those states will not be in balance. This was demonstrated by the start of the Second World War when the priorities of certain races over others were proved during the war. The German Jew and those who were originally the citizens of other states in Europe were genocided. This was based on the fact that the concept of equality was methodological in nature and not spiritual in essence.[8]

The principle of equality in Islamic international laws developed from the equality of individuals and therefore the concept of equality of states in Islamic international law constantly depends on whether equality between individuals is fully respected by certain authorities. Accordingly, a policy of non-equality between states can never be effective in the implementation of the principle of the equality of individuals. According to the second source of Islamic law "The Arab has no superiority over the non-Arab and the non-Arab has no superiority over the Arab. All are children of Adam and Adam was made of earth."[9]Thus, the equality of individuals must be seen, as one of the strong and important principles from which the different concepts of equalities are developed. These include social, economic and political equality.[10]

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[8] The question is also much sensible in the case of the position of individuals before the permanent International Criminal Court. This is because one of the principles of the court is to prosecute and punish all individuals who have committed international crimes. The principle is applicable, regardless of the nationality or position of individuals. However, the government of the United States has signed certain treaties with several states, in order not to prosecute its individuals who are accused of committing international crimes. Instead, they are to be handled to the United States. The policy of the treaties of this kind is against the principle of equality of individuals before international criminal courts. It also demonstrates that the concept of equality between individuals may be superficial. Examine part III.

[9] Weeramantry, p. 172.

[10] However, one should not disagree with the fact that the principle of equality of individuals in Islamic law has seriously been violated in many Islamic states. Clear

1.3. *Equality in Sex*

The principle of the equality of individuals in Islamic international law also extends to the principle of equality between males and females, tribes, nations and states.[11] In this connection the *Qur'ān* reads that 'O men, We created you from a male and female and formed you into nations and tribes that you may recognise each other. He who has more integrity has indeed greater honour with God.'[12] It is for this reason that Islamic international law prohibits all forms of discriminations and privileges on the basis of race, nationality, language, religion, geographical location and so forth.

The above elements of Islamic international law emanating from the principle of equality have existed since its revelation and therefore its jurisdiction from an historical point of view takes priority over the relevant principle of public international law governing the equality of gender. However, one cannot disagree with the fact that that the question of equality of gender has continuously been violated by most Islamic nations. This has made a serious difficulty in the identification and interpretation of the above-mentioned verse. At the same time, one cannot disagree either with the fact that until the middle of the 20th century and even up until today, the question of equality of gender has not been solved within the principles of international law practically. The question of gender equality is one of the most important issues of worldwide perspective and one of the most serious problems between Muslim nations today.

2. The Principle of Peace

2.1. *Peaceful Relations*

Islam should mean peace.[13] Islamic international law bases its international relations on the principle of peace between all nations and states. Common and reciprocal understandings of conflicts are the two chief

examples of these violations are in the Islamic Republic of Iran, the Kingdom of Saudi Arabia, the Socialist People's Libyan Arab Jamahiriya, the Arab Republic of Egypt and the dynastic Muslim Monarch Kuwait where the principle of inequality is strongly practised between individuals, and human rights norms are constantly ignored.

[11] See also below, the principle of reciprocal respect.

[12] The *Qur'ān*, 49:13.

[13] This has however not been respected by Islamic states.

elements for the peaceful settlement of disputes. The principle of peace therefore constitutes one of the most important principles of Islamic international law in order to achieve justice and cooperation for the solving of international conflicts. The principle of peace also coincides with the principle of peaceful co-existence and both of these present, more or less, the same ideology of peaceful relations.[14]

The difference between them relies on the fact that the principle of peace encourages the settlement of international conflicts with peaceful methods while the principle of peaceful co-existence draws attention to the fact that even though, there may be, between two or more nations, certain political, ideological or even theological conflicts, they should still encompass peaceful international relations. This should be regardless of conflicts basically arising from different interpretations of the same subject matter and being of mutual or multilateral interests. Moreover, its primary significance is the 'making of peace' and the idea of 'peace is the dominant idea in Islam.'[15] Islamic international law thus promotes reciprocal obligations and duties and due to its philosophy of justice consent constitutes the main principle for obedience to the law and to the peace. According to this philosophy no force should be employed for the implementation of Islamic law.[16] Rules and obligations must come into existence through peaceful relations and not by ideological or military force.

2.2. *Peace As a Duty*

Contrary to interpretations made by some European writers, Islamic international law does not encourage war between states. It respects all states on an equal footing, but, based on mutual respect.[17] Islamic international law is, thus, against waging war in international relations and an aggressive war is prohibited according to its basic provisions.[18] More importantly, wars should be ended as quickly as possible and the

[14] This principle was developed by the communist states during the Cold War. It denotes the possibility of creating international relations between two different ideologies.

[15] Muhammad Ali Maulvi, *Islam the Religion of Humanity* (1926), p. 4; See also Maulana Muhammad Ali, *Back to the Qur'ān, Back to Muhammad, Rise! Advance!* (1926), p. 19; Muhammad Ali, *Islam or the Natural Religion of Man: A Brief Sketch of Its Principles as given in the Holy Qur'ān* (1912), pp. 3–5.

[16] It is a well know fact in the *Qur'ān* that 'Let there be no compulsion in religion.'

[17] The *Qur'ān*, 49:13.

[18] See chapter on aggression.

conflicting parties should work for peace and its implementation. Having peaceful international relations is consequently a duty of all Muslim states and this should not be violated for political, theoretical, economical or any other reasons.

As a matter of fact, Islamic law employs the word duty in many contexts clarifying the moral and legal responsibilities of individuals. It is in this connection that keeping peace and justice is repeatedly stated in the main source of Islamic law. To keep peace is, therefore, an integral part of the duties of Islamic states and it should be respected at all times.

2.3. *Making Peace*

The *Qur'ān* has, especially, stated the importance of the principle of peaceful international relations and Islamic states are under the juridical and theological responsibility of carrying out the contents of the relevant provisions. It is for this reason that Muslims are prohibited from conducting war which is not necessary or unjust. The Waging of war is therefore permitted in the case of self-defence or self-determination.[19] It has even been emphasised that when the people who wage war are willing to make peace, one should not avoid the process of peace and writing peace treaties with them. Accordingly, 'if they are inclined to peace, make peace with them.'[20] Consequently, making peace in the path of Allah is almost an order for any Islamic state. Here, the word Allah does not necessarily mean God but, the way in which the whole machinery of Islamic law lays the principle of justice for the protection of the right of man and the promotion of the elements of peaceful relations.

3. The Principle of Reciprocal Respect

3.1. *Mutual Understanding*

Islamic international law puts an important weight on the principle of reciprocal respect. It is upon this principle that Islamic law requests not only individuals, but also states, to respect one another and not violate their rights and duties. The principle of reciprocal respect of states may not be respected if state A does not respect the rights of state B. This means that the principle of reciprocal respect of other states bases its

[19] The *Qur'ān*, 8:56–57.
[20] The *Qur'ān*, 8:61.

application on mutual give and take. This principle can also be seen in the provisions of public international law within the Charter of the United Nations. The Charter encourages the implementation of the concept of respect between all states. For instance, states are obliged to respect the territorial and political independence of other states. These principles are, in fact, expressed in the provisions of the United Nations Charter as the most fundamental elements for the maintenance of equality, peace and justice. The United Nations encourages the proper understanding of international relations based on different cultural, religious, racial and traditional factors.

The *Qur'ān* especially encourages all Muslim states not to promote acts of hostility against other states if they are not at war with them. This principle has therefore a significant function under Islamic international law and Muslim states are obliged to respect this important principle on a mutual footing. Accordingly, 'God does not forbid you from being kind and acting justly towards those who did not fight over faith with you, nor expelled you from your homes. God indeed loves those who are just.'[21] In other words, states should continuously contribute to the establishment of just and fair international relations and should not violate the territorial and political independence of other states.

3.2. *Mutual Consent*

In Islamic international law, the respect of the rights of other states is a part of the international duties and obligations of states. But, it has to be reciprocal and upon freely given consent. This is also the development of the principle of brotherhood and denotes the existence of common interests for the same subject matter between various states of the world. The chief purpose of Islamic international law with the principle of the reciprocal respect of other states in international relations is, not only to encourage peaceful international relations between all states, but is also to emphasize that Islamic international law should create equality and reciprocity by *mutual consent* and not by force. This is the rejection of the principle of inequality. According to Islamic international law, no Islamic state is under obligation to respect the rights of other states if its own rights are not respected owing to the circumstances of the

[21] The *Qur'ān*, 60:8. Another verse of the *Qur'ān* reads that 'He only forbids you from making friends with those who fought over faith with you and banished you from your homes, and aided in your exile. Whoever makes friends with them is a transgressor.' 60:9.

principle of reciprocity. The principle of reciprocal respect also extends to the binding character of international treaties including conventions, declarations, agreements, protocols and so forth. This is also true in the case of a conflict arising from the interpretation or application of the provisions of a treaty.[22] The system of public international law has, also, a great respect for the principle of reciprocity concerning rights and duties based on free consent. As a rule of law, in public international law, the principle of mutual consent has a significant value within its provisions.

4. The Principle of Self-Defence[23]

4.1. *Sources of the Principle*

Islamic international law places an important value on the principle of self-defence and the principle constitutes one of the most important policies of Islamic law for the protection of individuals and states. The principle of self-defence is also one of the most well-known principles of public international law. The principle has a significant value under the domestic systems of most states and plays an effective role in the protection of individuals from all forms of violations.

Islamic international law, like the system of public international law, has certain clear provisions concerning the principle of self-defence. In fact, the basic sanction for the use of the principle of self-defence in both systems arises from two important sources. One is positive law and the other is customary law. Both these sources also have a definite function on the application of the principle of self-defence within public[24] and Islamic international law.

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[22] See also the principle of integrity of agreements in the below. One of the contemporary chief arguments relating to the possession of nuclear energy technology platforms by certain authorities in Iran is also based on the application of the principle of equal rights and obligations for all states. They motivate their arguments by stating that the rights to possession or non-possession should be applied to all states regardless of their juridical, political, economic and, military capabilities. Needless to say that possession of nuclear energies which are for military purposes should be prohibited for all states, and this should not be mistreated, even by those states, having a permanent seat in the United Nations Organization.

[23] See also chapter twenty-seven 3, part II.

[24] See Malekian, *International Criminal Law*, vol. I, pp. 65–68.

4.2. *Positive Law*

In the system of public international law, the positive rules of the principle of self-defence can be found in Articles 51 of the Charter of the United Nations.[25] This article has an important function within the whole system of the United Nations and has also extraordinarily significant value for the implementation of the rules of public international law. Although the provisions of this article have been the subjects of most international controversies, they present the legitimate rights of states which have been the subjects of armed attack. The article divides the rights of self-defence into two different parts. These are individual and collective defence. Accordingly, states may, depending on the circumstances, choose individual or collective defence both of which has to be reported to the Security Council of the United Nations.

Similarly, Islamic international law refers to the legitimate rights of individuals, nations and states to resort to the principle of self-defence when it is of absolute necessity. Some verses of the *Qur'ān* state this principle. One verse deals with the most important part of the rights of self-defence and this concerns the right of oppressed people who have been the target of unjustified acts of violation or aggression. It reads that 'Permission is granted those (to take up arms) who fight because they were oppressed. God is certainly able to give help to those.'[26] The aforementioned provisions are completed with the following words, 'Fight those who fight you whosesoever you find them, and expel them from the place they had turned you out from.'

The term "aggression" which is used in the main source of Islamic law applies to acts of violence which are against the principles of equalities. In other words, the concept of aggression arises whenever certain basic rights are violated and certain conditions have not been respected. For instance, there are certain rules that have to be respected by the conflicting parties during an armed conflict. Whenever a conflicting party uses

[25] Article 51 reads that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

[26] The *Qur'ān*, 22:39.

much more force than is necessary during peace or the course of war, the concept of aggression may be arise. In general, aggression in public international law is also an act of violence against an established rule of law that has an important function for the maintenance of international legal order. Nevertheless, one cannot disagree with the fact that the term "aggression" is still one of the most controversial terms of international criminal law.

4.3. *Customary Law*

Another important source of Islamic international law and that of public international law governing the principle of self-defence is the provisions of customary law. It is, in fact, a consolidated principle of both systems that customary law supports the principle of self-defence and accordingly creates rights for the oppressed to fight against a serious violation or aggression.

Islamic international law like the system of international law prevents states and individuals from being aggressors. The *Qur'ān* clearly states that 'Fight those in the way of God who fight you, but do not be aggressive. God does not like aggressors.'[27] This version points to some important principles. Firstly, aggression is a crime. Secondly, to fight those who are waging conflict or war is a right. This provision implies the importance of the principle of self-defence. Thirdly, fight for justice and not for violence. Fourthly, do not be the aggressor. Fifthly, the principle of proportionality must fully be respected. Sixthly, the word God applies here to the divine jurisdiction and fairness which is against the aggressor. This means that aggressor should be prosecuted and punished without due regard to geographical position. Seventhly, the whole version denotes also the important function of a court for the implementation of justice and the founding of the truth.

4.4. *Implementation of Self-Defence*

There are some conditions for the implementation of the principle of self-defence within both legal systems of international laws and therefore the use of the principle is not unlimited. States are, accordingly, obliged to respect certain conditions in times of imminent attack, attack and armed conflict.[28] Furthermore, Islamic international law permits the use of the

[27] The *Qur'ān*, 2:190.
[28] See also the principle of proportionality.

principle of self-defence in several other situations with due regard to the circumstances of each case. These are when a nation:

a) struggles for the purpose of self-determination,
b) fights against the unlawful occupation of its territories,
c) assists a nation in order to be released from unlawful occupation,
d) assists an oppressed nation to be released from oppressive acts of another nation,
e) assists Islamic nations in order to keep Islamic unity and solidarity,
f) participates by its armed force against an act of aggression,
g) takes measures against any form of the use of force which is considered dangerous to its territorial integrity and political independence,
h) takes measures against a state which treats its nationals badly;
j) supports a nation in order to achieve the right of self-determination,
i) struggles against all forms of colonialization,
k) struggles against discrimination,
l) struggles against apartheid and genocide,
m) struggles against terrorist attacks,
n) struggles against an attack against its political foundations

Almost all reasons in the above can be found in the system of public international law under which it permits the right to self-defence. Illustrative examples are the employment of the right of self-defence in the case of self-determination or the recognition of the rights to struggle against foreign occupation.[29]

[29] Definition of Aggression United Nations General Assembly Resolution, 3314 (XXIX)—14 December 1974. For instance, Articles 6 and 7 of the resolution reads that "Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful." "Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration."

5. The Principle of Proportionality

5.1. *Limitations*

The principle of proportionality is one of those principles of Islamic international law which prevents acts of aggression and oppression in the case of self-defence. Thus, this principle should be read in conjunction with the principle of self-defence under the same law. This is because the latter speaks about the right of self-defence under Islamic law, while the former limits the right by the provisions of the principle of equivalent reprisal for an act of aggression. The principle does not constitute permission for resort to aggression. Its function is to act against an act of aggression for the purpose of its prevention. Consequently, respect for the following principles has been seen as a necessary condition in the application of the principle of proportionality. These are:

i) There must be a definite sign of action which clearly constitutes a serious internationally wrongful conduct jeopardizing the security of a state.
ii) It must be definitely impossible for a state which resorts to exercising the right of self-defence to obtain protection through other legal measures such as opening negotiations, sending diplomats and/or arbitrators. In other words, all alternatives must be exhausted.
iii) The principle of proportionality must fully be respected. The principle constitutes a basic element in Islamic law of self-defence and has an important function for the identification of an act constituting an act of self-defence.
iv) An attack which is carried out for the purpose of self-defence—must be discontinued where a wrongful conduct has already been prevented or corrected.
v) A reprisal should not be considered an integral part of the right of self-defence. This is because the right of self-defence automatically comes into force against a crucial act of attack which is obvious or imminent to be committed. Thus, a state may not legitimate its conduct as self-defence for an act which has already been committed. A state has, however, the right to demand reparation.

The principle of proportionality has, also, a significant place in the system of public international law. Although a definition of the principle is not clear and may create serious confusion in cases of serious armed conflicts between several states, the principle must be regarded as one of the basic

elements for the prevention of acts of aggression and hostility during armed conflicts. The difference between the principles of proportionality in the system of international law with that of Islamic international law is that the former permits the use of the principle of proportionality and its interpretation to the political authorities of the relevant state while the latter limits the scope of the application of the principle of proportionality to divine methods. It reads that 'Fight those in the way of God who fight you, but do not be aggressive.'[30] This means that a state has to be very cautious in the case of resorting to the right of self-defence and the use of the principle of proportionality should not be violated by any Islamic state.

5.2. *Applications*

The principle of proportionality may also coincide with the principle of equivalent reprisal. A reprisal should not violate the principle of proportionality of Islamic international law and public international law. Islamic international law prohibits acts of reprisal which are oppressive and aggressive. The main source of the law reads that 'Fighting during the holy month (if the sanctity) of the holy month (is violated) is (just) retribution. So if you are oppressed, oppress those who oppress you to the same degree, and fear God, and know that God is with those who are pious and follow the right path.'[31] In another verse the *Qur'ān* provides some provisions for those who are aggressors conducting war against the oppressed. It states that 'If they (enemies) desist, then cease to be hostile, except against those who oppress.'[32] In other words, the use of the principle of self-defence and the application of the principle of proportionality should not be brutal or oppressive. However, the right to resort to self-defence is prolonged, as long as the oppressive acts are continued. Thus, there is no special time limit to acts of defence against those who are aggressors and continuously conducting aggressive acts.

5.3. *Misinterpretation of the Principle*

One cannot, however, deny the fact that the principle of proportionality has been misinterpreted and wrongly resorted to under both systems

[30] The *Qur'ān*, 2:190.
[31] The *Qur'ān*, 2:194.
[32] The *Qur'ān*, 2:193.

of international law. Political and economic factors have been two of the most essential reasons for this wrongful use of the principle. This is because, although both systems of international law provide certain provisions for the use of the principle of self-defence, as well as the principle of proportionality, political authorities have had decisive role in the application of these principles. One important factor may be that international laws in both systems have not necessarily been enforced for juridical purposes but exclusively for the interests of the political consequences of a given case.

6. The Principle of Integrity of Agreements

6.1. Pacta Sunt Servanda

Islamic international law places a significant weight and respect on the juridical characterization of international agreements. The principle of the integrity of international agreements in Islamic international law is, strictly speaking, *pacta sunt servanda*.[33] It is for this reason that Muslims are legally obliged to implement and fulfil the provisions of treaties or agreements concluded between Muslims and non-Muslim communities. The principle of the integrity of agreements and full respect of their provisions in Islamic international law is principally based on the provisions of the *Qur'ān*. According to it, the provisions of a treaty must be fulfilled and parties to a treaty are consequently under a legal duty to carry out their treaty obligations.

In the system of public international law, the principle of *pacta sunt servanda* constitutes one of the most important principles of the law of international treaties. This can also be seen in the Vienna Convention on the Law of Treaties of 1969. According to the Convention, contracting parties are under conventional duties to carry out their obligations in good faith. Although customary and conventional international laws require states to fulfil their conventional obligations, the principle of *pacta sunt servanda* may be disregarded by another principle of public international law namely *rebus sic stantibus*. This means that the fundamental change of circumstances may invalidate the obligations given in a treaty.[34] Sim-

[33] For the law of treaties under Islamic international law see the relevant chapter.

[34] Article 62 of the Vienna Convention concerning the fundamental change of circumstances reads that

"1. A fundamental change of circumstances which has occurred with regard to those

ilarly, in the system of Islamic international law, a treaty provisions may not be fulfilled by a contracting party, if another party does not fulfil its obligations.

6.2. *Integrity of Given Obligations*

The principle of the integrity of agreements under Islamic international law can especially be understood from one of the most significant verses of the *Qur'ān* which emphasizes the importance of respecting the obligations of a covenant. The verse specifies that 'Fulfil your covenant with God, having made the covenant, and do not break your oaths once you have sworn them, as you have made God a witness over you.'[35]

In Islamic international law, a treaty establishes rights, duties and obligations for the parties and contracting parties should carry out their given obligations. The *Qur'ān* especially states that 'Except those idolaters with whom you have a treaty, who have not failed you in the least, nor helped anyone against you. Fulfil your obligations to them during the term (of the treaty).'[36] One important point of this verse is that it encourages the contracting parties to a treaty to carry out their obligations to the end of their terms.

It is important to emphasize that for all parties to a treaty, the provisions are only fulfilled on an equal footing. This means that mutual respect of the provisions of the relevant treaty is the basic reason for the fulfilment of its obligations. When the provisions of a treaty are not respected or are violated by one of the contracting parties to the treaty,

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existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party

invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

[35] The *Qur'ān*, 16:91.

[36] The *Qur'ān*, 9:4.

there will be no obligation on other parties to carry out the given obligations to the treaty concerning the violating party.[37] Similar provisions can easily be observed in the system of international law.[38]

6.3. *Proper Consent*

Another important matter in the systems of Islamic international law and public international law is that treaties should be concluded according to proper consent. A treaty which has been imposed by one state on another without the accurate consent of the latter, does not establish conventional obligations for that state and such a treaty is therefore invalid. Treaties which are concluded through fraud, misleading representation by the parties or other inappropriate behaviour are not valid and therefore do not create rights and obligations for the parties.[39] Provisions of treaties which are imposed by the use of force have not either the legal effect of international treaties and are therefore invalid. Thus, consent appears to be one of the most important principles for the conclusion of international treaties and this principle is one of the chief conditions of the law of treaties in Islamic and public international law.

7. The Principle of Justice

7.1. *Qualified Values*

Islamic international law essentially bases its social value on the principle of justice. In fact, this principle has important functions within the Islamic system and constitutes an integral part of Islamic jurisdiction. Islamic states are obliged not to ignore this principle and should implement the principle in their international conducts fully. This includes both in war and peacetimes. The principle of justice in Islamic law generally consists of moral, legal and theological values. All these values also benefit substantially from divine jurisprudence. By moral value, we do not necessarily mean that the law is based on the expression of moral necessities and emotional feelings, but, on the principles of natural and positive law. (55)

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[37] The *Qur'ān*, reads that 'How could there be a treaty between idolaters and God and His Apostle, except those you covenanted by he Sacred Mosque? Therefore as long as they are honest with you be correct with them, for God loves those who are godly.' 9:7.

[38] Consult Ian Brownlie, *Principles of Public International Law* (2008).

[39] See the relevant chapter.

Islamic international law calls on all Islamic states and nations to be just and not to violate the principle of justice, even when, there have been serious violations of their rights by other states or nations. This principle within Islamic international law encourages the peaceful settlement of international disputes and consequently prevents wars in international relations. It is therefore of fundamental importance that all international conflicts be resolved through justice and fairness. The disappearance of justice can disqualify all actions of human beings.[40]

7.2. *Human Qualification*

On the whole, the principle of justice in the Islamic system not only applies to the sense of human morality at a given time, but also, to human substance, nature, wisdom and consciousness and also to the attitude governing the general behaviour.[41] Appropriate justice in Islam belongs to the jurisdiction of God—all other justices are subject to human qualification. It is for this reason that Islamic international law places a significant demand on justice, basing its principles of jurisdiction on principles which are already accepted by an overwhelming majority of states through appropriate and pure consent e.g. the principles within the Statute of ICC.

There must be a balanced and unbiased presentation of regulations by any relevant jurisdiction and judge. Islamic law emphasizes that even when a person is guilty of violations; he/she should be brought with priority under the jurisdiction that concerns his own theological concept. This means that the Islamic jurisdiction should not be enforced by force of law but human will and choice.[42] The Qurʾān (the basic source),

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[40] The Prophet often stated that 'Acts will be 'judged' only according to motives.' Consult also El Din Attia Gamal, 'The Right to a Fair Trial in Islamic Countries', in David Weissbrodt and Rüdiger Wolfrum (eds.), *The Right to a Fair Trial* (1997), at pp. 343–371.

[41] There are several important principles relating to the general behaviour of a life of a person. It is asserted that Ali, one of the first four Caliphs (these are Abu Bakr, Umar, Uthman, and Ali) asked the Prophet about these principles. The Prophet replied that 'Knowledge is my capital, reason is the basis of my religion, desire is my mount for riding, remembrance of God is my comrade, confidence is my treasure, anxiety is my companion, science is my arm, patience is my mantle, contentment is my booty, modesty is my pride, renunciation of pleasure is my profession, certitude is my food, truth is my intercessor, obedience is my grandeur, struggle is my habituate and the delight of my heart is in prayer.'

[42] Due to the Qurʾān and the practice of Caliphs and opinion of Islamic jurists, non-Muslims have many rights which should be respected by national authorities. These are such as "1. right to life, personal safety, and respect; 2. freedom of religion; 3. right to

the Hadith (the second source) and 'the practice of all time demand that non-Muslims should have their own laws, administrated in their own tribunals by their own judges, without any interference on the part of the Muslim authorities, whether it be in religious matters or social.'[43] The concept of appropriate jurisdiction has also been developed in Islamic international law with analogy to the concept of jurisdiction in Islam. This means that when there is a question of the establishment of jurisdiction over a person who has a designated social position such as diplomats and protected persons, the rights of such persons should not be ignored.[44]

8. The Principle of Diplomatic Immunity

8.1. *Evolution of Immunity*

There are many rules regarding the immunity and protection of individuals under Islamic international law.[45] Diplomatic immunity and protection is regarded as one of the most predominant principles of the law for the development and consolidation of peaceful international relations between various nations. This principle was in fact practised in the diplomatic relations of the Prophet with other nations and the respect for this principle achieved a high level of applicability at that time.[46]

The principle of diplomatic immunity and protection is regarded as an integral part of Islamic customary international law. This custom came into existence with the practice of the Prophet and was later developed by the Caliphs whose practices were considered as a part of *Siyar*[47]or the Islamic international relations of approximately one thousand four hundred years ago. Contrary to Islamic international law, diplomatic immunity in public international law is mostly the development of the law during the twentieth century and its consolidation has not effectively

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justice and equality before law; 4. freedom of expression; 5. right to political representation; 6. freedom of movement, assembly, and association; 7. right to education; 8. right to social security; 9. right to property; 10. right to government service; 11. right to exemption from compulsory military service; etc." www.islamicity.com/articles/Articles.asp?ref=DW-0603–2948. Visited on 2009-10-14.

[43] *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 40.

[44] See chapter on diplomatic immunities.

[45] See the relevant chapter.

[46] The principle of immunity is also considered a part of diplomatic mission's dignity.

[47] Hamidullah, *The Muslim Conduct of State*, p. 21.

been possible before this time. Nevertheless, a considerable number of rules concerning diplomatic protection in public international law have been borrowed from its customary rules.[48] This is because the system of customary international law has encouraged the legal, criminal and political immunities of diplomats.

8.2. *Scope of Recognition*

The customary rules of diplomatic protection and immunity in Islamic international law may be compared with the customary rules of public international law. The difference between these two systems of law concerning diplomatic protection is basically the fact that most relevant rules of public international law are innovations of the twentieth century while the relevant rules of Islamic international law are manifestations of Islamic rules practised since the revelation of Islam by the Prophet and eventually developed in the course of Islamic jurisprudence.[49] Even though rules of Islamic international law governing diplomatic protection are as old as Islamic theology itself, they are, more or less, equivalent to contemporary rules of diplomatic protection under public international law.

In Islamic international law as in public international law, protection and immunity *inter alia* relates to matters of diplomats and their family lives, the protection and immunity of their baggage, home, any inferiors working under their offices, their religions and their relevant practices as well as the locality of their missions.[50]

One of the most important immunities and protections of diplomats under Islamic international law relates to the matter of jurisdiction over diplomats. This type of protection has had a significant function in the development and consolidation of diplomatic relations between Islamic and non-Islamic states.[51]

The protection of diplomats in public international law on the matter of jurisdiction overlaps, in many aspects such as civil and criminal cases, with that of Islamic international law. However, each area of law has its own type of jurisdiction and applies with certain conditions and under

[48] See also the relevant chapter in part II.

[49] See the relevant chapter.

[50] Immunities and protections are also for the victims of religious, political, racial or other persecutions. Therefore, refugees have good shelter under the jurisdiction of Islamic international law. See *infra*.

[51] See the relevant chapter in part II.

particular political circumstances. Moreover, the sources of one area of law are very old and are theological while the sources of international law are, generally speaking, the modern ratifications of international conventions including customary international law.

9. The Principle of Unity of Muslims

9.1. *Unity of Nations*

In principle, Islamic law emphasizes the unity of Islamic nations and is of the view that Muslim populations in essence constitute a single community. This idea of Islam can obviously be found within its international law denoting the universality of divine jurisdiction. The principle of unity of Muslims aims to bring all Muslims under one law and one jurisdiction and simultaneously spread the advantages of brotherhood, peaceful international relations, equality of interests in religions, politics as well as laws, and justices. This unity of Islamic nations may be seen within the principles of the Charter of the Organization of Islamic Conference. It states that

1) total equality between member states;
2) respect of the right of self-determination, and non-interference in the domestic affairs of member state;
3) respect of the sovereignty, independence and territorial integrity of each member state;
4) settlement of any conflict that may arise by peaceful means such as negotiation, mediation, reconciliation or arbitration;
5) abstention from the threat or use of force against the territorial integrity, national unity or political independence of any member State.[52]

The principle of unity of Muslims can especially be understood from one of the verses of the *Qur'ān* which denotes this important event. According to this verse, all human beings belonged to one community, but this was changed, at a later date.[53] This principle should not however be misunderstood by the reader. This is because Islamic principles of unity do not encourage discrimination and privileges for any nation over

[52] Article 1 (B) of the Charter of the Conference.
[53] The *Qur'ān*, 2:213.

another. It is rather the basic principle of Islamic theory that all Muslims are brothers and that all human beings should live in brotherhood and equal justice. The principle of Unity of Islamic nations can be compared with the principles of the European Union. Of course, one of the most obvious differences between these two systems is that one is based on a legislative treaty concluded in the twentieth century while the other on moral and natural principles of law. Obviously, the former is the modern institute of law, politic, economy and ethic in Europe. Otherwise both systems of law encourage more or less the following principles:

- respect of fundamental human rights;
- individuals should be treated in accordance with the law and legal orders;
- individuals should be respected by their respective governments;
- nationality or citizenship of each member is recognised by the member states;
- the voice and rights of the members should be given sufficient attention by other countries;
- development of friendly relations between the members of the union;
- assistance and cooperation in different matters of social and economic interests;
- creation of security and justice for the individuals and members themselves;
- assistance for the promotion of justice and peace;
- respects of the rights of members of the union;
- military cooperation in certain necessary conditions;
- promotion of social and economic progress between member states;
- financial assistance to states which have weak economic stability in the union;
- protection of each member from any form of antagonism.

9.2. *The Purpose of Unity*

One of the important aspects of the principle of unity of Muslims is that it creates peaceful relations between Islamic states and prevents conflicts and acts of aggression. The principle therefore highlights the fact that no Islamic nation or state should resort to aggressive conduct. Moreover, it sanctions all Muslims to contribute to the maintenance of Islamic justice, equality and brotherhood, to make available assistance, and if necessary,

armed forces in order to prevent acts of aggression. It is the duty of Islamic states/nations to impose retribution on the aggressive state to wipe out damages.

This principle of unity of Muslims in order to facilitate acts of assistance to an oppressed nation is clearly stated in the *Qur'ān*. It reads that 'If two groups of believers come to fight one another, promote peace between them. Then if one of them turns aggressive against the other, fight against the aggressive party till it returns to God's authority. If it does so, make peace among them equitably and be impartial.'[54] It is evident that Islamic law puts a significant value on the objectivity of justice and arbitrations in different matters and this principle should especially be respected in the case of a judgement relating to the matter of aggression.

9.3. *Interpretation of Unity*

The principle of the unity of Muslims should not be misinterpreted and should be compared with Chapter VII of the Charter of the United Nations relating to action with respect to threats to the peace, breaches of the peace and acts of aggression.[55] This is because the principle of the unity of Muslims prevents any act which may be a threat to Islamic peace, breach of Islamic unity, act of aggression and brotherhood ideologies. It also simultaneously prevents acts of aggression and aggressive war. The difference between these principles of Islamic international law with that of public international law expressed under Chapter VII of the United Nations may be in the form and character of authorization. The power of the latter arises from the contribution through membership by a large number of states to the Organization and their political relations with the permanent members of the United Nations while the power of the former arises from brotherhood, equality and justice including human morality and the divine jurisdiction.

Islamic relevant provisions are self-conductive while the latter may or may not be self-conductive depending on the circumstances and the views expressed by the Security Council of the United Nations. Moreover, the implementation of the relevant provisions of the United Nations depends on political consideration while the relevant provisions

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[54] The *Qur'ān, 49:9*.

[55] On chapter VII of the Charter of the United Nations see Farhad Malekian, *The Monopolization of International Criminal Law in the United Nations: A Jurisprudential Approach* (1995).

of Islamic international law is based on the notion that the unity of Muslims should not tolerate aggressive conducts which are against brotherhood, equality and justice.[56] The *Qur'ān*, the basic source of Islamic and Islamic international law reads in this context that 'The faithful are surely brothers; so restore friendship among your brothers, and fear God that you may be favoured.'[57] This verse strongly encourages the principle of peaceful relations between Muslims and settlement of their conflicts through peaceful channels.[58]

[56] This does not necessarily mean that the unity of Islamic states is not permitted to act against an aggressive conduct which is carried out against a non-Muslim nation/state.

[57] The *Qur'ān*, 49:10.

[58] The system of Security Council of the United Nations has been proved not to be healthy in international context. It has been misused for the purpose of fulfillment of interests of powerful states. For instance, the authority of the organization was monopolized by the United States and the United Kingdom to illegally invade the Iraqi territory. This brought by itself serious violations of international criminal law by the two permanent members of the United Nations. None of these members have been brought before an international court for prosecution and punishment. The recent show in the United Kingdom behind the government authority against Tony Blair demonstrates these criminal conducts of the big powerful nations. The fact is that "Tony Blair is directly responsible for the massacre of tens of thousands of innocent Iraqi, Afghani and Palestinian civilians. During his time in power he acted as George Bush's puppet, and reinforced the imperialistic and repressive measures against these countries and their people. It is estimated that up to 28,000 Afghani civilians have been killed as a result of foreign military actions since the beginning of the war in 2001, and it is estimated that around 100,000 Iraqi civilians have been killed as a result of US led attacks between 2003 and now." Hundreds protest war-criminal Tony Blair in Dublin (2010-09-04), www.wsm.ie/c/dublin-protest-war-criminal-tony-blair.

CHAPTER THREE

ISLAMIC PHILOSOPHY OF LAW IN RELATION TO ISLAMIC INTERNATIONAL LAW

1. Introduction

We look here at the theories of Islamic law only and not any political or other interpretations and applications of the law. It has frequently been seen that the pure theory of Islamic jurisprudence pragmatically differs from its origin and various political authorities have taken different advantages and benefit from that division in the system.

In this chapter, as other chapters of this book, we deal exclusively with questions affecting the philosophy of Islamic law in the system of Islamic international law and thus do not bring into consideration political factors and the misuse of the sources of the law by those who commit serious crimes under the shadow of the umbrella of Islam. Although, we do not oppose the fact that the origin of Islam is the law of struggle against inequalities and immoralities, the same law has, in some countries, been the tool of certain authorities in order to monopolize the mechanism of the law for their own personal intentions. Therefore, the chapter exclusively throws some light on the principles of the Islamic philosophy of law and its peculiarities, framework, juridical validity and flexibility in order to adapt itself to changes of time.

2. Internationalization

Islam is in essence the philosophy of universal natural existence which also includes our global relations with one another.[1] The juridical philosophy of Islam is one of the most recognised subjects within Islamic law and has been treated by Islamic jurists in various ways. This philosophy essentially bases its values on various sources of Islamic law and in particular on the framework of the *Qur'ān* constituting the basic source of

[1] For some aspects of Islamic philosophy see W. Montgomery Watt, *Islamic Philosophy and Theology* (1962).

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Islamic jurisprudence. The *Qurʾān* is a philosophy of social sciences for the rightful direction of mankind, pointing to and preventing unlawful and immoral acts which do not coincide with spiritual values.[2]

The Islamic philosophy of law in relation to the Islamic international law must be seen from the perspective of the internationalization of the conduct of Muslim nations in their external relations with other nations of the world. This philosophy cannot, in general, easily be separated from its historical evolution and evaluation, concepts of control of power and jurisprudence in Islamic world. This is because both—Islamic law and Islamic international law—have basically similar sources for the interpretation, application and enforcement of their provisions. And as a whole, Islamic law has had the purpose of internationalizing law and legal order and creating universal justice based on the principles of human rights. Therefore, the maintenance of human rights depends on two key elements. These are the international character of the principles and equal treatment of those principles concerning all nations of the world.

3. *Sui Generis*

The Islamic philosophy of law is based on the theory that Islamic legal obligations are formulated in accordance with the substance and nature of human beings. These must rely on the guidance and commands of divine jurisprudence.[3] In other words, legal obligations must correspond to the nature of man and should create equality, justice, brotherhood and peace at any level of human society. These are some of the most important principles of Islamic law and accordingly, no juridical system can be comprehensive if it does not fulfil these preliminary conditions of

[2] It is to be emphasised here that we are only dealing with the concept of Islamic law and jurisprudence and do not in any way present the exercise of the above values by individuals or Islamic states.

[3] "The motto of Islam is summed up in the expression of the Qurʾān, 'well-being in this world and well-being in the Hereafter.' Islam will certainly not satisfy the extremists of either school, the ultra-spiritualists and the ultra-materialists, yet it can be practised by an overwhelming majority of mankind, which follows an intermediate path, and develops simultaneously the body and the soul, creating a harmonious equilibrium in man as a whole. Islam has not only insisted on the importance of both these constituents of man, but also on their inseparability, so that one is not sacrificed for the benefit of the other. If Islam prescribes spiritual duties and practices, these contain also material advantages; similarly if it authorizes an act of temporal utility, it shows how this act can also be a source of spiritual satisfaction." *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 34.

juridical order. In other words, Islam puts emphasises on natural law *sui generis*. This means that Islamic law including Islamic international law is, in its own sense, mostly the presentation of natural law combing its rules into positive law in connection with its sources.

The peculiarity of Islamic philosophy of law arises from "the relatively limited range of explicit divine ordinances as compared to the whole edifice of Islamic law, particularly, Muslim international law, however, induces us to conceive of these ordinances in terms of what modern writers define as rules '*d'ordre public*."[4] Thus, an important aspect of Islamic philosophy of law is that it is a legal system which calls upon natural law, a law serving exclusively those rights which are a part of the natural rights of man. It is therefore asserted that "the idea of '*ordre public*' is comprehensive in Islamic legal theory, whereas it is rather unfamiliar to modern international law owing to the present international community's lack of a higher authority endowed with supreme powers. We have seen that in Islamic legal theory these sovereign powers reside ultimately in God. God has the power of imposing imperative rules, i.e. rules of '*ordre public*.' In Islamic legal theory, the concept of '*ordre public*' overlaps with its basis of obligation. This is natural law *sui generis*."[5]

It seems that natural law appears to be the basis of obligations under Islamic international law. With the expression of natural law in Islamic international law, we mean necessary and obligatory rules for human conduct revealed by the divine jurisdiction which are basically considered essential to the development and consolidation of peaceful international relations. Consequently, in Islam, natural law which is expressed as divine law has been a decisive factor in its promulgation. The sole purpose of natural law has also been to create peaceful relations between humans whether in an individual capacity or a state personality as a whole.

4. Fixed Framework

Within Islamic law certain principles must always be respected and agreements ignoring these important principles are incomplete. Although certain norms of Islamic law must always be fulfilled, there are

[4] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 104.

[5] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, pp. 104–105.

rules and obligations which have, in practice, quite powerful characterizations and may widely be interpreted in different countries. This means that Islamic law may be interpreted differently due to the circumstances of each case. The aim is to adapt the provisions of Islamic law to the needs of the time.[6] According to one writer, 'this theoretical aspect of rigidity becomes in practice quite elastic in Islam, in order to permit men to adapt themselves to exigencies and circumstances.'[7] This is called the flexible value of Islamic law orienting itself to the needs of the time.

It must, however, be emphasised that the principles of Islamic jurisprudence or *shari'ah* cannot be abolished or completely modified by inferior authorities. This is because Islamic law is, generally, a divine revelation and the assumption that mankind can abolish its principles is, in essence, against the constitution of Islamic law i.e. the *Qur'ān*. However, this does not prevent its interpretation and development of case law. The position may be compared with a Common law system which originally modifies itself based on cases of a modern understanding of the law.

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[6] *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 104.

[7] *Publications of Centre Culturel Islamique—Introduction to Islam*, pp. 103–104. According to one writer there are several essential reasons why Islamic law can adapt itself to the change of time and yet to be enforced. These are the following: *a)* One of the strongest reasons for the adaptability of the law is that divine laws and those established by Sunnah are not all together of the same degree or level. This is because some laws under the Islamic framework are compulsory; these are very few in number. Other laws which are recommendary according to Islam are quite considerable in number. There are still other rules under Islamic law which are neither obligatory nor recommendary, but are left to the discretion of individuals. These are the most important rules and one of the special characterizations of these rules is that they are often 'silent' in the text. *b)* One of the special characterizations of Islamic laws is that every individual has the right to interpret the laws but not to alter them. Thus, the right of interpretation or the power to interpret rules cannot by any means be monopolized by any person, although a person interpreting a rule must have the basic knowledge. Any interpretation by those who have no knowledge of Islamic laws may only be valid exclusively for their own use. *c)* Moreover, the Prophet of Islam announced an important rule which has a significant function in the interpretation and the adaptability of Islamic law to new circumstances and situations. The Prophet stated that 'My people shall never be unanimous in an error.' This means that 'Such a consensus has great possibilities of developing Islamic law and adapting it to changing circumstances.' Id., p. 104. *d)* In certain circumstances where the *Qur'ān*, the *Sunnah* and the other sources of Islamic law do not provide any provision, it is assumed that one may work out the relevant provision in accordance with other rules of Islamic law. This was accepted by the Prophet also. Id. *e)* When the interpretation of a sacred text consensus is achieved among Islamic jurists with due regard to its process, such interpretation may be modified and changed by a new consensus with similar process. Id.

Although the Islamic system of law is codified and cannot be altered from a constitutional point of view, its principal philosophy of law is that a law must be flexible and for this reason, the original source of the law, not only respects other legal systems, but also, encourages the adaptability of the law within the requirements of modern legal philosophy.[8] Under the Islamic principles of law, one can enter and conclude different agreements for a variety of purposes. Thus, when one speaks about a codify framework, one does not necessarily mean that rules and obligations of Islamic law are unsympathetic and cannot be interpreted in view of the needs of the time. A codify framework for a law does not necessarily mean a limitation for the scope of applicability of the law based on the jurisprudence of the law and its different sources.

5. Classification

While certain principles of law are codified within Islamic law, its juridical interpretation governs one of the most important aspects of the law.[9] This is because Islamic law has developed from various forms of interpretations deducted by specialists having the knowledge and capacity to interpret the law. Thus, the extension of Islamic jurisprudence largely depends on the capacity of those who are familiar with the law and have radical views for the development of the norms of Islamic law.

Within Islamic law and Islamic international law acts of individuals, groups and states may be divided into three categories. Those which are permissible or are, according to Islamic sources, of a good nature and acts where the abstentions from them are, in one way or another, encouraged. Thus, one must fulfil the *ma'ruf* and abstain from the *munkar*. The former denotes the appropriate and good nature of an act which must be fulfilled in the social or international relations of man and states while

[8] According to one writer, the judgement of history "demonstrates the flexibility and adaptability of Islam, both as a religion and as a State, throughout the ages. Accommodating itself to the needs of the time, Islam could never come into conflict with civilization, if by civilization we mean spiritual development, intellectual growth and material progress." Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 3. See also Khuda S. Sukhash, *Contribution to the History of Islamic Civilization*, 1st ed. (1930), vol. II, p. 41; See also *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 104.

[9] This aspect of the law has largely been developed and there are a number of doctrines of Islamic law which interpret it differently, but, whose arguments are, principally, based on similar sources of Islamic law.

the latter implies acts, the fulfilment of which are not recommended in Islamic law. There is also a third category of norms, the fulfilment of which has been left to the decision of the individual himself/herself.

5.1. *Permission*

The ma'ruf is characterized as those acts which are good for a person to fulfil and are also good contributions to the structure of social developments. This contains the norms which are well recognised and consolidated within the law. They are the absolute duties and obligations of mankind towards the law. The *Qur'ān* has, in many instances, referred to *ma'ruf* and its significant value for collective and social interests. Acts which fall under *ma'ruf* demonstrate also the moral values which are recognised by the *shari'ah* as permissible according to their reasons. Thus, *Ma'ruf* guides a person towards conducts that are permitted and encouraged by their nature. Therefore, it helps to a better understanding of the legal development of national and international rules and their respects.

Ma'ruf also means the right things that are commanded by divine law. It is the basic philosophy of Islamic morality encouraging all individuals to approach happiness, justice and clarity of vision, to make a distinction between right and wrong. Acts which come under *ma'ruf* are just in all aspects of social life, for example, one should assist and contribute to the elimination of starvation, to keep the natural environment from any type of harm, assist oppressed people, continuously lend a hand to the improvement of the conditions of children who do not have access to social services and developments and also give donations to the poor.

5.2. *Abstention*

Abstention is those norms of the law which seriously prohibit the commission of certain acts or violations of the law. In other words, prohibitive norms under Islamic law may be identified under the term *"munkar"*. These norms denote acts that are considered evil and are not encouraged. The purposes of abstention may vary from one subject to another and are, on the whole, for the good of both individuals and social interests. Cases that come under abstention or *munkar* are very rare in the *Qur'ān*.

The most known cases are such cases as the prohibition of alcoholic drinks and gambling. Both these are prohibited. Even though, the *Qur'ān* refers to the good utility of certain alcoholic drinks, it makes it clear that

the disadvantages of these drinks are much greater than their utility. It must however be emphasised that cases of abstention also depend on wisdom, a mature mind and the intelligence of the individual. In Islamic international criminal law, the principle of *munkar* may be applied to the prohibition of many international crimes such as crimes against humanity, war crimes, genocide, aggression, torture, rape, trafficking and slavery.

5.3. *Discretion*

The third is that categories of norms by reason being between the first two categories have neither the nature of the first category nor the second. These are chosen due to the discretion of the relevant individual. These norms can even be altered from time to time depending on the circumstances.[10] In the system of Islamic international law, discretion also has a significant function. The interpretation is that states should not conclude treaties which may solely be useful for themselves and harmful for other nations. In other worlds, any treaty which brings financial benefits to a nation, but cause, in one way or another, devastation for other nations should be abstained and not be encouraged in international relations of states. Clear examples of these treaties are treaties permitting the sale of weapons or treaties permitting the building of water dams between two nations and destroying agricultural production for a third nation.[11] In another words, even if ratifying certain treaties may not be prohibited by national or international rules, this non-prohibition should not be interpreted as permission to cause damage to other nations of the world.

The relevance of the principle of discretion within the law of armed conflict and international humanitarian law of armed conflicts is that certain activities may not be prohibited by the law of armed conflict, but, this should not interpreted as permission to conduct those activities. Atrocities and massive killing did not constitute genocide during the Second World War, but, the principle of discretion or good judgment did not permit its commission either. Accordingly, the perpetrators of the crimes against the innocent Jewish population of Europe should

[10] Although, one cannot deny that Islamic jurisprudence of law is divided into several branches by Islamic jurists and therefore has different interpretations of the law, these divisions do not mitigate the value of Islamic jurisprudence as a whole.

[11] A clear example is the destruction of food during the administration of the Prime Minister Margaret Thatcher which could be tackled under the principle of discretion.

have been given sufficient attention and care to the consequence of their serious criminal behaviours.

5.4. *International Application*

As a result of the above, norms or obligations of Islamic law including Islamic international law may be interpreted according to the given case and due to the circumstances of the given time. For this reason, Islamic international law tends to have a functional approach to the system of public international law governing the interpretation and application of the law in particular circumstances. This means that as long as, the rules of international law are not contrary to its basic principles of jurisprudence, they can coincide with the legal system of Islamic international law. For our purpose here, acts which are regulated, adopted or recommended in the instruments of international human rights law have the character of *ma'ruf* norms. They must be carried out by all Muslim nations and should not be violated. Acts of genocide, apartheid, crimes against humanity, war crimes, torture and similar acts may be categorized under the classification of *munkar* which means that they should not be committed by any Muslim nation. It is a traditional order under Islamic international law that nations must act against unjustified and unlawful acts. As it is stated by *hadith*, constituting one of the sources of Islamic international law "He who amongst you sees a *Munkar* should change it with his hand; and if he has not enough strength to do so, then he should change it with his tongue; and if he has not enough strength to do so, he should change it with his heart, and that is the weakest of faith." A close interpretation of the above statement means that it is the duty of every nation in the world to act against immoral and unjustified acts which are against the generation of mankind and harm every human being.

6. Judicial Validity

Islamic law has been basically developed within the process of juridical conclusions and not statute law.[12] A state may accept its principles and derive legal sanctions from them. The state should not however interfere in shaping the law in legal practice and neither should it determine

[12] Islamic law is a written law and has the character of Anglo Saxon laws simultaneously.

its methods and decisions. These are the duties of jurists and juridical courts. The radical extension of Islamic law is principally based on case law and whether conclusions of relevant juridical tribunals can reach the essence of the law for the adaptation of its norms to given circumstances.[13]

Accordingly, 'the Islamic ideal is, in its conception of Justice itself, nearer to the Equity of the English common law than to the Roman statute law, in that while the rights of the individual are fully recognised, the claims of the common good are always kept within view.'[14] Some of the Islamic jurists have however criticized this conception latter. Nevertheless, it implies the broad juridical validity of the Islamic system and the virtue of the development of the system which surely adapts itself to changes of the time.

7. Universality

One important characteristic of the Islamic philosophy of law is that the law and its subjects not only serve one another simultaneously, but are also bound to the universality principle of a central jurisdiction. Thus, Islamic law sees every legal system as an integral part of one legal system and all legal systems should correspond to the requirements of the basic system of law and order. This is the divine law and for the purpose of this book, the *philosophy of Islamic international law*.[15] "We may argue, from a philosophical viewpoint, that Islam, as a universal religion, laid emphasis on individual allegiance to a faith which recognised no boundaries for its kingdom: for under a system which claims to be universal, territory ceases to be a deciding factor in the intercourse among people. Piety and obedience to God were the criteria of good citizen under the Islamic ideology, rather than race, class, or attachment to a certain home or country."[16] It is on the basis of this universality principle and/or international community interests that the *Qur'ān* reads

[13] In fact "Muslim law began as the law of a State and of a ruling community and served the purposes of the community when it ruled supreme from the Atlantic to the Pacific. It had an inherent capacity to develop and to adapt itself to the exigencies of time and clime." *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 111.

[14] H.A.R. Gibb and Harold Bowen, *Islamic Society and the West, A Study of the Impact of Western Civilization on Moslem Culture in the Near East* (1957), vol. 1, part II, p. 118.

[15] *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 99.

[16] Khadduri, *War and Peace in the Law of Islam*, pp. 45–46.

that 'There is not a thing that moves on the earth, no bird that flies on its wings, but has a community of its own like yours. There is nothing that we have left out from recording.'[17]

The prophet of Islam has also repeatedly emphasised the value of the principle of universality in the relations of mankind. He pointed out the importance of faithfulness and the good morality of man and woman. In one of his very significant speeches, he stated that 'O people, verily your Lord is one and your father is one. All of you belong to Adam and Adam is (made) of earth. Behold, there is no superiority for an Arab over a non-Arab and for a non-Arab over an Arab; nor for a red-coloured over a black-coloured and for a black-skinned over a red-skinned except in piety. Verily the noblest among you is he who is the most pious.'[18]

The theory of Islamic law is considered by many writers of Islamic law to have substantive juridical value. Accordingly, this is on the basis that God anticipates its legal philosophy and its elements of jurisdictions are not therefore influenced, monopolized or selected by individuals for their own interests. This has therefore been recognised as a valuable aspect of pure Islamic law. It was on the basis of this theory that Islamic law developed into the civilisations of different nations and states.[19] One cannot however disagree with the fact that this theory has been violated and been employed in the interests of states or individuals under most states' political jurisdiction claiming to respect and apply Islamic rules. The historical background of Islamic law also demonstrates the fact that Islamic believers and fighters, in many aspects, imposed its rules by armed forces on the disbeliever who could not express their free consent. It is also worth mentioning here that the provisions of public international law have not come into effect voluntarily between states of the world and are not necessarily formulated for the interests of all states. On the contrary, a large number of provisions have entered into public

[17] The *Qur'ān*, 6:38.

[18] Mumtaz-Ul-Muhaddetheen Maulana A.M.G.M. Muhammad Ubaidul Akbar, *The Orations of Muhammad: The Prophet of Islam* (1972), pp. 96–97.

[19] According to one writer, "To judge Islamic expansion fairly, it is vital to look at it from the right angle. Islam … is a reformative revolution to be counted among the great revolutions in the history of humanity. Islam, like both the French and the Russian revolutions, is a revolution based on particular dogmas and theories addressed to humanity as a whole and claiming universality. Such revolutions tend to prevail by their very nature and have a predestined role to enforce their philosophy upon the opponents of the new ideas, otherwise they betray their aim and 'raison d'être.'" Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 20.

international law in accordance with the circumstances of that particular time. Consequently, many of its rules are the effect of monopolization of this legal discipline and the military power of a state over another. Thus, the system of consistency in the international law of today is the result of the inconsistency of international law of yesterday formulated during or after armed conflicts.

8. Legality

Significantly, the Islamic system of law places a high value on the principle of *de lege lata*. This means that the value of law is estimated on the basis of its general explanatory power or legality. Whilst the unchangeable characterization of Islamic law is an important element of the law of *Shari'ah*, new rules and obligations that are not against its fundamental elements can easily be exercised and may not be considered against its eternal characterization. It is for this reason that states which have regulated provisions of Islamic law into their legislations or definitely implement *Shari'ah* enter into the ratification of numerous international agreements.

The Islamic philosophy of law principally rests on the value of an individual's rights, duties and obligations. The application of the retroactivity principle is prohibited in the Islamic legal system. The jurisdiction in Islamic system is therefore based on quality and the application of norms which are already well-recognised within its system. This means that the enforcement of retroactive provisions which are not part of already recognised rules of Islamic jurisdiction is not permitted. It is in this relation that Islamic law has a different legal characterization governing principles of *jus cogens*.

According to the Islamic law, force must not be employed in the practice of individuals or states for the purpose of implementation of the principles of the *Qur'ān*.[20] Under Islamic law force may not be used for the purpose of implementing its principles on non-Muslims.[21] Similar to the provisions of Islamic international law, the provisions of public international law have to be of *de lege lata* nature. This means that the

[20] Although certain versions of the *Qur'ān* denote the enforcement of its rules on unbelievers, these should be read in relation to historical events and in the context of other versions which definitely prohibit the use of force between Muslims and non-Muslims.

[21] However, the practice of many Islamic states has been different from its basic rules and this creates conflict and contradiction between theory and the practice.

principle of legality has long been accepted within the system. However, despite this fundamental principle, one cannot ignore the fact that the provisions of public international law have not always been based on the legality principle. The principle of *de lege lata* has therefore been violated whenever such violation has been seen as a necessary condition for the maintenance of peace and justice.[22]

[22] A clear example of this violation occurred in relation to World War II. In fact, the International Military Tribunal in Nuremberg and Tokyo applied a number of rules of criminal jurisdiction and statutes that had the character of *ex post facto law*. One of the basic reasons for the use of this retroactive law was the gravity of the crimes during the war and therefore the importance of the implementation of the principles of natural law. The maintenance of human dignity took priority to the provisions of positive law or *de lege lata*. This means that the genocide of the Jew created more attention to humanity than to the content of the law itself.

CHAPTER FOUR

SOURCES OF ISLAMIC INTERNATIONAL LAW

1. Introduction

This chapter has mainly dealt with the sources of Islamic international law but sources of public international law have also been focused on when they have been seen to be necessary.

The differences between the sources of both these systems arise from the fact that the sources of public international law are created in international relations of states and are therefore the product of numerous states conducts while the sources of Islamic international law are basically created from the principles of the *Qur'ān*. Accordingly, the purpose of this chapter is to examine the sources of both these legal systems and study if their principles are adaptable to one another. The intention is to find out whether they can be referred to in certain international conflicts with Islamic nations. Here, the aim is to minimise any serious violation between the two legal systems with the chief purpose of achieving a peaceful settlement in international disputes. It is a fact that within a law, we are looking for the intentions of the law and whether different systems of law coincide with one another's intentions.

2. Constitution Machinery

While the Islamic international law and the public international law have certain similarities in the application of their sources, the basic legal ideas in both systems are quit different.[1] The latter essentially needs

[1] According to one writer "Analysed in terms of modern law of nations, the sources of the Muslim law of nations conform to the same categories defined by modern jurists and the Statute of the International Court of Justice, namely, agreement, custom, reason, and authority. The Qu'rân and the true Muhammadan hadîths represent authority; the sunna, embodying the Arabian jus gentium, is equivalent to custom; rules expressed in treaties with non-Muslims fall into the category of agreement; and the fatwas and juristic commentaries of text-writers as well ass the utterances and opinions of the caliphs in the interpretation and the application of the law, based on analogy and logical deductions

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proceedings for its legislations, while the former does not. The Islamic international law has based its legislation heavily on the *Qur'ān*. No element of Islamic international law can be regarded as complete if it is, in one way or another, contrary to the principal inspiration of the *Qur'ān*. The jurists regard the *Qur'ān* as the constitution of Islam.

Consequently, the constitutional machinery of Islamic law differs from the constitutional machinery of other laws. This is also true in the case of Islamic international law and public international law. Both have different types of constitutions. The latter is not self-creating and must be suggested, discussed, adopted and enforced, while the former is self-created and its provisions adapt themselves to the requirements of the times. For this reason the sources of public international law are still questioned due to the non-existence of a central legislation acceptable to all states.[2] But, since Islamic law has consolidated sources, its legal validity cannot be questioned by the Islamic jurists.

2.1. *Formal and Material Sources*

In Islamic law including Islamic international law one may, like municipal systems, distinguish between formal sources and material sources of the law, while in the system of public international law such a distinction is misleading and inappropriate.[3] The formal source in Islamic law is the Qurʾān. This implies rules, obligations, duties and responsibilities. The material sources of the law are sources which provide evidence of basic rules and are an extension and development of the formal source; hav-

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from authoritative sources, may be said to form reason. Such utterances, opinions and decisions are to be found in the jurists' commentaries in early law textbooks and in the compilations of fatwas." Khadduri, *War and Peace in the Law of Islam*, pp. 47–48.

[2] Sources of public international law can, for example, be examined in the provisions of Article 38 of the International Court of Justice which specifies that:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognised by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

[3] Ian Brownlie, *The Principle of Public International Law*, 3rd ed. (1979), p. 1.

ing the status of juridically binding obligations. Hence, one may distinguish between formal and material sources in Islamic law. Despite this, the material sources of the law are independent sources and therefore the relevant rules of law are applicable to different situations and are also binding.[4]

3. The Primary Sources

3.1. *The* Qurʾān

The *Qurʾān* is technically known as the Holy Book. It is the Holy Scripture of the Mohammedans.[5] It literally means reading as well as recitation. On the whole, the *Qurʾān* has two different legal commandments; those which are *muhkam*—decisive and those which are *mutashabih*—obscure which means they may be interpreted differently.[6] The decisive commandments of the Qurʾān are those which imply the basic precepts of Islam. The second legal concept implies verses which may be analogous to different situations.[7] The former has an obligatory character while the latter does not. The decisive rules of Islamic law can be compared with what is called *de droit* strict.[8] The obscure rules are subject to those terms of international law which are called complementary, interpretative and explicative.[9] Similar concepts are stated in the *Qurʾān* as well.[10]

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[4] It is also important to emphasize that the sources of Islamic international law, contrary to that of traditional public international law, place heavy weight on individual rights and duties. This is not seen in public international law until the late 1948 in the Declaration of Human Rights and its extension and development into other human rights instruments.

[5] The *Qurʾān* is accordingly the words of the God revealed through the angel Gabriel to the Prophet Mohammed, first at Mecca and later at Medina.

[6] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 111.

[7] Id.

[8] Id.

[9] Id., p. 112.

[10] The *Qurʾān* reads that "He has sent down this book which contains some verses that are categorical and basic of the Book, and others allegorical. But those who are twisted of mind look for verses metaphorical, seeking deviation and giving to them interpretations of their own; but none knows their meaning except God; and those who are steeped in knowledge affirm: We believe in them as all of them are from the Lord. But only those who have wisdom understand." 4:7.

3.1.1. *Prominent Source*

The *Qur'ān* constitutes the prominent source of Islamic international law.[11] The *Qur'ān* not only establishes the public provisions of internal relations in domestic affairs, but also, the international public relations between individuals, organizations and states. Furthermore, the provisions of Islamic international law in the *Qur'ān* consist of rules, obligations and also the methods to achieve internationally peaceful relations between individuals, groups, nations and states.[12] Therefore, an important principle of the *Qur'ān* is the principle of the peaceful settlement of international disputes. According to this principle, all international disputes must be settled equally and the principle of justice and equality before the law must not be ignored by the conflicting parties. For this reason, the conflicting parties are encouraged to use arbitral rules and avoid war in the settlement of disputes.[13]

The principle of the peaceful settlement of international disputes also has an important place within the system of public international law. This principle has been entered into the law of the United Nations Charter especially. The preamble of the Charter has strongly recommended states of the world which are the members of the Organization to respect this principle in their international relations. This means that there is a significant goal between the systems of public international law with that of Islamic international law in order to solve international conflict in accordance with peaceful methods and adjustment. In other words, while the sources of these two legal systems are different, their legal and political intentions are not.

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[11] The *Qur'ān* constituting the basic source of Islamic law is the most important source for the settlement of legal issues under Islamic law. The *Qur'ān* is known to be the words of God and was revealed to the Prophet of Islam over a 23 year period. The *Qur'ān* literally means recitation and reading. The *Qur'ān* was revealed to the Prophet in fragments due to the requirements of time. The earliest revelations of the *Qur'ān* were not written down immediately because there were then very few adherents and disciples of Islam. However, this changed very soon through the development of Islam and an appropriate copy of the *Qur'ān* was collected later and saved. The *Qur'ān* was adjusted to the standard pronunciation prevailing in Mecca.

[12] The *Qur'ān* has 6236 versions on different subject matter, 500 of which have juridical provisions.

[13] The principles and rules of the *Qur'ān* governing public international law have a broad scope and cannot altogether be presented here. The *Qur'ān* must, simultaneously, be analysed with other sources of Islamic law and their contents with due regard to their various historical contexts and legal interpretations. In any event, the *Qur'ān* contains numerous norms on the law of nations and remains invaluable both to international

3.1.2. *Principles of Justice and Equality*

The *Qurʾān* emphasizes in a number of articles the respect of the principles of justice and equality between all nations and states in an international, legal and political community. Accordingly, international justice cannot be achieved if groups and individuals do not have equal rights and obligations. It is upon these two important principles that the whole philosophy of Islamic international law has been developed. The *Qurʾān* emphasizes that "God does not guide those who are unjust."[14] The source goes further and reads that "God does not forbid you from being kind and acting justly towards those who did not fight over faith with you, nor expelled you from your homes. God indeed loves those who are just."[15] Furthermore, it is also stated that "It may be that God will create love between you and your enemies. God is all-powerful, and God is forgiving, ever-merciful."[16]

With all these versions, the Qurʾān encourages the peaceful, just and fair settlement of disputes and the distribution of equality between all nations of the world.[17] Equally, the sources of public international law encourage the peaceful, fair and just settlement of international disputes. In other words, many sources of the law such as international conventional law, international customary law and the resolutions of the General Assembly of the United Nations emphasise the settlement of international conflicts with peaceful channels. The assumption that the word justice or peace has different definitions within both legal systems is rather unacceptable based on the fact that peace or justice should create equality of arms between members of conflicting parties, and as long as this principle is not fulfilled, none of the systems is legally or ethically correct.

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law and Islamic international law. The international rules of Islamic international law are documented in other sections.

[14] The *Qurʾān*, 2:258.

[15] The *Qurʾān*, 60:8.

[16] The *Qurʾān*, 60:7. The above verse is followed by another one. It reads that 'He only forbids you from making friends with those who fought over faith with you and banished you from your homes, and aided in your exile.' The *Qurʾān*, 60:9.

[17] But, one serious problem of the verses of the *Qurʾān* is that they have a symbolic character and their real attribution has been very rare. In particular, the first Islamic states acted not only unjustly towards other nations such as Persia, but also, waged war against their own legal existence. In different periods of Islamic history, to own the power of Islamic states and to have authority over individuals and nations became one of the most important aspects of the theory of justice and fairness under the authority of those who had gained the power of Islamic state. It is the same fact today. This means that the democratic values of Islamic law and consequently the respect of different nations, cultures and religions are strongly misused.

3.1.3. *Opposition to Inequalities*

The *Qur'ān* opposes all types of rights and obligations creating inequalities and injustices between subjects of international law. If this were respected, it would present the most significant form of equality for all individuals before national and international legal systems in the Islamic societies. Since there are not any specific differences between Islamic law and Islamic international law with due regard to their purposes of creating equality between their subjects, their purposes can easily be applied at international level. It is for this reason that the *Qur'ān* clarifies that 'O men, We created you from a male and female, and formed you into nations and tribes that you may recognise each other. He who has more integrity has indeed greater honour with God.'[18] Accordingly, the *Qur'ān* orders for the recognition of each other as men and women, as a group and nation and as a state and international community. This order demands the appreciation of the natural integrity of one another and one nation as a whole. Due to the above version, the term "integrity" implies the principle of equality between all human beings and nations without any prejudice to their national, social, cultural, economic, race, religion, language and other artificial statutes.

The *Qur'ān* especially emphasizes that force should not be used in different matters of social conduct and individuals should choose their theoretical, political and theological understandings by free consent. It reads, 'There is no compulsion in matter of faith. Distinct is the way of guidance now from error. He who turns away from the forces of evil and believers in God, will surly hold fast to a handle that is strong and unbreakable, for God hears all and knows everything.'[19] Furthermore, according to the main source of Islamic law, in social relations no race is above the other and none is better than another. The *Qur'ān* illustrates this by stating that "O you who believe, men should not laugh at other men, for it may be they are better than them; and women should not laugh at other women, for they may perhaps be better than them."[20] It has also repeatedly emphasised the principle of brotherhood between all individuals in their national and international relations. The principle is applicable regardless of race, language, sex or religion. The principle has

[18] The *Qur'ān*, 49:13.
[19] The *Qur'ān*, 2:256.
[20] The *Qur'ān*, 49:11.

not only a juridical effect on the fulfilment of international obligations, but also has, a psychological role in the maintenance of accurate international relations.

3.1.4. *No Compulsion in Ideologies*

One of the most important and significant principles of Islamic international law is that it prohibits all types of compulsion in international relations of states. This is of particular consideration in the case of any concept of individual or group ideologies. This principle has particularly been emphasised by the main source of Islamic law. The relevant verse of the *Qur'ān* reads that '*There is no compulsion in religion*'.[21] The verse makes it clear that compulsion is prohibited in religion and further compulsion should not be used in order to convince a person about an ideology which is against his/her own consent. In order to grip the fact, the Islamic human right openly insists that:

1. Everyone has the right to freedom of thought, conscience and religion and no restrictions may be imposed on the exercise of such freedoms except as provided for by law.
2. The freedom to manifest one's religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others.
3. Parents or guardians have the freedom to provide for the religious and moral education of their children.[22]

The principle of consent under Islamic international law constitutes one of the first principles of human morality. This is in order to achieve peace and justice. It means that the use of force in order to enforce ideological conceptions is a prohibited principle under Islamic law. This principle stems from the fact that Islamic ideology empowers in essence from mutual consent between divine jurisdiction and individual himself/herself. Needless to say that our thesis has essentially been based on Islamic original rules and regulations embodied in the sources of the law and not necessarily in its historical development in the practice of different Islamic regimes. Consequently, when we say that there is no

[21] The *Qur'ān*, 2:256.
[22] Article 30.

compulsion in religious ideologies, we express the words of positive law and not its various developments and misinterpretations under the authorities of different religious political powers. A similar fact is also true in the case of many principles of public international law and their development in the practice of various regimes.

3.1.5. *Automatic Application*

There are, in practice, no sources of public international law which can be compared with the *Qur'ān* attitudes entirely. This is based on several essential reasons. Firstly, it is self-conductive. This means its principles, norms, rules and obligations do not need authorization and should automatically be applied in relevant situations by those who are faithful to its inspiration. This is one of the pleasing essences of the *Qur'ān*. It has different characterizations and owns the virtue of self-conductivity, self-adaptation, self-confirmation, self-applicability and also self-enforceability. Secondly, sources of public international law must be considered by conflicting parties and may or may not be enforced on equal and just principles.[23] The *Qur'ān* does not, however, own this *modus operandi* function of public international law. Its principles, if they are being respected, create without doubt for the communities of Muslims, equality and justice based on divine jurisdiction. This is a jurisdiction in which laws, courts, judges and the accused must be respected. Despite the fact that the theory is very powerful, the practice of the law is quite different between Muslim nations.

3.2. Sunnah

Sunnah is the behaviour, collection of sayings and decisions of the Prophet of Islam concerning different situations.[24] *Sunnah* or broadly speaking,

[23] However, by this statement we do not mean that the relevant provisions of the *Qur'ān* should be applied in international relations of states. This is because speaking about the theory of the law does not necessarily mean speaking of its application. The *Qur'ān* contains many rules which are, not only, rich in their meaning, but are also, simple in cases of application. This may, also be true, in the case of many other international laws of antiquity.

[24] Some words on the life of the Prophet are relevant here. According to the *Qur'ān*, the Prophet of Islam Mohammed was the seal and last of the messengers of God. He was born into one of the leading families in Mecca. He was brought up by an uncle when left orphaned in his childhood. Mohammed became a tradesman in a caravan and later became a leading commercial man for a widow named Khadija. He received the words of God and was chosen to relate the messages of God. Because of his new creative channel Mohammed suffered in Mecca and therefore fled secretly to Medina. The new centre

the Muhammadan literature which includes also *hadith* constitutes the second source of Islamic belief and refers to the *Qur'ān*.[25] Muslims have therefore no conflict in the acceptance of *Sunnah* as the second source of Islamic law.

It is on the basis of *Sunnah* that Islamic international law in general and Islamic law in particular are regulated, interpreted and applied in many instances. *Sunnah* is greatly helpful for the solving of judicial conflicts. *Sunnah* has also helped the interpretation of the *Qur'ān*[26] to a great extent and it may apply regardless of the conflicts concerning the interpretation of versions of the *Qur'ān*. It was for this reason that this source of Islamic law contributed to the practical development of the principles of Islam during the early revelation of Islam and consequently the enforcement of the principles of the *Qur'ān* between various Arabic clans and groups.[27] The employment of the *Sunnah* as a second source of Islamic law reached its highest stage of development after the death of the Prophet of Islam.[28]

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for the Islamic movement was thereafter established in Medina. This immigration of the Prophet is called *Hijra*. Only a year after the Hijra of the Prophet, it was proclaimed the central shrine in the world of Islam. The *Qur'ān* was revealed to Mohammed over a period of twenty three years, thirteen years in Mecca and ten years in Medina.

For the Prophet, Islam constituted an integral part of the community and was solely organized by one political motive and oriented for human safety. This was contrary to the idea of a church existing within a secular state. It was according to this fundamental theory that Islam and its political lines were considered a single body. It was this fundamental concept in Mecca which was put later on into political practice in Medina. Since the leaders and people of Medina had sought and invited the Prophet, the Prophet took over the authority of the political community of Medina. This religious and political invitation from Medina and the opposition from Mecca which was based on political and economic grounds together, became a strong reason for the Prophet to lead the Islamic political, theological and economic movements, not only in Medina, but very soon also in Mecca where he was strongly objected to by the authorities. Mecca was incorporated within the Islamic system after seven years of struggle during which three major battles namely Badr, Ohod, and the Ditch were conducted. The Prophet was much more interested in diplomatic negotiations and military actions were not conducted if the former was successful.

[25] Alfred Guillaume, *The Traditions of Islam: An Introduction to the Study of the Hadith Literature* (1924), p. 5.

[26] It must however be emphasised that *Sunnah* is not the law of interpretation of the *Qur'ān*. Although, we do not deny that it simplifies the interpretations of *Qur'ānic* versions whenever it seems necessary for a better understanding of their provisions. Nevertheless, the *Sunnah* constitutes a separate source of Islamic law.

[27] See generally Guillaume, *The Traditions of Islam: An Introduction to the Study of the Hadith Literature*.

[28] The Prophet of Islam was very cautious in writing and collecting Qur'ānic codes. The core purpose was to keep the Qur'ānic codes from misunderstandings and also to

However, there are different views concerning what should and should not be accepted as Sunnah or *hadith*.[29]

3.2.1. *Wisdom*

Wisdom is a condition for the adoptability of a view as a part of *Sunnah*. This means that persons who give information on *Sunnah* must be wise and should not have psychological problems. Another key condition is that news about *Sunnah* must be confirmed by a considerable number of persons. The *Sunnah* in Islamic international law may be compared with that of customary international law. This is because *Sunnah* is custom and the habits of life of Mohammed. Similarly, customs in international law are habits which have long been practised by the subjects of international law and have not been objected to as a rule within the system. They are both the consequence of repetitions. A chief difference between these two systems of custom is that the former largely emanates from the constitution of Islamic law and is consequently based on its own legal philosophy while the latter has essentially been developed from political considerations and been accepted by states as an obligatory rule binding in their international relations. However, one cannot disagree with the fact that many rules of customary international law are today an integral part of conventional international law. This is particularly credible in the case of the international humanitarian law of armed conflicts.

In other words, the Prophet's custom in Islamic international law is an integral part of its legislation but a custom in public international law is generally a rule having no basic legislation. Acceptance of the Prophet's custom in Islamic law is, essentially, a fact and it cannot be denied by its subjects while the subjects of international law, due to different interpretations and political considerations may, easily reject the existence of a customary rule of international law. In fact, it has been seen that a rule of customary international law that has been referred to

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give chief priority to the Qur'ān. Sunnah was not written until the beginning of the third Islamic century.

[29] See generally Guillaume, *The Traditions of Islam: An Introduction to the Study of the Hadith Literature*, p. 28. Different conditions have been suggested in order to keep the *Sunnah(s)* of Prophet far from interference by other acts. For this reason, it is asserted that the *Sunnah* must be transformed to us by those who are recognised just and right persons in accordance with overwhelming majority of people in a society. Thus, a *Sunnah* cannot be valid which is passed to us by persons who are notorious in giving wrong information or whose social reputation is bad.

by one state against another has not been accepted by the latter, because of its uncertain, as well as non-written characterization.

3.2.2. *Custom*

Under Islamic international law, it is almost impossible to disagree with a rule of *Sunnah* for legal or political reasons; while a customary rule of public international law may, for one reason or another, be altered or abolished. This is because the *Sunnah* constitutes a part of the customary rules of Islamic international law and cannot be abolished or completely modified. However, a customary rule of Islamic international law may, broadly, be interpreted in the light of new circumstances depending on the needs of states in certain international relations. Likewise, customary rules of international law have often been modified in order to fulfil the requirements of states.

The *Qur'ān* has also stated the duty of all Muslims to follow the manner, behaviour and decisions of the Prophet. It clearly states that 'O you who believe, obey God and the Prophet and those in authority among you; and if you are at variance over something, refer it to God and the Messenger … This is good for you and the best of settlements.'[30] In another version, it reads that 'O Lord, we believe in Your revelations and follow this apostle.'[31] Similarly, it announces that 'Obey God and the Prophet if you really believe.'[32] It also goes further and states that 'O believers, obey God and His messenger, and do not turn away from him when you hear him,'[33] and 'do not be like those who say 'we have heard,' but do not hear.'[34] These clarifications are completed with another verse. According to it 'O believers, respond to the call of God and His Prophet when he calls you to what will give you life and preservation.'[35] All these versions and many others imply the importance of Sunnah as a source of Islamic international law.

Certain practices under Islamic international law may also have the force of customary rule when the practice is not objected to in the conduct of states and if the function of such a rule is not against the principles of Islam such as practices concerning humanitarian assistance, human rights practices, cooperation with international entities in order

[30] 4:59.
[31] 3:53.
[32] 8:1.
[33] 8:20.
[34] 8:21.
[35] 8:24.

to prevent violations and create peaceful settlement of international disputes and giving asylum to refugees. The reason for this is that many of these practices have already existed within the system of Islamic law or their purposes do not contradict the chief purposes of Islam.

3.2.3. Hadith

A *hadith* must not be confused with a Sunnah.[36] This is because they have two different characterizations and different meanings. Nevertheless, jurists have asserted that they are, more or less, identical. In general, a section from Sunnah is Hadith and therefore constitutes an integral part of the *Sunnah*.[37] It denotes the narrations of the Prophet of Islam conveyed to man by listening.

Hadith has been criticised by certain writers having different opinions about it. These criticisms are of different degrees and mostly characterize it in a lower state of validity and recognition. According to one view it is difficult to accept that all *hadith(s)* are authoritative.[38] Some of them are

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[36] According to one writer, "*Sunnah* is the custom of mores, which was prevalent in the Arabian community, with regard to a religious, socil, or legal matter. After the advent of Mohammedanism the old customs of the Arabs were partly modify by the conduct of the Prophet, and to a lesser degree, of his companions. This change, however, only affected the content, for the *sunnah* still continued as a rule of conduct. A *hadith* on the other hand, is a statement of the Prophet." Nicolas P. Aghnides, *Mohammedan Theories of Finance with an Intorduction to Mohammedan Law* (1916), p. 36.

[37] According to one view a narrative is generally called a *hadith*—meaning statement. *Hadith* is therefore considered a vehicle for the *Sunnah*. It is thus stated that "the whole corpus of the *sunna* recorded and transmitted in the form of *hadiths* is itself generally called 'the *hadith*'." H.A.R. Gibb, *Mohammedanism: An Historical Survey* (1949), pp. 74–75.

[38] After the death of the Prophet and competition to gain power "naturally severed as so many inducements to the un-conscientious and the ambitious to invent and circulate false traditions in order to support their political or other schemes. As time went on and the Companions of the Prophet began one by one to pass away, it became relatively easier to put false traditions in circulation, and the number soon became very large. Some were even so unscrupulous as to ascribe to the Prophet statements referring to litigations that had arisen after his death … The zeal for circulating false *hadiths*, however, is to be contrasted with the great caution which characterized the Companions of the Prophet and other pious Moslems. The biographies … offer us many a remarkable example of this kind …" The Companions "were afraid that in repeating the words of the Prophet they might unwittingly add to or subtract from them. This state of mind explains why in the beginning the hadiths were not written down. For, if distortion of a *hadith* in saying it was so dreadful, how much more so in writing it. Therefore a *hadith* was not considered canonical unless it was kept in memory and orally handed on. This does not mean that writing was not used at all. From the very first, writing was resorted to, but only as an aid to the memory, and when a *hadith* was written, it was destroyed as soon

affected by individuals. Undoubtedly, there have been a large amount of *hadith(s)* in Islamic literature. These have not altogether been accepted as creating the second source of Islamic law. Quite a large number of them were wholly omitted from the history of Islamic law when they were being collected for record. This was in order to save them from individual monopoly and control. It is stated that 'There are six collections of *hadiths* in the making of which it was attempted to be critical and to include only reliable (*sahih*) *hadiths*. They were all compiled in the third century of the *Hijrah* and are considered *standard* works.'[39] These works are presented in six books known as the six sahihs *i.e.* the six reliable collections.[40] Obviously, *Sunnah* and *hadith* which were against the *Qur'ānic* principles and had, more or less, contrary conclusions could not be accepted at the time of their collections.

What remains for use from *hadith* is a selection of huge narratives from the early time of Islam. As it is stated 'In the course of time it became established that each tradition must include a chain of authorities through which it could be traced back to the actual Companions of the Prophet who were present on the occasion concerned.' Moreover, 'traditions were classified and compiled according to the relative certainty with which they could be—or—were accepted as authentic.'[41] Yet, the authenticity of a *hadith* neither rests on its degree, level and length nor the scope of application. It is rather the substance, aim, nature and above all the connection with the objectives of Islamic law which make the nature of *hadith* confidential. This means that in order for a *hadith* to be reliable; it must have a potential function for the accurate application of the *Qur'ānic* basic principles in given cases and at given times.

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as committed to memory. Nevertheless the writing down of *hadiths* became general early in the first century of the *Hijrah*." Aghnides, *Mohammedan Theories of Finance with an Intorduction to Mohammedan Law*, pp. 37–38.

The above writer however later concludes that "even if we assume that all the rules have been obeyed, the mere fact that a *hadith* had found a place in the approved collections, the *sahihs*, by no means proves its genuineness. Unless otherwise confirmed, there is always a theoretical possibility that it might have been forged. The Mohammedans themselves have recognised this possibility, since most of them agree that the 'individual' produces only probable knowledge …" Id., p. 58.

[39] Aghnides, *Mohammedan Theories of Finance with an Intorduction to Mohammedan Law*, p. 39.

[40] Id.

[41] J.N.D. Anderson, *Law as a Social Force*, p. 15.

4. The Subsidiary Sources

4.1. Ijma

4.1.1. *Common Understanding of* Ijma

Ijma constitutes one of the subsidiary sources of Islamic law. The justification for *Ijma* as a source of Islamic law is based on two of the verses of the *Qur'ān*. Accordingly the *Qur'ān* reads that 'It is thus that we have made you a nation of the right mean.'[42] In another verse, the *Qur'ān* further states that 'And he who opposes the Prophet even after the way has become clear to him, and follows a path other than the way of believers.'[43] The last sentence of this verse implies the fact that there may exist a consensus in the Mohammedans' community namely 'the way of believers.' The Prophet has also made this deduction clear when he stated that 'My people (ummah) shall never agree on an error.'[44]

Ijma constitutes the third source of Islamic international law. *Ijma* means consensus and can be interpreted differently with due regard to the opinions of Islamic jurists. The reason for this is that there is not yet an absolute definition of the word *Ijma* acceptable to all Islamic jurists or writers. There is still the serious question of whether consensus means a majority of opinions, unanimous agreement and/or an overwhelming majority of opinions? It may be asserted that in Islamic international law if a theory of juridical nature is not against the basic principles of Islamic law or the *Qur'ān* and its legal consequences are not objected to by a majority of Islamic jurists, *Ijma* is achieved. The important point with this source of Islamic international law is that it develops the concepts of law and modifies the system.

4.1.2. *Division of* Ijma

There are two main branches of Islam and therefore two different theories. One believes that *Ijma* constitutes one of the independent and consolidated sources of Islamic law presenting the will of the majority of

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[42] The *Qur'ān*, 2:137.

[43] The *Qur'ān*, 4:115.

[44] Another verse calls on the important position of the Prophet with the followings words: "We have sent you bearing witness, bringing good news, and warning so that you might all believe in Allah and His Messenger as well as honor, respect, and glorify Him in the morning and the evening. Those who pledge their allegiance to you pledge allegiance to Allah. Allah's hand is over their hands. Those who break their pledge only break it against themselves. But as for those who fulfill the contract they have made with Allah, We will give them an immense reward." The *Qur'ān* 48:8–10.

Islamic jurists while the other is of the view that *Ijma* does not constitute a source of Islamic law. There are several reasons for this statement. Firstly, the opinion of some jurists of Islamic law cannot constitute the commands of God. Secondly, the mere existence of a contrary view on *Ijma* denotes its fault within the Islamic system. Thirdly, for some of the jurists *Ijma* is another picture of Sunnah. According to another opinion, the *total* agreement on some matters of Islamic law between the followers of the Prophet constitutes *Ijma*. This means that all those who are Muslims and specialists in Islamic law must be of the same opinion concerning a specific matter of law. A third opinion asserts that *Ijma* is that source of law which implies the existence of an agreement between some Islamic jurists concerning a new discovery on a matter of Islamic law. The difference between these two theories is that the former believes that the proof of *Ijma* arises automatically from the circumstances of *Ijma* itself, while the latter is of the view that the existence of *Ijma* depends largely on its discovery on a matter of Islamic law. This is of fundamental importance for the proof of *Ijma*.[45]

Different arguments concerning the proof of *Ijma* have been put forth.[46] The reason for this is that many Islamic jurists have been of the view that it is difficult and complicated to know when Islamic jurists achieve the principle of Ijma. They argue that the development and extension of Islamic jurisprudence and especially the increasing phenomenon of Islamic jurists make it difficult to know whether a majority or an overwhelming majority of Islamic jurists are of the same view. In other words, the difficulty of accession to different views prevents the development of Islamic law through *Ijma*.[47]

4.1.3. *Proving* Ijma

In general, two methods for proving *Ijma* are suggested. One method bases its principles on the investigation and study of *Ijma* by reading the views of Islamic jurists. Accordingly, the overwhelming majority of Islamic jurists' views prove the existence of *Ijma*.[48] The second method rests on the principle of hearings by one Islamic jurists of another and it has been discovered that an overwhelming majority of Islamic jurists

[45] A. Mohammedi, *The Principles of Deduction in Islamic Law*, (in Persian, 2535), pp. 126–132.
[46] Id.
[47] Id., p. 133.
[48] Id.

are of the same view. This is called a movable method and is divided into two sub-methods; one is when a number of reputable Islamic jurists are of the same view.[49] The other is when Islamic jurists in the movable method are not considerable in number. *Ijma* in this case may also be accepted if the relevant norm containing *Ijma* has sufficient eligibility for the proof of its accurate nature.[50] In other words, 'the value of *Ijma* is that a legal prescription based on an *ijma* is considered to be positive (*yaqin*), and therefore, non-conformity with it entails heresy. After the attainment of an *ijma* on a point, further controversy on that point is barred, and the point becomes acquired forever, unless it be abrogated (*naskh*) in accordance with the following rules.'[51] In short, the existence of certain norms must be definite and this is valid as long as it is not rejected by other rules.

It must, however, be asserted that *Ijma* constitutes one of the complementary sources of Islamic law when there are no other alternatives for a solution to certain juridical issues. This is regardless of the existence of different views concerning *Ijma*. One of the important reasons for this is that Islamic law has a very broad scope of applicability and its rules and principles cannot be enforced in isolation from the modern system of law which requires adaptable interpretations. Although, the principle of adaptability of Islamic law is objected to by some of the Islamic jurists, the principle must be considered one of the most important principles within the Islamic system and makes the use of an ancient system of law within the modern system possible. This means that in order to solve many of the international conflicts between Islamic and non-Islamic nations the *ijma* has a significant function.

4.2. *Jurisprudential Analogy*

The word jurisprudence has a variety of definitions depending on the context in which the word is employed. With the word jurisprudence, as one of the sources of Islamic international law, we mean that part of jurisprudence which overlaps with juridical analogy. Since the word jurisprudence, among others, embodies the development of case law for its use and application, it seems to be more accurate to use the word jurisprudential analogy instead of juridical analogy. The reason for this

[49] Id.
[50] Id.
[51] Aghnides, *Mohammedan Theories of Finance with an Introduction to Mohammedan Law*, p. 65.

is that a jurist who seeks juridical analogy, is not only bound to take into consideration other sources of Islamic international law, but is also bound to use other relevant reasons for the development of the law including, in particular, case law. Thus, the word jurisprudence here enlarges the scope of the juridical capability of a jurist to make a juridical analysis or to compare one case with another. Jurisprudential analogy is called under Islamic law *Qiyas* and is an integral source of Islamic law in general.

A condition under which the Qiyas is stated varies according to different writers and depends on the scope of the relevant material. As a whole, Qiyas must be clear and should not be stated when the legal reasons are not proven. The Qiyas must therefore be based on facts which are not hypothetical and have the value of deduction and interpretation and be relevant to the given case. Qiyas should not therefore be made in cases having no connection with the subject matter of the relevant case. Moreover, when a law states that the reason for the invalidity of a contract is a lack of age or the absence of a legal guardian, a juridical analogy in such cases is indeed without grounds.[52] Accordingly, the law must be 'silent' about the motivation for its existence and this is the essential reason for a juridical analogy being expressed.[53] If a jurist cannot discover the reasons for the existence of a law, he/she should not make a juridical analogy to the law with suspicion.[54] Therefore, some essential principles must be respected when expressing a juridical analogy. *Inter alia* are i) the source of the juridical analogy, ii) the subject for which the law is silent, iii) the law to which analogy must be made, iv) the reason for the juridical analogy, *v)* the reason for which the law is silent and so forth.[55]

Another view asserts that *Qiyas* is a subsidiary source of law. It is considered to be a mode of *Ijtihad*, which means individual judgement in a legal dilemma or question based on the interpretation and the application of the principles of Islamic law. Its function is to discover the law. The view further states that *Qiyas* 'authority is disputed, for it involves human thinking and bias. The original case (*asl*) which a jurist makes the basis for his reasoning is sometimes open to question.'[56] It follows then that the methods employed for the discovery of the law

[52] Muhammad Jafar Jafary Langaroody, *Islamic Law* (in Persian, 1978), pp. 83–84.
[53] Id., p. 84.
[54] Id., p. 84.
[55] Id., pp. 85 ff.
[56] Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence—A Study of the Juridical Principle of Qiyas* (1986), p. 463.

should be made adaptable in order to apply them to new situations. For this purpose *Qiyas* must revert to its original position in order to be useful and practical. According to the same writer, the methods used in the application of *Qiyas* or analogical reasoning are of two types.[57] One is certain and the other probable. The *Qur'ān* and Sunnah are the main sources of Islamic law and together with the third source *Ijma*, constitute the certain methods in Qiyas above. Due to the same view, the conclusion arising from the above analogical reasoning is therefore reliable.[58] In contrast to this, the probable method is not reliable since it bases its analogical reasoning on resemblance, suitability, rotation, probing and division.[59] The conclusion by this method is, consequently, uncertain.[60]

Moreover, Qiyas must solve or make understandable any unclear part of a given case and it should not therefore make the understanding more complicated. This is the chief function of Qiyas in the case of employing it as a source of Islamic international law. Due to differences in case histories, it is also stated that Qiyas should not be made to another Qiyas. However, this does not prevent an authority from employing Qiyas by referring to another case for the purpose of exemplification. In another words, Qiyas is the essence of the law for a given case and should not therefore be based on interpretations of the same law in another case. If the law fits a prior case, it is also supposed to fit other cases of the same character without any need to bring prior case(s) into examination.

The following conditions are essential in order to achieve Qiyas.

i) There must be a subject the decree of which is clear. This is called the principal subject.
ii) There must be a second subject the decree of which is unclear. This is called sub-subject.
iii) There must be a reason to call upon the decree.
iv) The decree to the sub-subject must be unclear and require adaptation.

It must be asserted that the decree to the principal subject must be based on Islamic law and not other regulated matters within another system. The decree to the principal subject must therefore be proven by way of the Qur'ān, Sunnah or Ijma and not Qiyas. This is because if the reason

[57] Id., p. 463.
[58] Id., 463.
[59] Id.
[60] Id.

in the first Qiyas also exists in the second Qiyas, both will be the same in character and if in the sub-subject the first reason does not exist, it will be impossible to declare the decree. Moreover, it must be emphasised that the principal subject and its relevant decree must not be exceptions within the Islamic system. In such cases, it cannot be used as Qiyas. In certain cases however no Qiyas can be made. These are such as the meanings of words and terminologies, in matters of the duty of praying to God.

4.3. *International Custom*

Custom is that part of international law practice which has systematically been repeated between states over a long period of time and therefore has an obligatory function. Thus, duration is one of the important principles of customary law.

A custom is a legal obligation and creates rights and duties between states. Customary rules can also easily be found in the contents of international conventions. Many international conventional obligations have therefore been taken from customary international law. Although, custom is not considered an integral part of the *Qur'ān* or the main source of Islamic law, as in the system of international law, a similar function to the above can be found in Islamic customary international law. 'Custom' should contain the following conditions in Islamic law.

i) It must be praiseworthy. This means that the custom must not be against the moral or social attitudes of a nation.
ii) It must emanate from the will of its subjects, which means *inter alia* a custom must not be a result of use of force by one state over another.
iii) A custom must be logical in nature. A custom, which is not wise, is not acceptable to the Islamic system.
iv) Islamic law must not be silent about the custom. This means that one cannot refer to a custom in Islamic international law when there is no clear evidence for its acceptance.

As a whole, a custom is valid as long as its provisions are not against the principles of Islamic law.[61] The validity of a custom between individuals, organizations or states does not necessarily mean that the custom is an integral part of Islamic law. This is because the content of Islamic

[61] According to an element whatever which is known as good between Muslims it is also recognised as good by God.

law is not alterable and the value of the law rests on the substance of divine law and not any other obligations prevailing between states. However, one cannot disagree with the fact that most rules of customary international law which have received the statutes of law are adaptable or acceptable under Islamic system. These are such as rules applicable in the time of armed conflicts, rules concerning diplomatic protections, rules concerning customary human rights law such as the Universal Declaration and, rules enforceable in the Open Seas. In any event, Islamic international law does not prevent nor object to a custom which is in conformity with its principles and does not therefore violate them.

A custom under the system of international law should not be confused with a usage. Although writers employ the words custom and usage interchangeably, they are in fact juridically different. A usage has no juridical binding character while a custom is an obligatory norm of international law. A customary rule creates a legal obligation between states while a usage does not. A very recognised usage under the system of international law is ceremonial salutes at sea. This does not however create legal obligation for states. For this reason, a usage may easily be ignored, altered or abolished. Similarly, a usage in Islamic international law is different with custom. The former is not obligatory like certain ceremonial acceptances of diplomatic persons. But the latter is obligatory, like the immunity of diplomats concerning civil procedures.

A customary rule should not be ignored, altered or abolished in the international relations of states except when a common consent is achieved between states. Ignorance of a customary rule violates the provisions of international law and creates liability for the relevant state.[62] Similarly, under Islamic international law, the violation of a customary rule may be a reason for individual, organization or state liability. That is why the statements 'behaviour and social traditions of the Prophet of Islam' are to be respected and not violated in the practice of Muslim states. In fact, as we will discuss later, some parts of Islamic customary international law arise from the traditions of the Prophet constituting in many respects an integral part of Islamic international law.

[62] Moreover, a customary rule of international law cannot be abolished or modified unless a great majority of states are willing to do so and this must be proven in practice. There are still other difficulties in the abolition or alteration of a customary rule. This is when the states for the alteration or abolition of a customary rule are, more or less, equal in number to the states which do not want to modify the customary rules. Obviously, in such situations, a certain amount of time is needed in order to prove in practice that the opinion of one side has priority over another.

CHAPTER FIVE

ISLAMIC INTERNATIONAL LAW WITHIN MUNICIPAL LAW

1. Introduction

The relation between public international law and municipal law has been one of the most important topics of international law. There have been various schools of thought presenting the nature of relations between these two systems of law. Their theories have caused serious controversy between various international lawyers and this problem is one of the most important issues in the field of public international law.[1] These conflicts have, principally, been based on issues of dualism and monism. On the one hand, there is a certain central agreement between these two legal systems on the matter of enforcement of international law. On the other hand, the question whether municipal or international law is the master of law and order is still an essential question between the aforementioned schools and this controversy has still to be settled. One of the essential reasons for this is that state sovereignty is still the master of law-making treaties, law-making power and law-making enforcement which in turn causes a considerable number of problems in the enforcement of the serious norms of international law.

One of the significant values of Islamic international law is that the above issue does not exist within its legal system and the non-existence of the above conflict functions as an important privilege in the enforcement

[1] The nature of public international law has been one of the most serious questions of legal theories between western writers. One serious objection to the system of international law has been that the system lacks, juridically and practically, the three necessary elements for producing and implementing the law. These are legislature, the executive and sanction. Therefore it is claimed that international law does not own the proper function of law and its definition. Kelsen who gives common basis for the evolution and development of the law has introduced one of the most authoritative definitions. But, his view has also been subject to criticism, because, it is a theory based on the assumption that municipal law is subject to international law. According to him municipal law has to take its order from international law and since the legal enforceability of international law is in itself subject to debate, his theory has variously been analysed by scholars of international law.

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of the provisions of Islamic international law between Islamic states. While it is a fact that both systems of international law have their own interpretations and applications, they establish certain rules for the enforcement of their provisions that are sometimes very difficult to enforce. Conflicts within public international law cannot be solved in isolation from the question of the unlimited power of state sovereignty over their territory. Equally, the provisions of Islamic international law have not been free from political tides and various divisions between different religious groups. Both systems have therefore certain difficulties concerning the interpretation of their rules under the limits of the sovereign power.

2. No Issues of Municipal Law

2.1. *Major Similarities*

Islamic international law does not generally differ in a number of significant details from the Islamic states' domestic systems. The reason for this is that Islamic international law and the domestic systems of Islamic states are based on the same source which is applicable to different juridical issues.[2] This facilitates most conflicts which may normally arise between public international law and municipal systems.[3]

Generally speaking, municipal systems differ from public international law and this creates great difficulty in the formulation and adaptation of soft national and international systems.[4] Public international law does not therefore have major similarities with municipal systems[5] but this is quite different for Islamic international law.[6] For example, the system of public international law does not have compulsory jurisdiction and therefore perpetrators of various crimes may escape punishment because of the lack of an appropriate international enforcement measure. Even, the machinery of the permanent International Criminal Court may not enforce the law, as long as states do not work and coop-

[2] Id., pp. 1–2.

[3] Maryan N.A. Green, *International Law* (1987), p. 9.

[4] Brownlie, *Principles of Public International Law*, pp. 33–36.

[5] 'In principle, municipal law may ignore international law: if a state incorporates rules of international law into its municipal law, it does so as a matter of free choice and convenience.' Green, *International Law*, p. 9.

[6] Under Islamic law, both Islamic international law and municipal systems constitute an integral part of one system. This is the most preferable system of law according to Islamic philosophy. The reason for this is that Islamic law does not, in essence, make a difference between law of state, national law or international law.

erate with its purposes. In fact, international criminals cannot be prosecuted and punished without a particular force and attention by states. The system of public international law lacks police authority to enforce its rules and obligations. Islamic international law has, contrary to public international law, major similarities with its municipal systems and the question of which system of law takes precedence over the other has no place within its legal system. The Islamic system presents a system of law which includes, among other things, municipal and international legal systems at the same level. However, one cannot decline that the system of public international law works extensively to implement its rules and provisions within all municipal legal systems and create an effective international legal system within municipal laws. A clear example is the provisions of the system of international human rights law which are to be adopted within domestic systems and be enforced as an integral part of their jurisdictions.

2.2. *Major Implementation*

The Islamic international law has practised a different policy concerning the implementation of its international legal system. Islamic law has emanated from and is regulated by one original source and since its laws are meant to be implemented by all domestic courts at the same degree and level, its implementation must be equal. In contrast to this, the system of public international law does not generally rest on the implementation of international law by domestic courts; moreover, domestic courts are not authorized by all states or by international law to carry out its juridical provisions.

There are very few instances in the system of public international law which are acceptable to most states and have not needed reconsideration. A clear example of this is the right of jurisdiction over the crime of piracy. Parties to some of the contemporary international conventions are, however, authorized to enforce their provisions concerning the prosecution of perpetrators of international crimes, but this has been very difficult in practice because of certain provisions of internal law. For example, a considerable number of treaties on the question of extradition between various states, have made the implementation of relevant international criminal provisions governing serious international crimes a very complicated dilemma.

3. Issues of Sovereignty

3.1. *Doctrines*

One important aspect of Islamic international law is that it is not based, as the system of international law is, on the extreme doctrines of sovereignty.[7] This is because Islamic international law is a manifestation of individual rights and obligations rather than the regulations of a sovereign power(s).[8] Although the law recognises the existence of different states, its principal purpose and function is based on the equal rights of all individuals and states.

On the whole, Islamic international law is principally based on individual rights and duties and was originally an international law of individuals compared with that of public international law which has basically been the international law of states. According to one writer, Islamic international law constitutes the law of individuals rights rather than states rights. According to him: "It has only been in modern times, especially under the pressure of modern material civilisation and culture that the observance of law has been attached to people in relation to the

[7] Under Islamic law sovereignty belongs to God and all other forms of sovereignty are superficial. Divine law has absolute priority over all other laws within Islamic states.

[8] Islamic states have several types of duties towards their population and these should not be ignored in Islamic interstate conduct. The first is executive duty which is principally the duty of Islamic governments when they have come into power. However, the fact that the Islamic concept of sovereignty is different from that which is generally understood under other legislations must not be ignored. This is because, according to Islam, sovereignty belongs to God and it is therefore a public interest which is organized and administered by internal authorities without exceptions for the well-being of everyone. The executive duty of a state implies also both, civil and military administrations. The second is legislative duty which regulates the rules and obligations for social conducts. It must however be admitted that the legislative duty of an Islamic state is already fixed and basically rests on the provisions of the *Qur'ān*. This, in essence, constitutes the basic source of law in the social and international conduct of states, governments and individuals. The third duty of an Islamic state is, like other non-Islamic states, judiciary duty. This duty relates to laws and social orders. In order for the judiciary duty of an Islamic state to be appropriate it must treat, before the law, all individuals as equal to one another. This is a basic principle which must also be fulfilled in the case of heads of states or governments. The fourth duty of an Islamic state is to develop Islamic culture including rules and legislations for the purpose of the accurate recognition of Islam by other states. Thus, an Islamic state is under a recognised duty to arrange different diplomatic missions for the development of cultural relations with other states. According to the foundation of Islam, no Islamic state has the right to force the Islamic system on other states. However, this has not historically been respected.

territory they live in rather than in relation to the group they belong to."[9] The same writer further clarifies that:

> We may argue, from a philosophical viewpoint, that Islam, as a universal religion, laid emphasis on individual allegiance to a faith which recognised no boundaries for its kingdom: for under a system which claims to be universal territory ceases to be a deciding factor in the intercourse among people. Piety and obedience to God were the criteria of a good citizen under the Islamic ideology, rather than race, class, or attachment to a certain home or country. Failing to achieve this ideal, the Muslim jurists did not give up the concept of the personality of the law, that is, its binding character on individuals, not on territorial groups.[10]

A part from the doctrine of sovereignty power, there are writers in public international law who try to link municipal and international law, for example, the philosopher of law Hans Kelsen. Similar ideas to Islamic international law can be found in the theory of Kelsen.[11] According to him, municipal and international law have basically the same norms for the development of their scopes of applicability.[12] He argues that international norms are the development of municipal norms[13] but do not, however, have the real virtues of enforceability, applicability and accountability like municipal systems. For him, norms of international law are primitive and therefore incomplete compared with municipal norms.[14] The theory of Kelsen is and is not consolidated within the system of international law. It has, nevertheless, played an important function in the development of international theories based on the relationship between municipal and international law.[15]

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[9] Khadduri, *War and Peace in the Law of Islam*, pp. 45–46.

[10] Id.

[11] Kelsen is one of the most well-known international law writers of the twentieth century. His opinion has been studied in most relevant academic institutions. He has, essentially, argued on the juridical and philosophical aspects of 'pure theory of law' and also on the matter of individual and state responsibility in international arena.

[12] He further argues that the municipal system has its legal validity and this is the same for the system of international law. The former is based on constitutional values or rules and obligations which are accepted and adopted by the authorities through legal process. The latter i.e. international law is principally based on international treaties and customary law, both of which together constitute the framework of the international legal system. Since treaties and customary obligations internationally bind states, they are therefore under legal duties to fulfil their international obligations. This is called in the system of international law *pacta sunt servanda*. Kelsen is thus of the opinion that 'states ought to behave as they have customarily behaved.'

[13] Lord Lloyd Hampstead, *Introduction to Jurisprudence* (1979), p. 322.

[14] See Khadduri, *War and Peace in the Law of Islam*, p. 46.

[15] Kelsen's theory therefore links domestic law with international law to one original

3.2. *Spiritual Values*

Islam emphasizes on the real value of man and his spiritual nature. It does not put any weight on totalitarian theory and therefore rejects all issues of limitation based on material values.[16] Due to the totalitarian state theory, states could not bind themselves to all types of international agreements. Even if the concept of totalitarian states is now very rare in public international law, the theory that all international conventions are not applicable under the domestic system has, not only, not been abolished, but it also plays, a significant role in the enforceability and non-enforceability of international conventions.

According to the domestic systems of most states, international conventions must be signed and ratified by internal authorities and must be adopted into municipal systems.[17] Consequently, most rules of international law, having a conventional character, are binding only in states which have accepted their legal obligations. This is based on the principle of given consent to the provisions of a treaty. States may even make, a reservation or understanding of international treaties, even though they have ratified them in accordance with their constitutional provisions. The treaties of this types having been ratified by states are indeed numerous. A recent clear example is the 1998 Statute of ICC.[18]

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source that is what the system of Islamic international law also represents. Although we do not claim that Kelsen presents the Islamic concept of law, it is nevertheless the case that his opinion overlaps on some important principles with that of Islamic international law. This is because Kelsen has, in his opinion on the pure theory of law, exclusively searched for an accurate definition of the subject matter. For him, law should be scientific and not political. In other words, the pure theory of law solely relates to that part of knowledge which deals with the law exclusively. Islamic law, in principle deals with legal questions and does not therefore deal with the politics of law. Although, this law has greatly been developed and modified in the process of its applications by the Islamic states, its framework and principal functions are the same, however. One of the most unfortunate facts is that the law is used as a political instrument to express the interests of a handful of individuals who have occupied sovereign power within the state.

[16] This is the pure theory of Islamic law and state. This was also the case when the Prophet of Islam created the first Islamic state in Medinah. However, the later practice of Islamic states varied considerably and from the theory of spiritualization, it become, in practice, more and more materialized which caused various conflicts and finally wars between those who sought the leadership of Islamic states. Thus, the pure theory of Islamic law based on divine law changed its direction considerably.

[17] See chapter two.

[18] For instance see reservations to the Statute of ICC by the Eastern Republic of Uruguay, Australian reservation, France and Colombia.

For the above reason, international conventions ratified by certain states may not be enforced under the jurisdiction of their national systems. Under Islamic international law, an international convention ratified by an Islamic state should, not only, be enforced under its national system because of the given consent for its enforcement, but also, for the reason that the convention could not have been adopted if it was contrary to the basic legislation of Islamic law, i.e. the *Qur'ān*.[19]

Although, this explanation may not be entirely satisfactory in the system of public international law, the given consent of an Islamic state must be sufficient for the implementation of conventional international law. In other words, *under the system of public international law, it is the law which must be accepted by the community of states while under Islamic international law, the conduct of the state must accept the law*. This means that the conduct of state should not be against the law and its order. In other words, a state is not permitted to interpret the law as it wishes and ignore the sole purpose or object of the law.

More clearly, under Islamic international law, certain basic principles are fixed and cannot be modified by the conduct of states. When a treaty has already been accepted by an Islamic nation, it has to be in conformity with Islamic law and therefore a state which has ratified the treaty should not later claim that the treaty was against its internal law. The provisions of the relevant law have to be developed as an integral part of its internal rules and as a part of its progressive adaptability as well as the changing facet of Islamic law within the international community as a whole. We do not however disagree with the fact that the practices of Muslim states do not altogether coincide with the sole purpose of the law. It is also a well-known fact that in public international law, decisions of the International Court of Justice relating to international issues brought before the court, international treaties having multilateral character, as well as resolutions of the United Nations General Assembly which are unanimously adopted by states, do not have the power of applicability. This is, as long as, certain treaties have not been approved by internal sovereign authorities.[20]

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[19] One of the most useful characterizations of Islamic international law is that its legal nature is very adaptable and therefore many rules and obligations can be adopted into its general legislations. For instance, Islamic international law can orient itself to the rules of international conventional law and therefore the provisions of most international conventions coincide with its characterization. It is for this essential reason that most international conventions are signed and ratified by Islamic states.

[20] See generally A.D. McNair, *Law of Treaties* (1961); Hans Blix, *Treaty-Making Power*

3.3. *Superiority*

Whilst the international legal order is achieving a type of technique in which the consent of states for the application of international obligations is necessary, it is no longer a decisive factor concerning certain particular cases. This is because the effects of certain provisions of customary and international law of *jus cogens* are so important that the requirement of consent has lost its legal validity. Two clear examples are the law of the sea and the Geneva Conventions relating to armed conflicts applicable to all states of our international legal community irrespective of their participation in the conclusion of the relevant instruments. These means that no reason of religious, constitutional, domestic, cultural, political, military or any other motive can create a basis for the mistreatment or violations of *jus cogens* norms.

The system of international law therefore takes precedence over states within the law in those areas. The reason for this is that certain provisions of international law are, basically, so important and essential for the safeguarding of peace, justice and human rights in international legal and political community that they cannot be ignored in the conduct of states. Nevertheless, this especial type of characterization of international law is not, in certain areas, consolidated in the international legal community and states are not ready to accept the superiority of the provisions of international law over their domestic provisions. In other words, they do not permit any limitation over their sovereign power.

Islamic international law has, however, no discussion on the priority of the law. Both systems of municipal laws and international law are parts of the same body of the law and the whole system of the law is employed for the purpose of creating equivalent norms between the subjects of the law. Thus, states and individuals are an integral part of the same machinery and for this essential reason no issues of extreme doctrines of sovereignty arises under Islamic law. There is naturally a close relationship between the policy of the law and the individual interests.[21] This concept of the legal system is also integrated into Islamic international law and due to this recognition, all states should be equal before its statute and the law should not recognize superiority between the Islamic system and the

(1960); Brownlie, *Principles of Public International Law*; C.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976).

[21] However, this is not true in practice.

system of international law. Nations and their laws are equal before the Islamic legal system based on its first source.

4. Islamic Political Framework

One should always bear in mind that the political framework of Islamic international law has functioned as an equal to its political framework in the national system and since there is not essentially any difference between these two legal systems of the law, they overlap one another in their policies of applications. Under Islamic law, the political system is founded on three basic consolidated prinicples. These are the principle of *tawhid*, the principle of *risala* and the principle of *khilafat*. These principles actually constitute the basic phenomenon of Islamic law and Islamic international law for the orientation and the employment of the Islamic system.

4.1. Tawhid

Tawhid means that there is solely one God, creator of all mankind and the universe. This also includes everything in the universe whether organic or inorganic. This principle of the quality of being solely one creator makes the perception of the legal and political sovereignty of states insignificant. No class of different races can situate itself above the universal law of nations principally developed with the will of divinity. Accordingly, the strength of spiritual will creates laws and legal order. This may include humanitarian laws, human rights norms or Islamic law. They demonstrate God's basic commandments.[22] The term "tawhid" means also believing in one judgment which is above all aspects or theories that are created by man. Tawhid is thus the manifestation of God's will and his broad power and authority in the spirit of man. Tawhid also implies the universality of justice and the existence of the union of mankind under one law and one legal system, even though, they are divided into different nations and national legal systems. As long as they keep the norms of humanity and do not violate the basic ethical norms of man i.e. equality, brotherhood and justice, they are regarded equitable to the universal union of man.

[22] Abul A'la Mawdudi, *Human Rigths in Islam*, 2nd. ed (1990), p. 9.

4.2. Risala

The second principle of the political framework of Islam consists of the *Qur'ān* and the Prophet of Islam as the authoritative man in interpreting the *Qur'ān*. This is the way in which the words of God have been revealed to mankind, so called *risala*. It denotes therefore the key representative of the God who was nominated in order to reveal the Islamic universal law to all of mankind regardless of their global sovereignty as well as their territories. Consequently, *risala* constitutes one of the three cornerstones of the Islamic philosophy of law and Islamic international law. Risala promulgates the universality of justice, equality, brotherhood, peace and freedom of mankind from the dictated law of man applied by force. This means that *risala* does not disagree with other laws or other nations. It understands the value of man and their international relations equally from various points of view.

4.3. Khilafa

Khilafa means the successor to the Prophet Mohammed as political, military and administrative leader of Islam. Thus, the word *khilafa* came to be known in the world of Islam after the death of the Prophet. But, this does not mean that they presented the duties of the Prophet. In the context of Islam, the word *Khilafa* is employed to imply the government of the Muslim state or the guardians. The head of the government was, therefore, called *Khalifa*. He had different duties, *inter alia*, safeguarding Islam, creating justice, protecting the territorial integrity of the state, protecting the rights of Muslims abroad and struggling for the maintenance of peace, justice and equality for all nations of the world as a whole.

CHAPTER SIX

INTERNATIONAL STATUS OF STATE SOVEREIGNTY

1. Personality and Recognition

Personality and recognition constitute two of the most central subjects of public international law. This is because personality and recognition create rights and duties which cannot be denied in the process of international relations. Personality creates a legal person and, if certain conditions exist at an international level, organizations may also obtain the status of international legal personality and are therefore recognised as international persons. Clear examples of these are the United Nations and the International Criminal Court (ICC).

It is important to emphasize that a picture for international personality is very complex and cannot easily be defined here. In the whole, an international personality does not exclusively belong to states or organizations, certain self-governing peoples, states not being wholly independent and individuals also have certain international personality.

A legal person in the formal context of international law is a juridical body having the capacity to make agreements, the capacity to make claims in the case of violations of its rights and the capacity to enjoy immunities and privileges. In certain circumstances, an international personality may also depend on whether other relevant subjects of the law have recognised such an international personality.

2. Authority to Recognize

On an international plane, states are the most recognised subjects of international law and also have the most recognised rights and duties. These prominent subjects may, in fact, recognize an international personality for other subjects under international law. Therefore, the recognition of new states and their international legal personalities are normally determined by existing states. In international law, basic changes and motivations come from states and this principle cannot be altered as long as states have not agreed to the contrary.

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According to Islamic international law, an international personality does not emanate from circumstances of recognition, but, by practising certain rules which do not make any conflict against the proper rights of other states and against the fundamental principles of mankind. Therefore, the definition of international capacity in Islamic international law is quite different from that of public international law. However, this does not mean that non-Islamic states were or were not recognised by Islamic States. Any state could be recognised as having full international personality if it respected the legal personality of the relevant Islamic states and did not act with injustice as well as inhumanely towards its own population. This is because the theory of recognition in Islam is mostly the recognition of rights of individuals from various points of view and the recognition of personality of states is mostly superficial and therefore its existence is not a necessary condition for the recognition of the rights of individuals. In other words, the personality of a state is subject to the implementation of the rights of individuals under the juridical power of the state.

In public international law, the total sum of various capacities creates an international legal personality while in Islamic international law, various capacities are an integral part of the natural existence of man coming from one universal power and all other capacities are superficial. It is on these grounds that all persons and even the political division of states are subject to the universal recognition and this cannot be modified by the rules and regulations of mankind. Therefore, the international legal personality in Islamic international law is an integral part of Islamic juridical and cultural societies. The conclusion is that international personality and recognition are an integral part of one another and from its judicial and theoretical points of view, if not practical and political, every Muslim state automatically gains an international legal personality and universal recognition. In the time of Mohammed, the Prophet of Islam, every nation which gained accession to Islamic divine law was treated as an independent Islamic society.[1] Yet, this did not necessarily mean that other states did not have an international legal personality.

[1] "Islam was not simply a body of private religious beliefs, but involved the setting-up of an independent community, with its own system of government, laws, and institutions. That the 'Emigration' (*Hijra*) marked a turning-point in history was recognised already by the first generation of Muslims, who adopted the year 622 as the first year of the new Mohammedan era." H.A.R. Gibb, *Mohammedanism: An Historical Survey* (1949), p. 3.

3. Accession

The international legal personality and recognition under Islamic international law are achieved by accession to the Islamic system. When one accepts the provisions of divine law, one is recognised as capable of performing its rights and duties. Contrary to this, under public international law, acceptance of its provisions does not automatically create international personality or recognition; new states must juridically and politically be recognised by other states. This means that the provisions of the system of public international law are not complete by themselves and must be interpreted by each state of our global legal community in accordance with political, economic, military and cultural factors, all of which may undermine the system of public international law and its application. This is because international personality and recognition may vary considerably due to different interpretations. The result is that the international legal personality of a state which has been recognised by some states may, at the same time, be rejected by some other states. The conclusion being that international legal personality of states and recognition under Islamic international law depends significantly on the fulfilment of its rules and obligations, while in the system of international law this extensively depends on the political relations of the states in question.

It must also be added that a state that has received a certain amount of recognition under the system of international law will not easily lose its international recognition, even though; it is expelled from the United Nations Organization. The recognition of the personality of a state is, generally speaking, perpetual, unless certain political changes are made to its rolling system. Contrary to this, under Islamic international law, a Muslim state may lose its international legal personality and recognition if it does not fulfil its juridical, political, economic and, its duties and responsibilities towards the system of universal equal existence i.e. the motivation of God.

As a customary principle of Islamic international law, Islamic states can enter into treaties and agreements with other states while recognizing their statehood and independent political unity. Recognition in Islamic international law may therefore be divided into two categories. These are permanent and provisional. Permanent recognition is usually between Islamic states and provisional recognition is an international relation between Islamic and non-Islamic states.[2] Both recognitions are

[2] M.R. Ziai Bigdeli, *Islam and International Law* (in Persian, 1368), pp. 85–86.

equivalent to one another and although different in substance, their legal consequences are the same in Islamic international law. Accordingly, Islamic and other states must create just, equal and peaceful international relations with all other states[3] and these are some of the basic commands of God in the Qur'ān.[4] Provisional recognition also means accession and attainment to universal jurisdiction.

4. Characterization of Personality

The legal characterization of state sovereignty or statehood varies considerably in Islamic international law from that of public international law. This is because while in both legal systems certain criteria are required for the recognition of statehood, the juridical definitions or interpretations of the criteria are different. Islam places a heavy weight on the substance of a society and its basic source of theory for the determination of the principles of equality between all men, regardless of race, colour or language, while in the system of international law, the existence of a society does not necessarily constitute a basic principle for the recognition of a state, even though the principles of equality between all men, regardless of race, colour or language are respected.

According to Islamic international law, even though the criteria of population, territory and government may be necessary conditions for the establishment of statehood, this does not mean that a population having no territory but struggling for the establishment of their legal rights may not be recognised as having international legal personality. This theory is however different in the system of international law where international personality and recognition are two different matters. Furthermore, personality and recognition are, in most instances, both the subject and object of one another. In other words, in international law recognition cannot be reached without personality and the latter must be proven while in the Islamic system personality does not need to be proven and recognition therefore is not subject to personality.

According to traditional international law, there are several criteria for a state to be recognised as a full independent sovereign state. These include *a*) population, *b*) territory, *c*) an independent government, *d*) the right to use public sources, *e*) legal right over all nationals abroad

[3] Id., p. 86.
[4] The *Qur'ān version 8*.

and *f*) the conclusion of international agreements or treaties.[5] These are several important basic principles for the recognition of a fully independent sovereign state. Each of these basic principles has a different scope for interpretation and the most important principle is indeed subject to debate. The reason for this is that almost none of the above criteria are definite and their definitions, interpretations and scopes vary considerably and in the final stage depend on the consideration of political tides.[6]

While the above principles also have important functions in Islamic international law, the existence of the Islamic system does not necessarily depend on their fulfilment. More significantly, Islamic international law accepts the existence of other states, even though they are not ruled by the principles of Islamic law. This is because under the Islamic principles of law, the law, state ideology and population of other states are considered to be equal, as long as the state in question exercises some of the most important principles of equal justice. These are such as the principles of brotherhood and equality in social, economic, political, cultural or religious factors.

5. Nationality

In the system of public international law, there are two important theories for the existence of a nation. The first emphasizes that a nation consists of a people who have a tendency to live together while the second is of the view that it is common history, race, language, culture, religion and custom(s) which prove the existence of a nation.

Under Islamic international law, a nation is a group of individuals living together, although, they may have different theological, traditional and cultural concepts.[7] Race and language have no spiritual values. Islam speaks, the entire time, of one juridical language and one community of

[5] There have also been other criteria for the existence of state sovereignty. A state had a right to wage war whenever considered necessary. This criterion has been abolished and the only right of state is today to defend itself against aggressive use of force. This right is also subject to certain criteria.

[6] The legal criteria of statehood can also be understood from the content of Article 1 of the Motevido Convention on Rights and Duties of States, signed 26 December 1933. The article reads that "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States."

[7] Khadduri, *War and Peace in the Law of Islam*, pp. 45–48.

human beings. This is what is deducted from the main source of Islam. It is here that the criteria such as the existence of territory, political independence and government lose their substantial value under the system of the universal value of mankind.[8]

The main reason for this statement is the *Qur'ān* constituting the basic source of Islamic jurisprudence. Accordingly, it "has rejected all superiority on account of language, colour of skin or other ineluctable incidences of nature, and recognises the only superiority of individuals as that based on piety."[9]

Islamic international law in general, and Islamic law in particular, emphasize on the equality of the soul of all individuals and this specific equal nature of individuals denotes, according to Islam, the existence of an individual description which may be called his/her nationality. Islamic law therefore emphasizes the principle of brotherhood as the basic principle for the recognition of people(s) constituting a nation. This means that the Islamic law of nations goes beyond conditional rules and subjects nations to substantial reason.

It is also according to this fundamental theory of Islamic international law, that the nationality of a person or their political union is not questioned when they have acceded to Islamic divine law. This meant that the acceptance of Islam immediately grants Islamic nationality. For this reason, in the early development of Islamic law, any person who, for one reason or another, immigrated or came and submitted himself/herself to the jurisdiction of Islamic law, was considered to be an integral part of the relevant Islamic society, having a similar status to the Muslim citizens. However, this discussion does not mean that the main purpose of Islam does not accept or respect other nationalities. Under Islamic law, everyone has the same rights and duties in the world regardless of which

[8] According to one writer, when "in the 7th century of the Christian era, differences and prejudices arising from race, language, place of birth and other things had become the rule rather than the exception; they developed a deep-rooted notion, which grew to be almost a natural instinct. It was so everywhere in the world, in Arabia, in Europe, in Africa, in America and elsewhere. Islam cam to class this notion among the evil habits of humanity, and tried to bring about a cure." *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 87.

[9] *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 87. "Nationalization is a feature now admitted among all 'nations', but to be naturalized in a new language, in a new colour of skin, and in a new land is not as easy as to adhere to a new ideology. Nationality among others is essentially an ineluctable accident of nature; while in Islam it is a thing depending solely upon the will and choice of the individual." Id., p. 88.

religious beliefs they have. However, in practice this principle has not been respected by many Islamic authorities.

Consequently, early Islamic societies practised Islamic state nationality on an Islamic spiritual basis and not on any other grounds. This principle is not practised by any Islamic state today, but constitutes, one of the basic principles of Islamic jurisdiction for the development of the theory *that a state should be subject to a person and not the person be subject to the state*.[10] This means that under Islamic international law, the sole principle of social contacts between individuals is brotherhood and no principles of international personality, statehood, recognition or nationality should be the criteria for the prevention of this concept. It must, of course, be added that the Islamic international law does not reject the concept of nationality, as it is understood in the system of public international law. It admits the existence of different states and nations in order to achieve the concept of a universal nation in which no race, language, culture, religion and nationality has priority over another.

6. Equality of States

Since Islamic international law bases its fundamental principles on Islamic law and regulations as well as practices which originally emanated from the *Qur'ān*, the legal characterizations of state sovereignties are equal; and any provision of a conventional character should not modify this principle. The reason for this is that all states consist of individuals who are the real reason for the existence of states. All individuals are also equal to one another. This is a necessary corollary of the concept of universal recognition of individuals. Therefore, the concept of equality of states is essential for the maintenance of international peace and justice. Equality before the law constitutes an integral part of Islamic international law and this is irrespective of the military or economic strength of states.[11]

The above principle can also be found in the system of public international law. This principle has, especially, been emphasised in the constitution of the United Nations and other international conventions. One of

[10] An immigrant having no access to the jurisdiction of a state but being one of those who believed in one of the revealed religions of God could also obtain nationality with due regard to certain juridical conditions.

[11] The same theory is also true in the case of individuals before Islamic international law. See *infra*.

the legal consequences of equality between states has been their voting status before international entities. Although, the respect of the principle of equality of states is necessary in both international legal systems, the principle has repeatedly been violated in the actual practice of states. The equality of states in the United Nations and other international and regional organizations has been a matter of law and not reality. States have forced other parties in international conflicts to accept certain conditions and violations of this type are frequent in the system of international law.

CHAPTER SEVEN

SUBJECTS OF THE LAW

1. Introduction

What constitutes subjects within public international law and Islamic international law is a significant question. Although both systems rely heavily on the legal status of their subjects, their legal characterizations vary considerably. It must generally be asserted that the legal concept of subjects in the system of international law is different from that of Islamic international law. This is because under Islamic law subjects are an integral part of the system and the system is an integral part of its basic subjects. However, subjects of international law have to be recognised, created or accepted within the system.

2. Evaluation

Under Islamic law individuals are the main recognised subjects of the law while in the system of international law states are considered the main recognised subjects. The reason for this being that in the system of international law states are the masters of the law while in Islamic law, the nature of individuals is above the law and the jurisdiction of the spiritual existence of man above the latter.[1] Although we do not deny that certain aspects of the system of international law also relate to natural law, this

[1] "Islam believed … in the universality of the Divine call with which Muhammad was commissioned. It was this conviction which led the Muslims to aspire at a world order, but we must distinguish between the domination of a nation based on race or language and between the nation aspiring to establish on earth the kingdom of God, where His word alone (the Quran in this case) should reign supreme. Obviously for Islam it makes not the slightest difference whether the ruler is an Arab or a Negro provided he is a Muslim. The Muslims considered as their own enemies only the enemies of God … They wanted to conquer the world not to plunder it, but peacefully to subjugate it to the religion of 'submission to the Will of God,' religion of which they were not the monopolisers but which was open to all the nations to embrace and become equals. In a word, the Muslim aim was to spread Islamic civilization and to realise a universal *Polity*

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has not been the original aim of contemporary international law regarding its subjects. Even international human rights constituting an integral part of international law, is not capable of application because of the limited position of the individual's characterization under national and international law. While some claims may arise concerning the strong movements for the accepting individuals as one of the basic subjects of international law, this is still in its beginning with the reservation that individuals are recognised as being the direct subjects of human rights law and international criminal law.[2]

The aim of international human rights law is to create equality between individuals, reduce inequalities before the law and prevent unjustified activities by states. Islamic international law has, however, a different characteristic. The practical enforcement of the law under Islamic law is in the hands of individuals, while in the system of international law, it is under state authority. The former is self-conductive while the latter is not. Nevertheless, great movements have been started between European states, the United States, Latin American, African and Asian states and other states in the world for the practical protection of individuals and their unavoidable rights against the unlawful acts of states. The Islamic nations have indeed been very slow in the application of the principles of human rights and their violations are therefore very frequent.

2.1. *States*

States in the system of public international law are recognised as being the main subjects and have therefore occupied especial position within the system. They have traditionally been the only primary subjects having rights and duties in international relations. They have therefore been capable of concluding international treaties and submitting claims to international entities.

The legal characterization of states is also of essential importance in Islamic international law but they are not necessarily considered primary subjects of the law. One of the essential reasons for this is that individuals are the most essential reason for the existence of Islamic law while states are the most essential reason for the existence of public interna-

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based on the equality of the faithful and a system which provided the basic necessities of all the needy in the country, irrespective of religion, without in the least impairing private enterprise." Hamidullah, *The Muslim Conduct of State*, p. 73.

[2] See *infra* part on international criminal law.

tional law. Again, contrary to international law, individuals in Islamic law are considered the most capable legal persons and the capacity of Islamic states greatly depends on the capacity of the former. It is here that the most important differences between the two systems of international law appear. In other words, in one system, states have basically created international law, but in another system, the natural integrity of individuals is the reason for the creation of the law and its enforcement and development. In any event, Islamic international law deals with the rights and duties of different states. This means that it also recognises states as its subjects. Consequently, its fundamental philosophy does not preclude the acceptance of states as its subjects in order to protect the universal rights of individuals.

2.2. *Individuals*

Recognizing individuals as the full subjects of international law has yet to be established, although they have the most important function in the performance of the provisions and obligations of this law. A considerable number of writers differ upon the legal personality of individuals under this system. Some writers recognize individuals as subjects and others as objects, but the most recognised tendency since the creation of the Universal Declaration of Human Rights is to consider them as the beneficiary subjects of the law.[3] This means that according to some writers, an individual has not received full international recognition for the independence of his/her international personality as a fully legal person.[4] Some of the essential reasons for the non-recognition of individuals as full

[3] According to one writer "the fact that rules of international law apply to individuals does not necessarily mean that individuals are legal persons in international law unless 'international personality' is given a definition sufficiently wide to include them. Closer to the realities of international life is the definition suggested that the attribute of personality should be reserved for those entities, primarily states and certain international organizations, which have an objective, and independent, capacity to operate on the international plane … The appearance of treaty rules bestowing rights directly on individuals destroyed the logical foundation of the 'object' principle, but the result was not the acceptance of individuals as 'subjects' of international law. Instead of 'objects' they became 'beneficiaries' of its rules. Therefore the position of the individual on the international plane is still at the whim of each state." D.W. Greig, *International Law*, 2d ed. (1976), pp. 115–119.

[4] According to one writer "It is states and organizations (if appropriate conditions exist) which represent the normal types of legal person on the international plane. However, as will become apparent in due course, the realities of international relations are not reducible to a simple formula and the picture is somewhat complex. The 'normal

subjects of international law rely heavily on the political power of states and the high value of their international legal personality. Within the Islamic system of international law, it is the individual who causes the creation of the basic values of legal order and this is one of the fundamental reasons that individuals in the system of Islamic law constitute the reason of law or are, in other words, the reasons for proper or non-proper implementation of the law.

It must however be asserted that within the system of international law, the theory that individuals have to be recognised as primary subjects of the law is rapidly developing and one of the basic reasons for this development is the formulation of numerous international instruments governing the international human rights law. This is also true in the case of international criminal law and international criminal justice within which individuals are the direct subjects of the law.

Another important matter in Islamic international law is that the legal characterization of individuals is not based on subjectivity or nationality but on their spiritual nature. In contrast to this, nationality in the system of international law plays an important role in the recognition of individuals and if individuals have, for one reason or another, lost their nationalities, they may not any longer be protected by the provisions of their own original states. The system of international law does not even offer absolute nationality for those individuals unless a third state grants them appropriate legal protection. Thus, an individual may be expelled and recognised as a stateless person.[5] According to the Arab Charter, "no one may be arbitrarily or unlawfully prevented from leaving any country, including his own, nor prohibited from residing, or compelled to reside, in any part of that country."[6] Equally, "no one may be exiled from his country or prohibited from returning thereto."[7]

In other words, within Islamic international law, the existence of spiritual personality is a fact which cannot be denied by any state exercising the provisions of Islamic law, while in the system of international law, recognizing an individual as a subject of their jurisdiction is a right which exclusively belongs to states themselves. Individuals have been and are

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types' have congeners which create problems, and various entities, including non-self-governing peoples and the individual, have a certain personality". Brownlie, *Principles of Public International Law*, p. 61.

[5] Consult instruments governing refugee statute.

[6] Article 27 (1).

[7] Article 27 (2).

the direct subjects of Islamic law. It is for this reason that the recognition of individuals as subjects of international law is undermined by the legal power of states. For example, in the international legal system holding a passport appears to be a significant criterion for nationality while Islamic international law does not base its recognition of individuals, as primary subjects of the law, on the existence of an identified paper, but, on each individual being a person having obtained the substantial values of universal union.[8] Contrary to the policy of Islamic philosophy, the rights of individuals are seriously violated under Islamic practices. The fact is that the rights of individuals within the present Islamic states are limited and their duties have been increased for the benefit of certain powerful authorities. The historical investigation also proves this unfortunate fact.

2.3. *Other Subjects*

Other subjects of Islamic international law are those international organizations, institutions or entities which have, for one reason or another, been organized to carry out specific functions. This means that Islamic international law, similar to public international law, has accepted the existence of different subjects of the law and their international legal personalities. But, individuals in Islamic international law are the basic subjects and no other subject can be given priority to their legal position. Any other subjects are therefore considered legal consequences and should base their purposes for the development and consolidation of the principles of brotherhood, equality and justice between individuals.

Islamic international law accepts other subjects within its legal system on the condition that they should not, in any case, take priority over individual rights. This includes, but not excludes, political, economic, religious, cultural, social and the right to integrity.

In the system of international law, rights and duties are an integral part of statehood and organizations. The defence of individual rights can only be brought before international courts by states. However, there are strong movements in different regions of the world to create certain

[8] While the above theory refers to the spirit of Islamic law, the practice is quite different. For example, one of the most recognised Islamic states i.e. Iran violates the main aspects of the theory of Islam and expels or banishes individuals. This policy is practised regardless of what individuals believe. Similar policy has also been seen in other Islamic societies such as in the Hashemite Kingdom of Jordan, Libya, Tunisia, Algeria, Morocco, Egypt, and Sudan.

rights for individuals in order to submit complaints to certain regional courts. The European states have been more functional concerning this matter.

Yet, reparations and damages to individuals may not properly be requested from guilty parties unless sought by the state of nationality. It is for this reason that individuals in the system of international law are normally subject to states or organizations legal personalities while in Islamic international law rights and duties belong to individuals. The function of an organization as a subject of the law under Islamic international law does not diminish the responsibility of individuals because of their working in the organization. Similarly, the system of international law stresses the responsibility of individuals who are working for an organization. However, the concept of this responsibility is rather new and has been increased since the outbreak of the Second World War in 1939. In the contemporary system of international law, individuals bear the heaviest responsibility for the commission of war crimes, crimes against humanity, aggression and genocide. The system also has established the concept of responsibility of the joint criminal enterprise which has broadly been developed by the International Criminal Tribunal for the former Yugoslavia.

CHAPTER EIGHT

HUMAN RIGHTS LAW

1. Introduction

The subject of human rights is today one of the most motivated and significant subjects of public international law. The subject has, commonly speaking, been developed for the protection of the fundamental rights of individuals in different situations after the establishment of the United Nations Organization. It is on this ground that the Declaration of Human Rights of 1948 constitutes the basic and the most anticipated instrument in the field of human rights in the system of international law.

Islamic international law does not have, however, a separate body like the public international law denoting its human rights law. Contrary to international law, human rights in Islamic international law can be found in every rule of Islamic law which has some connection with social and ethical relations. It is for this reason that although the human rights law in public international law constitutes an integral part of its system, it is almost entirely a separate body of innovated principles gathering the rights of individuals in their social conducts. Human rights in Islamic international law are, however, not an innovation.[1] They are rather a fact which exists within its sources and have today been collected and formulated in a separate international document as the public international law.

In this chapter, we will deal with the norms of the Islamic human rights law constituting an inseparable body of Islamic law since its revelation in AD 610. Some of the most basic provisions of Islamic human rights law are analysed in individual sections in order to express the importance of the relevant principles of the law and emphasize that the human rights law exists in Islam, although these rights have been strongly violated by many Islamic States.

[1] But, this does not necessarily mean that human rights are respected within Islamic nations.

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2. Human Rights in International Law

The creation and development of the principles of human rights in the system of international law are basically the result of the criminal events of the Second World War, especially against the Jewish population of Europe. They were, widely and systematically, raped, tortured, degraded, humiliated, killed and genocided by the new and old generation of Europeans, who, in one way or another, assisted the network of Nazism. The consequence of which was claimed by writers to be the soft or hard Holocaust.[2] Whether it was the annihilation of a million or millions, it confirmed the extreme race and religious hatred in Europe. The Holocaust would never have been completed without the direct or indirect complicity of a considerable number of European States.[3]

These maltreatments were partly brought before the jurisdiction of International Military Tribunal in Nuremberg. This is because a large number of people were not prosecuted and punished because they were sheltered by the provisions of the constitution of their home state. There are still lists of names which have not been permitted to be released and are probably top secret. Another aspiration was the formulation of the declaration of human rights. Although the 1948 Declaration of Human Rights is not a law-making treaty, its principles are considered an integral part of international customary law. It is upon the development of the principles of this Declaration that many other direct or indirect international criminal conventions have been regulated under the authority of the United Nations Organization. The most illustrative examples are the 1948 Convention on Genocide, the 1949 Geneva Conventions on the law of armed conflicts, the 1952 Protocol relevant to the 1926 Convention on Slavery, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave trade, and the Institutions and Practices Similar to Slavery, the 1973 Convention on Apartheid, the 1975 Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1977 Protocols addition to the four Geneva Conventions of 1948, the

[2] This is because some historians have presented another view of the Second World War. See David Irving, Arthur Butz, Ernst Zündel, and Robert Faurisson. For instance consult Arthur R. Buts, *The Hoax of the Twentieth Century: A Case Against the Presumed Extermination of Europe Jewry* (2003).

[3] Many original documents are still an integral part of the secret archive of some of the European States.

1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[4] and, the 1991 Convention on the Rights of the Child.

All these documents in the field of international human rights represent certain core principles necessary for the security and well being of social structure. Some of them deal especially with those consolidated principles of criminal jurisdiction which should be respected by all legislations. They have not only emphasised the rights of every individual to security and liberty, but also, the fact that all rights integrated in the documents are applied to everyone without distinction to race, colour, sex, language, religion, political or other ethnic background.[5] Furthermore, they guarantee that no one shall be subjected to arbitrary arrest, detention, exile or retroactive law.[6] This also means that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'[7]

The essence of all these documents in the field of international human rights is that they guarantee certain rights for all and these rights are granted to all irrespective of social or racial status. As we have demonstrated elsewhere, the rights provided by the system of the international human rights law are strongly protected by the provisions of the system of international criminal law. In particular, a number of international criminal conventions are regulated to prevent and prohibit the commission of certain crimes in the national and international conduct

[4] For a brief examination of most of these conventions see the relevant chapters. Generally speaking, certain principles of the system of international human rights have the effect of customary rules of international law and should therefore be respected in the national and international relations of individuals, groups, governments or states. Some other instruments on human rights are the 1953 Convention on the Political Rights of Women, the 1960 Declaration on the Granting of Independence to Colonial countries and People, the 1966 International Covenant on Economic, Social, and Cultural Rights, the 1966 International Covenant on Civil and Political Rights, the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, the 1975 Declaration on Protection from Torture, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1989 United Nations Convention on the Rights of the Child and a number of other international instruments contributed by the International Labour Organization and other international bodies on the principles of human rights.

[5] Article 2 of the 1948 Universal Declaration of Human Rights.

[6] Id., Articles 9 and 11.

[7] Id., Article 10.

of governments or states.[8] However, we cannot deny the fact that the provisions of the documents on international human rights and the relevant international criminal conventions have often been violated in the official and unofficial conduct of states.[9] These violations have occurred under the jurisdiction of most states and must be analysed in other volumes.

3. Human Rights in Islamic International Law

3.1. *Basis*

The whole notion of the Islamic philosophy of jurisdiction rests on the creation and the establishment of a universal or international standard of equality between all races irrespective of any distinction based on race, colour, sex, language, religion, political, economy, or any other ethnical background.[10] Islamic law encourages all men to enter into the Islamic sovereignty of God and understand their ethical duties towards the divine law. Islamic philosophy, contrary to what it is understood by some societies, does not compel a person to enter into its religious or legal region. Such pressure would be contrary to the law of God and is therefore basically prohibited. Islam 'prohibits all compulsion in the matter of religious beliefs; … Islam is under the self-imposed religious dogmatic duty of giving autonomy to non-Muslims residing on the soil of the Islamic State.' Furthermore the 'Qurʾān, the *Hadith* and the

[8] See the first paragraph of this section. See *also* appendix on the Arab Charter.

[9] As with Islamic international criminal law, many international crimes in the system of international criminal law are today considered crimes against humanity and a number of resolutions of the General Assembly denote this fact. Moreover, an analysis of the system of international criminal law demonstrates that within the system, most crimes including war crimes have, on many occasions, been considered crimes against humanity and this was especially proven by the procedures of the Nuremberg Tribunal, which had great difficulty in distinguishing between war crimes and crimes against humanity as specified in its constitution.

[10] It cannot be denied however that classical Islamic law has distinguished between Muslim and non-Muslim residents under the territorial jurisdiction of Islamic states. This has, historically, occurred for several important reasons, *inter alia* the superiority of divine law and to guarantee the security of the Islamic state against any internal and external intervention. This practice of classical Islamic internal law must be seen from a political perspective, during a time in which all religions were rivals in order to control the political power of a sovereign state(s). One must, however, emphasize that according to Islamic international law, 'the Muslims and non-Muslims are equal (sawaʾ).' *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 94.

practice of all time demand that non-Muslims should have their own laws, administrated in their own tribunals by their own judges, without any interference on the part of the Muslim authorities, whether it be in religious matters or social.'[11] It is therefore stated that 'Not a single instance can be quoted to show that the Holy Prophet ever brought the pressure of the sword to bear on *one individual, let alone a whole nation*, to embrace Islam. What was not permissible in the case of the Holy Prophet, could not be permissible in that of any one acting in his name and on his behalf.'[12]

Islamic law has therefore promoted its principles, rules, regulations and traditions through the Islamic sources of law and emphasizes that the key principles of co-existence are brotherhood, equality, liberty and justice. Islamic law has also, strongly, encouraged two other important principles for the promotion of human dignity and the development of other related principles; these are the principles of mercy and compassion.

3.2. *Functions*

One of the chief functions of Islamic law is the protection of people(s) from all types of tyranny and crime which may be committed by individuals, groups, governments or states. Other functions are uniting men and women for common purposes and fairness. It is therefore on the basis of protecting and promoting the principles of brotherhood, equality and justice that the whole philosophy of Islamic international criminal law is built.

The observation of the principles of Islamic human rights under Islamic law is a basic legal and moral duty of the political structure of a state.[13] The State should not refuse to fulfil these duties, primarily regulated by the universal law, in order to establish the core principles of Islamic philosophy i.e. brotherhood, equality and justice.[14] Human

[11] Id., p. 40.

[12] Maulana Muhammad Ali, *The Call of Islam*, 2nd ed. (1926), p. 21.

[13] *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 87.

[14] One of the strongest reasons for this is that Islamic international law is not necessarily a positive law arising from international human rights conventions, the policies of which are based on acceptance, adherence and ratification by states. Although the automatic legal characterization of Islamic international human rights law is of significant importance, it does not necessarily mean that Islamic human rights or the system of international human rights are superior or inferior to one another. The former is based on moral-legal autonomy while the latter has a conventional ratified characterization. It is

rights must be respected by every individual and this includes self-inflicted abuse also. It is for this reason that suicide is considered an act against the principles of human rights in Islamic jurisprudence.[15] Political authorities are especially responsible in the fulfilment of Islamic human rights concerning all social conduct under their jurisdiction—including criminal ones.[16] Similar protection is also provided for by Islamic law for those who have other religions. Thus, Islamic law does not place any restrictions on the freedoms and practices of other groups and minorities. They can fulfil their religious obligations without restrictions.

According to the classical practices of Islamic law, Islamic state is, not only, responsible for the fulfilment of its own specific duties, but also has a great responsibility for the protection of the life, liberty, property and other social affairs of those who are resident under its jurisdiction.[17]

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axiomatic that in practice the human rights principles, norms, provisions, rules and other regulations of modern international human rights should be respected entirely and fulfilled by states having been affected by Islamic human rights provisions. For some views on human rights practices in Islamic states see, generally, Ann Elizabeth Mayer, *Islam & Human Rights: Tradition and Politics* (1991).

[15] But for exceptional suicide see the *Qur'ān*, 22:11–22 'Suicide is unlawful for those people who cannot bear a slight suffering or confusion and commit suicide; that is a great … sin.' *The Glorious Holy Quran*, translated by L.A.A.K. Jullundri (1962), part 17, p. 19, note 15.

[16] But see Lasse A. Warberg, 'Shari'A: Om den Islamiske Strafferetten (Uqûbât)', 80 (4) *Nordisk Tidsskrift for Kriminalvidenskab* (1993), pp. 260–283.

[17] The following provisions have been recognised by a number of Islamic jurists (*Ulama*) in 1951 and should be contained within the Constitution of an Islamic State. These principles are considered the Basic Principle of an Islamic State. These are: … "Citizen's Rights

7. The citizens shall be entitled to all the rights conferred upon them by Islamic law i.e. they shall be assured within the limits of the law, of full security of life, property and honour, freedom of religion and belief, freedom of worship, freedom of person, freedom of expression, freedom of movement, freedom of association, freedom of occupation, equality of opportunity and the right to benefit from public services.

8. No citizen shall, at any time, be deprived of these rights, except under the law and none shall be awarded any punishment of any charge without being given full opportunity for defence and without the decision of a court of law.

9. The recognised Muslim schools of thought shall have, within the limits of the law, complete religious freedom. They shall have the right to impart religious instruction to their adherents and the freedom to propagate their views. Matters coming under the purview of Personal Law shall be administrated in accordance with their respective codes of jurisprudence (*figh*), and it will be desirable to make provision for the administration of such matters by judges (*Qadis*) belonging to their respective schools of thought.

10. The non-Moslim citizens of the State shall have, within the limits of the law, complete freedom of religion and worship, mode of life, culture and religious education. They shall be entitled to have all their matters concerning Personal Law administrated in accordance with their own religious code, usages and customs.

According to the provisions of Islamic human rights, "Everyone lawfully within the territory of a State party shall, within that territory, have the right to freedom of movement and to freely choose his residence in any part of that territory in conformity with the laws in force."[18] Furthermore, "No State party may expel a person who does not hold its nationality but is lawfully in its territory, other than in pursuance of a decision reached in accordance with law and after that person has been allowed to submit a petition to the competent authority, unless compelling reasons of national security preclude it. Collective expulsion is prohibited under all circumstances."[19]

As a result, if a Muslim state is attacked by belligerent armed forces, the state must protect all residents irrespective of their religion, political view, colour, language, and other social matters. It must be possible for aliens to benefit from the protection of the state of residence[20] and the state in question must also protect the rights of its minorities. The concept of Islamic human rights strongly advocates equal rights and makes no difference between rights which are violated against the majority or minorities under a state sovereignty.

3.3. *Sources of Human Rights*

Sources of human rights in Islamic international law can be examined within all sources of Islamic law, in particular the *Qur'ān* constituting the basic or the original source of Islamic law.[21] There is also a declaration on human rights which is written with accordance to the basic principles of Islamic law and with the consideration of Islamic jurists and nations.

In this section, we deal with both of the above sources. It is, however, clear that the Islamic Declaration only has a hortatory effect in the system

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11. All obligations assumed by the State, within the limits of the *Shari'ah*, towards the non-Muslim citizens shall be fully honoured. They shall be entitled equally with the Muslim citizens to the rights of citizenship as enunciated in paragraph 7 above.

12. The Head of the State shall always be a male Muslim in whose piety, learning and soundness of judgment the people or their elected representatives have confidence.

13. The responsibility for the administration of the State shall primarily rest on the Head of the State although he may delegate any part of his powers to any individual or body …" Appendixed in Sayyid Abul A'la Maududi, *Islamic law and Constitution*, 7th ed. (1980), pp. 333–334.

[18] Article 26 (1).

[19] Article 26 (2).

[20] Hamidullah, *The Muslim Conduct of State*, p. 128.

[21] For the sources of the law see chapter four.

of Islamic human rights and should not entirely be compared with the original sources of the international human rights law under the public international law.

3.4. *Principles of Human Rights*

The basic principles of human rights which are presented in the Declaration of Human Rights in public international law in 1948 are similar to those basic principles of human rights which were regulated in Islamic law approximately fourteen hundred years ago. The difference between these two systems of human rights may be said to be that the concept of human rights within the Declaration of Human Rights is not juridically as strong as the concept of human rights in the system of Islamic human rights. This is because the 1948 Declaration has been decorated by numerous aftermath documents and instruments of human rights dealing and developing with different aspects of the declaration, but, violations of their provisions are indeed outsized. However, this does not necessarily mean that human rights in Islam are not violated by Muslims or other communities. On the contrary, violations of Islamic human rights by many of Islamic authorities are indeed frequent and notorious.

The 1948 Declaration of Human Rights is based on an instrument which is juridically not enforceable while human rights within Islam are an integral part of the constitution of Islamic law and Islamic international law. The former must thus be accepted in the constitutional mechanism or municipal procedures while the latter does not need such a procedure. Nevertheless, one cannot disagree with the fact that the enforcement of both systems of human rights ultimately depends on juridical and political consideration of each relevant government and whether or not they are on the favour of the enforcement of the natural or positive rights of their nationals.

3.4.1. *Equality*

One of the most important principles of international human rights concerns the equality of individuals. This principle creates for all human beings the same rights in their social relationships. This right has, more significantly, been defined in the Declaration of human rights in international law. The declaration in one of its articles states two important principles. These are equality in dignity and brotherhood for all human beings. The relevant article reads that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and

conscience and should act towards one another in a spirit of brotherhood.'[22] Both these principles were, long ago, recognised under Islamic law as constituting two of the chief principles for the consolidation of justice and peace in social relations of mankind.

Islamic law including Islamic international law recognises the principle of absolute equality between all human beings regardless of race, colour, nationality, language, geographical location, sex or religion. Equality between all human beings therefore constitutes a consolidated principle in Islamic law and should not be abrogated and mitigated within any Islamic state/nation for the purpose of priority of Muslims over others. There are several verses in the *Qur'ān* which imply this fact. For instance, it reads that:

> O men, We created you from a male and female, and formed you into nations and tribes that you may recognise each other. He who has more integrity has indeed greater honour with God.

The above verse signifies several important facts. Firstly, there is no difference between male and female. Secondly, human beings were formed into various nations in order to be distinguished from one another for the sake of recognition and not to give one tribe or nation more priority over another. Thirdly, all human beings are equal in dignity regardless of race, colour, tribe, nationality and ideological modalities. Fourthly, the noblest among all human beings before God are those who have more integrity. This includes several important facts. These are such factors as the moral values, relations between men and her/his creator and the respect of all human beings on an equal footing.

3.4.2. *Entitlement to All Rights and Freedoms*

Islamic international law constituting an integral part of Islamic law has a number of important principles governing the fact that everyone is entitled to all the rights which are stated by *Shari'ah*. Access to these rights is not limited to Muslims, or a particular race, but is, for every human being, without distinction to the place of birth, colour, race, sex, nationality, language, ideology and religion. The basic source for these freedoms must be examined from the provisions of the *Qur'ān* as well as other sources of Islamic law.

Since there is no compulsion in religion under the Islamic philosophy of law, everyone is entitled to all rights and freedoms because of the

[22] Declaration on Human Rights, 1948, Article 1.

prohibition of the use of force on individuals and groups. These rights and freedoms include and do not exclude the right to life, to choose a religion, work, be active in political groups, marriage and divorce and the right to fair and just procedures in all forms of social conducts with the relevant authorities.[23] The 1990 Cairo Declaration on Human Rights in Islam contains some of the most necessary rights of human beings concerning their rights to freedom. The Declaration is even completed with the words of the 2004 Arab Charter on Human Rights. It reads that:

(a) Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the Law.
(b) Every individual and every people has the inalienable right to freedom in all its forms—physical, cultural, economic and political—and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle.

The Declaration of Human Rights of 1948 in international law has, similar to Islamic international law, provided rights and freedoms for everyone, but, in different propositions. The Declaration does not, for instance, within its provisions as does the Cairo Declaration on Human Rights in Islam or the 2004 Arab Charter on Human Rights; recognize 'every oppressed individual or people as having a legitimate claim to the support of other individuals and/or peoples in such a struggle'. It reads that:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[24]

It is important to emphasise that rights and freedoms stated in the Islamic international human rights law are not limited to Muslims and therefore include non-Muslims too. The reason underplaying this interpretation is that the Islamic philosophy of law does not force other nations and non-Muslims to be limited to Islamic rules. Even non-Muslims under Islamic jurisprudence enjoy a very high value from the principles of Islamic law. For instance, "Far from imposing the Qurʾānic law on everybody, Islam admits and even encourages that every group, Christian, Jewish, Magian

[23] See relevant sections below.
[24] Article 2.

or other, should have its own tribunals prescribed over by its own judges, in order to have its own laws applied in all branches of law, civil as well as criminal. If the parties to a dispute belong to different communities, a kind of private international law decides the conflict of laws. Instead of seeking the absorption and assimilation of everybody in the 'ruling' community, Islam protects the interests of all its subjects."[25]

Likewise, since Islamic law and the Islamic international law do not put any weight on the nationality of individuals, their locations and other status, there is not any difference between states and their characterizations under the law. According to the Islamic international law, all categories of divisions of territories are superficial and therefore do not effect the rights and freedoms of individuals.[26] This important provision in the Islamic international human rights law can also be examined in the 1948 Declaration of Human Rights. According to this declaration "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."[27]

One essential difference between the Islamic international law governing human rights and international human rights in public international law is that everyone is entitled to all the rights and freedoms in Islamic human rights on the basis of their benefiting from *spirit of mankind*, while rights in the international human rights law are declared on the basis of preventing unlawful acts of sovereignty imposed on individuals as occurred against the innocent Jews, in particular children, women and the elderly during the Second World War.

3.4.3. *Right to Life*

According to Islamic law and the Islamic international human rights law, the right to life is an integral part of mankind life and therefore the killing of a human without juridical justification is a crime against the whole of mankind. This principle has clearly been stated in the *Qur'ān* and constitutes the most important element for the protection of all human beings. Thus, the right to life is an established principle which should not be modified or mitigated for political, juridical or any other reasons. The *Qur'ān* reads that:

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[25] *Publications of Centre Culturel Islamique—Introduction to Islam*, pp. 105–106.
[26] See chapter one.
[27] Article 2.

> … whosoever kills a human being, except (as punishment) for murder or for spreading corruption in the land, *it shall be like killing all mankind*.[28]

The principle of the right to life is one of the most important principles of the Islamic human rights law. This is based on the fact that the principle prevents individuals and legal authorities from killing a person for whatever interests. These interests include also religious interests. It also includes genocide, discrimination, crimes against humanity, slavery and also disappearance. The killing of individuals on any basis is a great sin and constitutes a serious crime against mankind.[29] Therefore, the right to life in Islamic international human rights constitutes a form of social and juridical security for a person in order to be saved from prejudices. The words of the Cairo Declaration on Human Rights in Islam also contain this important fact.[30] Similar provisions can also be noted in the 2004 Arab Charter on Human Rights. It provides that "1. Every human being has the inherent right to life. 2. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[31]

In any event, Islamic international law strictly prohibits the killing of human beings. It considers the principle of right to life as an integral part of the international legal order and makes it clear that killing or taking of life of a person, if necessary, ought to be in accordance with consolidated national and international procedures. The *Qur'ān* has especially stated that 'do not take a soul which God has forbidden, except through the due process of law.'[32] The principle is justified by the fact that it applies to all human beings and does not limit itself to a special race. Human beings are equal before the divine law.[33] This principle also relates to the principle of the appropriate application of law.[34] It must also be born in mind that Islamic rules, in certain circumstances which seem necessary, are not limited to the death penalty; even should one be

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[28] The *Qur'ān*, 5:32.

[29] See the next section.

[30] The Declaration concerning right to life reads that: "(*a*) Human life is scared and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the Law. (*b*) Just as in life, so also after death, the sanctity of a person's body shall be inviolable. It is the obligation of believers to see that a deceased person's body is handled with due solemnity."

[31] Article 5.

[32] The *Qur'ān*, 6:151.

[33] It is also stated that the original word of soul in Arabic i.e. *nafs* is applicable to all persons without any distinction between various citizens leaving under one territorial jurisdiction. Abul A'la Mawdudi, *Human Rights in Islam* (1990), p. 17.

[34] See below.

found guilty. This means that capital punishment can be abolished under the provisions of the Islamic international law due to the provisions of newly adopted provisions of documents in the international human rights law. This is because Islamic law expresses a significant respect to the principle of *pacts sunt servanda* and whenever an international agreement against capital punishment is ratified by an Islamic nation, it has to be implemented by all means.[35]

The 1948 Declaration of Human Rights has also stated the right to life and this is one of the most important principles of the Declaration. The relevant article of the Declaration reads that "Everyone has the right to life, liberty and security of person."[36] The wording of the Declaration is quite similar to the concept of life and security in the Islamic international human rights law with the major difference that the former is presented in the context of a Declaration while the latter constitutes an integral part of the chief source of Islamic law i.e. the *Qur'ān*.

3.4.4. *Right to Be Saved for Life*

The principle of the right to life has also been strengthened through adherence to another principle which encourages human beings to help, cooperate and assist with one another for the sake of mankind. This principle is considered to prevent, with one way or another, the murdering and killing of individuals. The principle reads that:

> ... whosoever saves a life, saves the entire human race.[37]

The above principle also encourages self-security, self-confidence, the individual defence of one another's lives and also promotes the principle of brotherhood. This principle is especially helpful when one considers that an innocent person may be found guilty of the commission of crimes and be punished according to false evidence. The principle encourages the theory of saving life and its great appreciation under the principles of Islamic international law. Consequently, it serves for all human race and their human rights. While the principle of the abolition of capital punishment is strongly consolidating in the international arena, the principle of "whosoever saves a life" may open a door for the prevention

[35] However it is true that the 2004 Arab Charter on Human Rights permits capital punishment. See Articles 6 and 7. This have to be modified and be abolished in all circumstances.

[36] Article 3.

[37] The *Qur'ān*, 5:32.

of capital punishment under Islamic nations or states. Nevertheless, it is a fact that despite the existence of the principle of "whosoever saves a life" during fourteen centuries within the provisions of the Qurʾān, the principle has strongly been disregarded or misunderstood by Islamic nations or authorities.

The principle of the right to be saved for life is one of the most serious achievements under Islamic international law. The Declaration of 1948 on Human Rights does not own a similar principle. But, the recent documents on the principles of international human rights denote the creation of similar provisions for the protection of human beings from unjustified acts of governments.[38]

3.4.5. *Rights of Children*

The principle of rights of children to life is one of the very central and significantly established principles of Islamic international human rights for the purpose of protection of children from unjustified and illegal acts of their parents. The principle not only protects children's rights to life, but also, makes it clear that it is a legal and moral duty of parents to provide the necessity of living for them. One of the verses of the *Qur'ān* relates to this important principle. It states that:

> … Come I will read out what your lord has made binding on you: That you make none the equal of God, … do not abandon your children out of poverty, for we give you food and we shall provide for them.[39]

The 1948 Declaration of Human Rights does not have a single provision governing the rights of children. The principle of children's rights to life and other living necessities has however, today, been entered into a separate international convention under international law and is greatly supported by many states for the protection of children from unjustified and immoral actions of individuals including governments. This is known as the 1989 Convention on the Rights of the Child. It is, however, regrettable that those children's rights are not respected in national and international conflicts and children are exploited in accordance with different theories for various purposes including waging war, slavery and

[38] For instance, see the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 1998. Farhad Malekian, *Documents on the Principles of International Human Rights* (2007), p. 124.

[39] The *Qur'ān*, 6:151.

trafficking.[40] In fact, the opponents of both systems of human rights have violated the rights of children for their own private purposes. Some of these are Iran, the United States, the United Kingdom, Somalia, Sierra Leone, Palestinian liberation movements, Israel, Afghanistan, and Rwanda.[41]

3.4.6. *Rights of Parents*

The Islamic human rights law has, not only, established rights for children to be protected by their presents, but has also established similar rights for partners in order to have a safe and reliable security served by their children. The principle of parents' rights on their children is a part of the principle of children's rights. This right of parents is especially more tangible when the relevant persons are, due to age or other reasons, incapable of surviving by their own hands or incomes. The *Quran* reads that 'be good to your parents, … for we give you food and we shall provide for them.'[42] The principle of the rights of parents and children rights complete one another's intentions with different proposition and for different reasons during the lifespan of a person.

The principle of the rights of parents also has a significant moral effect on the social life of persons and it also diminishes the possibility of the isolation of parents from their social conducts. The principle not only creates moral, but also, legal duties for all individuals to participate and cooperate with social services for a better and more reasonable results. The principle has not, however, been given place in the 1948 Declaration

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[40] Farhad Malekian, *Prohibition Governing Child Soldiers Constituting an Integral Part of* Erga Omnes (2007).

[41] For instance, violations of international human rights and international criminal law have been very grave in Rwanda. These caused some of the population of the region to turn to Islam in order to keep their life safety. "This position that blame lies with individuals, rather the Church as an institution, is still highly controversial, as Rwanda marks the tenth anniversary of the genocide. The Church hierarchy in Rwanda supported the previous regime of President Juvenal Habyarimana. And they failed to denounce ethnic hatred then being disseminated. Some survivors … have since left the Catholic Church, unable to reconcile the Church's teaching with the actions of its most senior members during the genocide … because Muslims were seen to have acted differently. 'The roofs of Muslim houses were full of non-Muslims hiding. Muslims are not answerable before God for the blood of innocent people.' But after the genocide, converting to Islam was also seen by some as the safest option. 'For the Hutus, everyone was saying as long as I look like a Muslim everybody will accept that I don't have blood on my hands.' And for the Tutsis they said let me embrace Islam because Muslims in genocide never die. So one was looking for purification, the other was looking for protection." BBC, 1 April, 2004, news.bbc.co.uk/2/hi/africa/3561365.stm. Visited on 2009-10-07.

[42] The *Qur'ān*, 6:151.

of Human Rights, but it is today, an integral part of some of the regional documents on the principles of international human rights law.[43]

3.4.7. *Prohibition of Slavery*

The principle of the prohibition of slavery in Islamic international law must be examined from different aspects in order to achieve the essence of the prohibition as a whole. Slavery in Islamic international law has been prohibited in a very significant way and this was due to the fact that in the early times nations were, by their cultural and economic factors, encouraged to keep slaves or servitudes. This cultural policy has slowly been changed for the benefit of all human beings in order to be free from all forms of monopolization.

Islam did not in the early time of its revelation prohibit slavery as a whole. There was a process which had to be followed in order for the social construction not to collapse. For this reason, Islam prohibited slavery by indirect contribution and encouraged some important principles which finally lead to the prohibition of slavery under Islamic international law. Consequently, the Islamic international human rights law on the matter of slavery bases its prohibition on the special technical, juridical, philosophical, moral, economic, theological and historical approaches. In other words, all these constitute *the jurisprudence of prohibition of slavery under Islamic international human rights law*.[44]

In the system of public international law, slavery was not abolished until towards the end of the twentieth century. The institute of slavery was even exercised up until the Second World War. This did not even

[43] Malekian, *Documents on the Principles of International Human Rights* (2007). The American Declaration of the Rights and Duties of Man, 1948 in Article XXX concerning the Duties toward children and parents reads that "It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honour their parents always and to aid, support and protect them when they need it." Id, 40; The African Charter on Human and Peoples' Rights of 1981, in Article 29 provides that "The individual shall also have the duty: 1. to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need," Id., 184. The 1990 Cairo Declaration of Human Rights in Islam reads in Article 7 (c) "Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the Shari'ah."

[44] The policy of Islamic international human rights for the prohibition of slavery is thus one of the most significant methods for the freedom of human beings from the institute of slavery. The policy does not rest on political dilemma rather on the understanding of the situation of slaves by men themselves and on the fact that freeing slaves is the equivalent to the freeing of human beings from sins or crimes.

include the institute of slavery concerning the prisoners of war. Attention to prisoners of war was given in the Geneva Conventions of 1949. It is since the establishment of the United Nations that many conventions regarding the prohibition of slavery, slave trade and institutions similar to slavery have created strong international rules for the serious protection of mankind. The Declaration of Human Rights also has a separate article on the matter of slavery. It reads that 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.'[45]

The difference between the prohibition of slavery, slave trade and institutions similar to slavery in the Islamic international human rights law and international human rights law is that the former considers slavery against the moral, legal and spiritual statutes of human beings including the integrity of mankind while the latter principally considers it illegal. But, this is not necessarily based on moral and legal considerations rather on the fact that the institution of slavery does not any longer fit the circumstances of the time being. Moreover, slavery is considered against the modern attitude of different nations towards free labour. But, as we shall see in the part relevant to international criminal law, slavery and institutions similar to slavery are being continued under both legal systems. This is despite the fact that the position has long been prohibited by customary and conventional international law.

3.4.8. *Just Legal Process*

The principle of just legal process in the Islamic international human rights law must be considered the cornerstone for all rights of human beings. The Islamic law and Islamic international law has put a significant value on the level, degree and standard of legal processes which may be set out for an accused. Therefore, according to the *Qur'ān*, a reasonable 'due process of law' is considered of prominent importance in the case of the implementation of whatever punishment on a person. For instance the *Qur'ān* reads that 'do not take a soul which God has forbidden, except through the due process of law.'[46]

Under the Islamic international human rights law, all human beings are equal before Islamic jurisdiction. Thus, parties to a conflict are not only equal before the verdict of the law, but enjoy similar protection before the provisions of the law. These are two of the important principles

[45] Article 4.
[46] The *Qur'ān*, 6:151.

of Islamic law provided in the *Qur'ān* and also in the practice of the Prophet of Islam. A very significant verse reads that:

> God enjoys that you render to the owners what is held in trust with you, and that when you judge among people do so equitably. Nobles are the counsels of God and God hears all and sees everything.[47]

Certain provisions in the international human rights law are similar to the provisions of the Islamic international human rights law. These are such as things equality before the law, recognition of a person as an integral part of human beings, protection and non-discrimination. For instance, the Declaration of Human Rights reads that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[48] Similarly, another article of the Universal Declaration on Human Rights reads that "Everyone has the right to recognition everywhere as a person before the law."[49]

Two of the chief purposes of the principle of just legal process in the Islamic international human rights law are to promote full respect of the law and to prevent discrimination between conflicting parties and accused persons. The principle also prevents, to a great extent, different forms of corruptions within juridical system.

In any event, the principle constitutes one of the legal rights of every person to be claimed under the Islamic international human rights law. The principle is without prejudices to race, colour, nationality, language, religion and any other social ranks.

Similarly, the Cairo Declaration on Human Rights in Islam and the 2004 Arab Charter on Human Rights have taken up several important elements in the case of just and fair legal processes. It lists some of the most important rights of human beings before the law and refers to the right of all persons in particular to protest or deny a procedure when it is seen as being against the content of the law. It reads that:

IV. Right to Justice

(a) Every person has the right to be treated in accordance with the Law, and only in accordance with the Law.

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[47] The *Qur'ān*, 4:58.
[48] Article 7.
[49] Article 6.

(b) Every person has not only the right but also the obligation to protest against injustice; to recourse to remedies provided by the Law in respect of any unwarranted personal injury or loss; to self-defence against any charges that are preferred against him and to obtain fair adjudication before an independent judicial tribunal in any dispute with public authorities or any other person.
(c) It is the right and duty of every person to defend the rights of any other person and the community in general (*Hisbah*).
(d) No person shall be discriminated against while seeking to defend private and public rights.
(e) It is the right and duty of every Muslim to refuse to obey any command which is contrary to the Law, no matter by whom it may be issued.

Rights which are stated in the above section of the Islamic Declaration of Human Rights have significant values on the promotion and development of justice and settlement of disputes on equal footings. Accordingly, it is a right of a person to refuse orders which are contrary to the law. This is also one of the most important principles of the *Qur'ān*. Due to the source, no one is obliged to fulfil orders which are against justice and denote the violations of the Divine law. Justice and orders must be equivalent to the law. This means that in certain circumstances one may refuse to fulfil a superior order which violates the basic purpose of the law such as torture or the commission of international crimes including war crimes, genocide, and crimes against humanity.

The Islamic international human rights law places an important weight on the fact that no one should be subjected to arbitrary arrest and detention. According to Islamic law no one shall be recognised guilty of commission of a wrongful act, so long as, it is not proved in a just legal process.[50] The arbitrary imprisonment of a person constitutes, therefore, a violation of one of the principles of the Islamic international human rights law.[51]

It is therefore a consolidated principle of Islamic law and that of the international human rights law that an individual should not be arrested or imprisoned for the crimes of another person. The *Qur'ān* reads that 'no man shall bear another's burden.'[52] This means that a person must

[50] See above section.
[51] See the Arab Charter on Human Rights in appendix. Many Islamic governments have however contrary practice. A clear example is the governments of Iran and Turkey.
[52] The *Qur'ān*, 6:164.

not be punished for acts which have not been committed by him. In other words, no bearer of burdens shall be made to bear the burden of another.

The Islamic human rights law recognises the right of a person to protest and avoid injustices subjecting the person to arbitrary arrest and detention. The relevant provisions of human rights in international law governing the question of arbitrary arrest and detention are also similar to Islamic law. There is however a chief difference between these two systems of human rights law. An interpretation of the relevant provision of the human rights law implies the fact that if the exile of a person is not arbitrary it is acceptable by the Declaration. This is because the Declaration of Human Rights reads that 'No one shall be subjected to arbitrary arrest, detention or exile.'[53]However, the new documents on the principles of the international human rights law have modified this position and it is the right of every human being to live in his/her place of birth and governments should not force a person to emigrate from his/her own county by force.[54]

3.4.9. *Right to Integrity*

The principle of the right to integrity in the Islamic international human rights law indicates the invaluable nature of human beings before the divine law. It is a prohibited rule in Islamic law to violate, in one way or another, the integrity of man. This is clearly stated in the *Qur'ān*. It reads that 'O you who believe, men should not laugh at other men, for it may be they are better than them; and women should not laugh at other women, for they may perhaps be better than them. Do not defame one another, nor give one another nick-names. After believing, it is bad to give (another) a bad name. Those who do not repent behave wickedly.'[55]

This principle should, not only, be respected in the social relations of all human beings, but also, and more seriously, by the relevant national authorities in order to respect those who for one reason or another come under their jurisdiction. Regarding the principle of right to integrity it is especially important that it be respected in the case of all civil and criminal procedures over a person accused of having violated the relevant orders. This is because, according to the Islamic international human

[53] Article 9.
[54] Malekian, *Documents on the Principles of International Human Rights*.
[55] The *Qur'ān*, 49:11.

rights law, the violation of the principle of right to integrity is recognised as a crime if it violates the individual rights and justice.[56]

3.4.10. *Rights to Remedy*

Islamic law aims in all circumstances, at the protection of individual rights. This has been considered one of the policies of Islam in the case of the violations of these rights. Thus, according to the Islamic legal system similar to the provisions of 1948 Declaration of Human Rights in international law, all persons are granted an effective remedy in the case of the violation of their rights.[57]

Under the principles of Islamic law, no one shall, in the case of damages, be left out without adequate remedy. This should also be respected in the case of non-Muslims coming for one reason or another under the territorial jurisdiction of an Islamic state. According to pure Islamic law, rights must be respected without due regard to race, colour, nationality, language, ethnic origin, religion or political views.

The principle of the rights to remedy in the Qur'ān has been foreseen in the context of a considerable number of versions. According to Islamic international law including the human rights law, it is a legal order imposed on individuals and courts to take accurate decisions concerning legal remedies and not to violate the principle of justice. It reads that "O you who believe, stand up as witnesses for God in all fairness, and do not let the hatred of a people deviate you from justice. Be just: This is closest to piety; and beware of God. Surely God is aware of all you do."[58] In another verse, the *Qur'ān* clearly refers to the important function of justice and

[56] According to one writer, the Islamic "law is superior to the Western law of defamation. Under Islamic law, if it is proved that someone has attacked the honour of another person, then, irrespective of whether the victim is able to prove himself a respectable and honourable person, the culprit will be punished. The interesting fact about the Western law of defamation is that the person who files suit for defamation has first to prove that he is a man of honour and public esteem and during the interrogation he may be subjected to scurrilous attacks and accusations by the defence counsel—to such an extent that the court hearing may be more damaging than the attack on his reputation which originally led him to the court. In addition, he also has to produce witnesses to testify in court that the defamatory accusations have damaged his reputation in their eyes." Mawdudi, *Human Rights in Islam*, p. 24.

[57] 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' Article 8.

[58] The *Qur'ān*, 5:8.

points out that "God has made a promise of forgiveness and the highest reward to those who believe and perform good deeds."[59] These versions separately and together imply the momentous function of fair decision and their applicability in universal level.

3.4.11. *Rights Not to Suffer from Deprivation*

The principle of the right not to suffer from deprivation in the Islamic international human rights law indicates the fact that everyone has the right to a basic standard of economy in order not to suffer from deprivation. This is one of the important rights which has solely appeared in the Islamic international human rights law and there is indeed no equivalent right under the Declaration of Human Rights in international law. But, the new developments in the international human rights law provide a large number of rights concerning this matter.[60]

The *Qur'ān* makes it clear that no one shall suffer from deprivation and this principle therefore creates economic rights for all human beings which should not be denied by any person or authority exercising and fulfilling Islamic law and order. The *Qur'ān* reads that 'And in their wealth there is acknowledged right for the needy and destitute.'[61] At the same time as the above right has been recognised by the Islamic human rights law and many instruments of international human rights law have similar vocabulary, this right has not been respected by legal and political authorities. A large number of Muslims and non-Muslim populations of the world are seriously suffering from economic imperfection and a lack of those preliminary basic standards for life which are necessary for all human beings.

3.4.12. *Rights to Cooperation and Non-Cooperation*

The principle of the right to cooperation and non-cooperation is one of the principles of the Islamic international human rights law which encourages and promotes international peace and security and the consolidation of the fact that all human beings are equal and have duties and responsibilities in national and international relations.[62] This invaluable principle of the Islamic international human rights law reads that

[59] The *Qur'ān*, 5:9.
[60] Malekian, *Documents on the Principles of International Human Rights*.
[61] The *Qur'ān*, 51:12.
[62] Mawdudi, *Human Rights in Islam*, p. 17.

you should 'cooperate with one another for virtue and heedfulness and do not cooperate with one another for the purpose of vice and aggression.'[63]

The Islamic international human rights law places a significant weight on the question of cooperation between individuals and groups for the purpose of goodness and faithfulness. In other words, individuals are encouraged to assist and help those who are struggling for self-protection, including self-cultural protection, self-territorial protection, self-national protection, self-language protection, self-ethnic protection, self-religious protection and also self-evidence protection(s).

Although the Islamic international human rights law encourages and recognises a right to co-operate with those who are struggling or fighting for various forms of protections, it simultaneously makes it clear that the right to cooperate should be given for those whose struggle is just and self-evident and not aggressive. It is for this reason that the *Qur'ān* read that 'do not cooperate with one another for the purpose of vice and aggression.'[64] In other words, it is a prohibited principle in Islamic international human rights law that human beings cooperate or help one another for the purpose of aggression, criminal behaviour, discrimination, injustices, and immorality. This means that any assistance that is given for the purpose of helping the commission of a crime is considered to be a violation of the Islamic provisions of human rights and all human beings as a whole.[65]

3.4.13. *Rights to Property*

Islamic law places a significant weight on spiritual values. It also fully respects the individual's rights to ownership and property with a very effective juridical policy for the division of wealth between individuals.[66] The principle of the right to property is in fact considered one of the most indispensable principles of the Islamic international human rights law for the protection of individual rights governing property or ownership. The main source of Islam reads that:

> … do not consume each other's wealth in vain, nor offer it to men in authority with intent of usurping unlawfully and knowingly a part of the wealth of others.[67]

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[63] The *Qur'ān*, 5:2.
[64] Id.
[65] Id.
[66] The *Qur'ān*, 2:188.
[67] The *Qur'ān*, 2:188.

The principle of Islamic human rights on the right to property can also be seen in the 1948 Declaration of Human Rights. The Declaration provides that "Everyone has the right to own property alone as well as in association with others."[68] And further that "No one shall be arbitrarily deprived of his property."[69]

The right to protection of property has also been recognised by the provisions of the Islamic Declaration of Human Rights. It reads that 'No property may be expropriated except in the public interest and on payment of fair and adequate compensation.'[70] This means that the right to property is sacred and if the national authority deprives, for one reason or another, someone of his/her property, the owner has a legal right to compensation.

Obviously, both systems of human rights aim at the protection of the rights of individuals for their property. Possession of property by various uses of forces is prohibited and is therefore recognised as being unlawful and unjust.[71] It must be emphasised that the principle of right to property in Islamic international law like its other principles of human rights are not limited to Muslims and should widely apply to all human beings without any due consideration to their race, colour, nationality, language, religion or any other ethnical origin. The principle of right to property in Islamic international law must also be read in conjunction with the principle of right to privacy which complements, in one way or another, the former principle. The reason for this is that both principles deal with the matter of property and other matters of privacy.

3.4.14. *Rights to Privacy*

The principle of the right to privacy is supported by different means in the system of Islamic international human rights law. It denotes the importance of the fact that the privacy of all human beings must be respected and must not, in one way or another, be violated by national, legal and political authorities. The principle has, in particular, been

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[68] Article 17.

[69] Id.

[70] Section XVI of the Declaration.

[71] "The Women will inherit from the blood-money of her husband and his property; and he will inherit from her blood-money and property; as long as one of them does not kill the other. But if one of them kills the other deliberately, he or she will not inherit anything from his or her blood-money and property; and if one of them kills the other by mistake, he or she will be inheritor of his or her property, and not of his or her blood-money." Ubaidul Akbar, *The Orations of Muhammad*, p. 40.

emphasised in the *Qur'ān*. It reads that 'do not enter other houses except yours unless you have obtained owner's consent.'[72] This verse implies the fact that privacy of all human beings must be respected and should not be violated by others. The principle has also been entered into the Islamic Declaration of Human Rights. The relevant section of the Declaration reads that "Every person is entitled to the protection of his privacy."[73]

Consent appears to be one of the important provisions for the employment of the contrary notion of the principle of the right to privacy. This is because to enter the property of others without permission is the violation of the integrity of the property and violation of the right of the ownership of the owner and simultaneously the violation of the principle of freedom of individuals. In other words, the Islamic international human rights law prohibits any form of arbitrary interference which falls in one way or another under the term privacy.[74]

3.4.15. *Rights Not to Be Spied*

The principle of the right not to be spied on by others is one of the most important cornerstones of the Islamic international human rights law which has not clearly been entered into the 1948 Declaration of Human Rights. This principle of the Islamic human rights law presents some of the most important aspects of the principle of the right to privacy which has developed into another similar principle for the purpose of the protection of all human beings in their social relations.

The principle of he right not to be spied on can, in particular, be examined in one of the verses of the *Qur'ān*. It reads that human beings must:

i. avoid most suspicions,
ii. Some suspicions are indeed sins.
iii. So do not pry into others' secrets and
iv. do not backbite.

In other words, the principle of the right not to be spied on implies the fact that political or legal authorities should not, in one way or another,

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[72] The *Qur'ān*, 24:27.

[73] Section XXII of the Islamic Declaration.

[74] Similarly, the system of international human right has given special consideration to the matter of privacy and has recognised that 'No one shall be subjected to arbitrary interference with his privacy, family home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.' Article 12.

violate the principle of privacy and spy on the daily life of others for their own interests. A broader interpretation of this principle concerns also the fact that listening to and filming others without particular permission is also recognised as a violation of the rules of Islamic law. According to the Islamic human rights law reading and photocopying the correspondence of others is also assimilated to the violation of the principle of the right not to be spied on.[75] A violation of the principle, as can be seen from the above presentation, is a sin/crime under Islamic provisions. Nevertheless, it is a fact that the principle has repeatedly been violated in the practice of Islamic nations/states.

3.4.16. *Rights to Nationality*

The principle of the right to nationality is also one of the key principles of the Islamic international human rights law that has to be respected by the Muslim states. According to this principle, every human being has the right to nationality and his/her right of nationality cannot be refused on the basis of cultural, political, economic, religious, race, language or any other factors.

The principle of the right to nationality is based on the fact that any individual who is born under the territorial jurisdiction of Islamic states has a legal right to nationality, as long as his/her family has the nationality of the place. The nationality is here followed by the nationality of parents.[76] In the old system of Islamic practice, every person who came under the jurisdiction of Islam could automatically receive nationality whenever he or she entered into the religion of Islam. The Islamic law of human rights law sees, in fact, the concept of nationality as an individual right and not a state. This is because the state is established on the concept of individuals' rights and not the contrary.[77]

4. Rights within the *Sunnah*

The principles of human rights under the second source of Islamic international law i.e. *Sunnah* have indeed the highest degree of philosophical and human rights jurisprudence documented in the earliest traditions of

[75] Mawdudi, *Human Rights in Islam*, p. 25.

[76] See the Cairo Declaration of Human Rights in Islam, 1990.

[77] The principle of right to nationality is very extensive which cannot altogether be discussed over here.

various Islamic nations.[78] These principles of Islamic human rights can be examined and compared with the principles of the Declaration of Human Rights in the system of international law.[79] The principles are specially presented in the 'Farewell Sermon of the Prophet' which provides one of the broadest principles of equality between peoples and abolishes all forms of inequality in the social life of men. These are regardless of race, colour, language, religion, sex, culture, ethnic origin, all types of social position, physical ability or disability, and many superficial inequalities, the types of which have no substantive character in the social value of men.[80]

The Farewell Sermon reads that:

> O people, listen to my words; verily I do not know, I may not ever meet you after my this year at this place.[81]
>
> Behold, no criminal committing a crime is responsible for it but himself. No son is responsible for the crime of his father and no father is responsible for the crime of his son.
>
> Behold, the Muslim is the brother of the Muslim. So nothing is lawful for a man from his brother except what he gives him willingly. So you should not oppress yourselves. O Allah! have I conveyed the message? …
>
> Take care of your slaves; take care of your slaves. Feed them from what you eat and clothe them from what you wear.
>
> If they commit any crime which you do not like to forgive, then sell the bonds of Allah and do not chastise them.
>
> O people, fear Allah; and (even) if a mangled Abyssinian slave becomes your chief hearken to him and obey as long as he executes the Book of Allah.[82] …
>
> O people, verily your Lord is one and your father is one. All of you belong to Adam and Adam is (made) of earth. Behold, there is no superiority for an Arab over a non-Arab and for a non-Arab over an Arab; nor for a

[78] For some examination see W. Montgomery Watt, *Muhammad, Prophet and Statesman* (1961); Muhammad Ali Mawlawi, *The Religion of Islam* (1936); S. Bukhush Khuda, *Contribution to the History of Islamic Civilization* (1930).

[79] Sami A. Aldeeb Abu-Sahlieh, 'Muslims Human Rights: Challenges and Perspectives', in Wolfgang Schmale (ed.), *Human Rights and Cultural Diversity: Europe. Arabic-Islamic World. Africa. China* (1993), pp. 239–268, p. 243.

[80] See below.

[81] Ubaidul Akbar, *The Orations of Muhammad*, p. 90.

[82] Id., pp. 92–94.

> red-coloured over a black-coloured and for a black-skinned over a red-skinned except in piety. Verily the noblest among you is he who is the most pious.[83] …
>
> I recommend you to do good to the First Emigrants and I recommend the Emigrants to do good among themselves.[84] …
>
> Then he said: 'There may be some rights which I owe to you and I am nothing but a human being. So if there be any man whose honour I have injured a bit, here is my honour; he may retaliate.
>
> Whosoever he may be if I have wounded a bit of his skin, here is my skin; He may retaliate.
>
> Whosoever he may be, if I have taken anything from his property, here is my property; so he may take. Know that he, among you, is more loyal to me who has got such a thing and takes it or absolves me; then I meet my Lord while I am absolved.'[85]

The above principles obviously provide full juridical, theological and human rights support for Muslim and non-Muslim nations in all parts of the world. This is one of the methods of application of the principle of equality for all men regardless of their philosophical, theoretical, theological or political opinions.

[83] Id., pp. 96–97.
[84] Id., p. 102.
[85] Id., p. 106.

CHAPTER NINE

THE DISCIPLINE OF ISLAMIC INTERNATIONAL CRIMINAL LAW

1. The Purposes of International Criminal Law

The system of international law in general and the system of international criminal law in particular were originally developed from the law of war, or to use modern terminology—the law of armed conflicts.[1] This is because it was normally on the basis of war treaties, agreements and protocols that many principles of international criminal law were originally created. It is however important to mention that the existence of the body of international criminal law has been discussed from various points of view and there are a number of views which question the nature of its existence.[2]

The concept of international criminal law and its existence was expressed in the early years of the twentieth century and the most important reasons for its initial development and the consolidation of its principles were the First and the Second World Wars.[3] The First World War resulted in the creation of the League of Nations and the ratification of a number of international treaties governing the law of armed conflicts and the prevention of states from resorting to the unlawful use of force and aggressive war.[4] It was in fact between the two World Wars that the principles of international criminal law governing the protection of human beings and states from unlawful and illegal acts by one another were primarily regulated in a number of international criminal conventions. This development can also be seen in the international criminal conventions ratified after the establishment of the United Nations.[5]

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[1] Farhad Malekian, *International Criminal Responsibility of States* (1985), p. 99.
[2] Farhad Malekian, *International Criminal Law* (1991), vol. I, pp. 3–10.
[3] Malekian, *International Criminal Responsibility of States*, pp. 55–67.
[4] Id., pp. 103–113.
[5] See Malekian, *International Criminal Law*, vols. I and II.

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All these conventions provide a substantive protection for their various subjects of interest. Consequently, the varied purposes and functions of international criminal law can be examined in the provisions of these conventions, which have strongly prohibited and prevented the commission of certain acts and have recognised their violation as constituting international crimes.[6] Accordingly, the purpose of international criminal law is to bring the perpetrators of international crimes before appropriate jurisdiction for prosecution and punishment and it is for this reason that the system of international criminal law contains a wide range of regulations for the extradition of criminals. The purposes and the functions of international criminal law are therefore elimination, prevention, prohibition, extradition, jurisdiction, prosecution and application of appropriate punishment.[7] To this it must also be added that the system of international criminal law, with its specific purposes and functions, protects and secures the implementation of the international legal system and/or the system of public international law. One cannot, however, disagree with the fact that the theory of international criminal law is rather different from its practical enforcement measures.[8] Nevertheless, this does not prevent the development of international criminal law.

The purposes and functions of international criminal law are developing increasingly and its enforcement concerning certain international crimes such as crimes against humanity, war crimes and genocide is, to some extent, gaining reality. Some of the clearest examples of these are the tribunals which have been created in order to bring the perpetrators of international crimes under appropriate prosecution and punishment. These are, for example, the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY)[9] and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring

[6] Id.
[7] Id., pp. 1–53.
[8] Id., pp. 49–51.
[9] U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

States, between 1 January 1994 and 31 December 1994 (ICTR). More significant is the formulation of the treaty on the Statute of the permanent International Criminal Court (ICC) in 1999 and its ratification by many states during the following years. As we will discuss in Part III, the ICC is now working with many cases in order to improve justice and put an end to impunity. One of the most recognised cases before the ICC is the Omar Hassan Ahmad al-Bashir case which has to be investigated and prosecuted by the Court if the Sudanese political and legal authorities decide to surrender him to the jurisdiction of the Court. He may, not only, be recognised as being responsible for the violations of the system of international criminal law, but also, violations of the Islamic International Criminal Law if it had, hypothetically, been applied. This means that one of the prominent purposes of both international criminal laws is to bring criminals under prosecution and punishment and apply appropriate penalties.

2. Definitions

2.1. *Definition of International Criminal Law*

The system of international criminal law has been defined in a number of different ways and in different contexts.[10] This is because, although there are a number of international criminal conventions applicable to international crimes, the real nature and the true function of international

[10] For the development of international criminal law see Ludwig von Bar, *Das Internationale Private- und Strafrecht* (1862); Alfred Hegler, *Prinzipien des Internationalen Strafrechts* (1906); Friedrich Meili, *Lehrbuch des Internationalen Strafrechts und Strafprozessrechts* (1910); Josef Kohler, *Internationales Strafrecht* (1917); Maurice Travers, *Le Droit Pénal International et sa Mise en Oeuvre en Temps de Paixiet en Temps de Guerre*, 5 vols. (1920–1922); H. Donnedieu de Vabres, *Introduction à L'étude du Droit Pénal International* (1922); H. Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928); Vespasian V. Pella, 'Plan for World Criminal Code', 17 *Revue Internationale de Droit Penal* (1946); Vespasian V. Pella, 'Fonctions Pacificatrices du Droit Pénal Supranational et Fin du Système Traditionnel des Traités de Paix', 1 *Le Droit Internazional Public* (1947); Nino Levi, *Diritto Penale Internationale* (1949); Georg Schwarzenberger, 'The Problem of an International Criminal Law', 3 (263) *Current Legal Problems* (1950); Hans-Heinrich Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (1952); Vespasian V. Pella, 'La Codification du Droit Pénal International', 56 (337) *Revue Génerale de Droit International Public* (1952); K. Siegert, *Grundlinien des Völkerstrafprozessrechts* (1953); Stefan Glaser, *Introduction à L'étude du Droit International Pénal* (1954); Antonio Quintano-Ripolles, *Tratado de Derecho Penal Internacional e*

criminal law is subject to various relevant legal and political discussions between scholars and politicians. According to most definitions international criminal law is that part of international law which applies to serious violations of international law leading to international crimes.[11] According to these definitions international criminal law is that part of international law which prohibits and prevents the commission of international crimes and has certain procedural measures for the extradition, prosecution, and punishment of perpetrators of international crimes. While the definitions are important in the development of the system of international criminal law, they have, mostly, considered the system, an integral part of domestic criminal law and therefore do not give certain necessary independent characterizations to the system.[12]

Internacional Penal, 2 vols. (1955–1957); Stefan Glaser, *Infraction Internationale* (1957); Georg Schwarzenberger, *The Frontiers of International Law* (1962), pp. 181–209; G.O.W. Mueller and E.M. Wise (eds.), *International Criminal Law*, 2 vols. (1965); Stefan Glaser, *Droit International Pénal: Son Origine, son État Actuel et son Développement, L'indice Pénale* (1968); Stefan Glaser, *Droit International Pénal Conventionnel*, 2 vols. (1970); Edward M. Wise, 'Prolegomenon to the Principles of International Criminal Law', 16 (562) *New York University Law Review* (1970); Claude Lombois, *Droit Pénal International* (1971); Stanislaw Plawski, *Etude des Principes Fondamentaux du Droit International Pénal* (1972); M. Cherif Bassiouni and Ved P. Nanda (eds.), *A Treatise on International Criminal Law: Crimes and Punishment*, 2 vols. (1973); Bart de Schutter (ed.), *La Belgique et le Droit International Pénal* (1975); Quincy Wright, 'The Scope of International Criminal Law: A Conceptual Framework', 15 *Virginia Journal of International Law* (1975); L.C. Green, 'An International Criminal Code—Now?', 3 (560) *Dalhousie Law Journal* (1976); M.Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1987); Farhad Malekian, *International Criminal Law: The Legal and Critical Analysis of International Crimes*, 2 vols. (1991); Farhad Malekian, *The Concept of Islamic International Criminal Law, A Comparative Study* (1994); Farhad Malekian, *The Monopolization of International Criminal Law in the United Nations: A Jurisprudential Approach*, 2nd ed. (1995); M. Cherif Bassiouni (ed.), *International Criminal Law*, 3 vols. (1999); Farhad Malekian, 'International Criminal Responsibility', in M. Cherif Bassiouni (ed.), *International Criminal Law* (1999); M. Cherif Bassiouni, *Introduction to International Criminal Law* (2003); M. Cherif Bassiouni, 'The Discipline of International Criminal Law', in M. Cherif Bassiouni (ed.) *International Criminal Law*, vol. I (2008) pp. 3–40; M. Cherif Bassiouni, 'The Subjects of International Criminal Law: Ratione Personae', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. I (2008) pp. 41–70; Robert Cryer, 'The Doctrinal Foundations of International Criminalization', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. I (2008) pp. 107–128.

[11] Malekian, *International Criminal Law*, vol. I, pp. 3–10.

[12] Robert A. Friedlander, 'The Foundation of International Criminal Law: A Present-Day Inquiry', 15 *Case Western Reserve Journal of International Law* (1983), pp. 13–25.

One of the reasons for this is that most relevant writers are of the opinion that the prosecution of most international criminals depends on national criminal systems and this is also evident due to the provisions of the Statute of ICC which gives the primary right of prosecution of accused persons to the national criminal jurisdiction. The function of the ICC is, solely, under the complementarity principle which means whenever a state is not, for one reason or another, capable of the enforcement of national criminal jurisdiction over accused persons, the ICC is empowered to take over the case and apply appropriate prosecution and punishment. Therefore, the legal characterization of the system of international criminal law largely relies on domestic criminal legislations and co-operations between various legal systems for the effective enforcement of their relevant provisions.

There are however writers who give an independent characterization to the system of international criminal law and are of the view that domestic criminal laws cooperate with international criminal law in the prosecution and punishment of the perpetrators of international crimes.[13] For this reason they do not see the principle of complementarity as an essential reason for the independent characterization of the system, but the enforcement of international criminal law by national criminal courts is seen as the first step for the implementation of the system of international criminal law by international criminal tribunals or the ICC.[14] Several opinions have therefore been put forth in the defence of this theory. The system of international criminal law has, in my opinion two clear aims:

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[13] See, generally, M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1st ed. 1981, 2nd ed. 1986).

[14] M. Cherif Bassiouni, 'The Time Has Come for an International Criminal Court', 1 *Indiana International & Comparative Law Review* (1991), pp. 1–43; Farhad Malekian, *The Principal Function of an International Criminal Tribunal*, paper submitted to the World Conference on the Establishment of an International Criminal Court to Enforce International Criminal Law and Human Rights, Associated with the United Nations, International Institute of Higher Studies in Criminal Sciences (Siracusa, Italy, November 2–5, 1992), 16 pp.; M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (1999); M. Cherif Bassiouni (ed.), *International Criminal Law*, 2nd ed., 3 vols. (1999); M. Cherif Bassiouni, *The Statute of the International Criminal Court and Related Instruments: Legislative History, 1994–2000* (2001); M. Cherif Bassiouni, *Introduction to International Criminal Law* (2003); M. Cherif Bassiouni (ed.), *International Criminal Law*, 3rd ed., 3 vols. (2008); M. Cherif Bassiouni and P. Manikas, *The Law of The International Criminal Tribunal for The Former Yugoslavia* (1996).

> The first purpose of international criminal law is to secure the international legal order and therefore to maintain international perpetual peace. Consequently, *international criminal law is a body of law which is attributable to wrongful conduct which violates international public regulation and endangers the maintenance of international legal order and peace*. The second aim of international criminal law is to secure domestic legal systems where they are unable to implement their own legal systems. In this case international criminal law can be defined as *a body of rules cooperating in criminal matters with domestic legal systems for the effective prosecution of criminals*. International criminal law therefore has two characteristics. The first being international criminal laws arising from international criminal conventions having more or less international legal enforceability. The other is to regulate rules between municipal criminal legal systems for the enforcement of national criminal court decisions. Two examples of this are extradition and information gathering. The difference between the former and the latter is that the former is enforceable internationally, while the latter is only enforceable among a certain number of states. The former may, in certain situations be considered as a principle of *jus cogens* and therefore creates obligations for all states regardless of their participation in an international criminal convention—such as the convention on genocide. The latter's enforceability is regional. Nevertheless, both concepts of international criminal law are correlative and have a more or less similar aim in the maintenance of a particular legal system. However, in the final analysis the enforceability of international criminal law of both types depends upon political considerations. This is because the structure of international criminal law depends at present upon national provisions, which means the concept of violation varies from one nation to another.[15]

However, because of the new developments of the system of international criminal law and the establishment of the ICC and other international criminal tribunals and courts, definition of international criminal law has, today, been more consolidated than ever before. The system of international criminal law may, therefore, be defined as a body of rules, provisions, norms and principles which have the purpose of the criminalization of certain conducts which seem to be hazardous for the security of mankind and safeguarding of international peace, security and justice. This system empowers national, regional, temporary and permanent international criminal tribunals and courts to bring violators of its provisions before their jurisdiction for the purpose of the founding of truth from the realm of judgement. Its purpose is therefore to prosecute and punish criminals.

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[15] Malekian, *International Criminal Law*, vol. I, pp. 9–10. This position is the same even after the establishment of the ICC.

2.2. *Definition of Islamic International Criminal Law*

With the Islamic concept of international criminal law, we mean that part of Islamic law which exclusively relates to certain customs, principles, rules and obligations prohibiting and preventing the commission of certain activities in the relations between individuals and states, the commission of which are extraditable, prosecutable and punishable within the law. Thus, Islamic international criminal law not only consists of rules of Islamic law, but also, of rules of customary and conventional international criminal law. Obligations arising from treaties are *pacta sunt servanda* and consequently bind Islamic nations which have signed and ratified the relevant international treaties. This means that Islamic international criminal law has, similar to the system of international criminal law, a policy of prevention, prohibition, prosecution and punishment of acts which are contrary to the safeguarding of international peace, security, equality and justice. In other words, as we will demonstrate within this work, both systems of international criminal law have the character of criminalization of certain conducts which seem not to be competent for the universal or international legal and political order as a whole. The term "universal" is used here in order to demonstrate that the most purposes of Islamic international criminal law have been universal rather than a regional or international. This means the system has the capacity of internationalizing its conduct with due regard to the system of international criminal law.

While the terminology of 'Islamic international criminal law' is my own innovation, this type of criminal law has generally existed for a much longer period of time; it has not, however, been previously analysed within a separate field of law.[16] This is also true in the case of the international criminal law system. While the system has long been exercised, it was in the early twentieth century that the system was slowly recognised as an integral part of public international law. The latter consists of several different international laws—including international criminal

[16] See, for instance, Muhammad Hamidullah, *The Muslim Conduct of State*, 7th ed. (1977); Muhammad Hamidullah, *The Battlefields of the Prophet Muhammad* (1953); Majid Khadduri (ed.), *Law in the Middle East* (1955); Majid Khadduri, *War and Peace in the Law of Islam* (1955); Majid Khadduri, *Islamic law of Nations: Shaybani's Siyar* (1966); Mohammad Talaat Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach* (1968).

law.[17] The legal provisions of both systems have, therefore, previously existed to some degree within their original sources, but, they have not been studied separately.

The Islamic concept of international criminal law bases its elements on the well known principle of *nulla poena sine lege* or *nullum crimes sine lege*, which means that *a conduct cannot be punished as criminal unless some rule of law has already declared conduct of that kind to be criminal and punishable as such*.[18] For this reason Islamic international criminal law, like the system of international criminal law, essentially builds its framework on the principle of legality and this is particularly important in the recognition of international crimes.[19]

Islamic international criminal law is therefore against the principle of retroactivity which has, sometimes, been exercised in the system of international criminal law. Accordingly, a crime must first be defined as an action and cannot be criminalized after its commission. For this reason, the principle of legality must be regarded as the chief principle of criminal justice system in Islamic international criminal law. It is for this reason that the *Qur'ān* (the main source of Islamic criminal law) reads that 'We have revealed the Book to you with the truth that you may judge between people according to the complete Code and knowledge of justice which God has given you.'[20] The *Qur'ān* therefore makes it clear that the prosecution and punishment of individuals can only be carried out on the grounds of pre-existing criminal law criminalizing the given conduct. This interpretation means that Islamic international criminal law considers the principle of criminalization of a given international conduct as a key element in the international criminal justice system and therefore challenges any type of criminal jurisdiction, the jurisdiction of which is retroactive.[21]

Due to this consideration one can draw the conclusion that the international criminal jurisdiction created after the Second World War, which based its jurisdiction on retroactive law and partly *de lege lata* against the perpetrators of international crimes, would have been recognised as invalid according to Islamic international criminal law. However, the per-

[17] Malekian, *International Criminal Responsibility of States*, pp. 47–49.
[18] The *Qur'ān*, 4:105. See also *supra*.
[19] Id.
[20] The *Qur'ān*, 4:105.
[21] See *supra*.

petrators of war crimes during the Second World War could have been punished in accordance with legal principles, if, the principles of Islamic international criminal law had been taken into consideration within the framework of the constitution of the International Military Tribunal in Nuremberg. This is because in accordance with Islamic international criminal law, which has a wide range of regulations and principles governing the international humanitarian law of armed conflicts,[22] the perpetrators of international crimes during the Second World War, could have been punished due to its principle of legality.[23] This means that the nature and character of the Holocaust are strongly condemned due to the provisions of the law and due to the fact that the Jews were an integral part of mankind and could not be put aside by the universal jurisdiction of pure Islamic law.[24]

The principle of legality in Islamic international criminal law therefore implies respect for two important principles in the criminal justice system of Islamic law, 'The first is that no obligation exists prior to the enactment of legislation, and the second is that all things are presumed permissible. The application of those rules to the criminal law signifies that no punishment shall be inflicted for conduct which no text has criminalized and that punishment for criminalized conduct is restricted to instances where the act in question has been committed after the legislation takes effect.'[25]

This power of the legalization of the given international conduct in Islamic international criminal law increases the common value of the law and therefore makes its implementation or enforcement possible. In a broader perspective it decreases the commission of criminal activity at an international level. This principle of non-retroactivity has, however, been one of the imperative parts of contemporary international criminal law and has been entered into the structure of the Statute of ICC. Today, both systems of international criminal law are of a similar view concerning the non application of the principle of retroactivity.

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[22] See chapter twenty-eight .

[23] I have however given this example for clarification of the subject matter and not necessarily for the implementation of Islamic international criminal law on the perpetrators of international crimes in Europe after the Second World War.

[24] However, one cannot disagree with the fact that the Tribunal refers to the law of civilisation of mankind and violation of the human morality.

[25] Muhammad Salim al-ʿAwwa, 'The Basis of Islamic Penal Legislation', in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (1982), pp. 127–147, p. 134.

2.3. *A Comparative Definition of Both Systems*

It is true that the system of international criminal law may be defined in a number of ways. Yet, its general definition coincides in many aspects with the definition of Islamic international criminal law. Both systems aim to define criminal conducts and have the purpose of preventions, prohibitions, extraditions, prosecutions and punishments. It is the basic principle of both systems to bring the violators of certain specific rules and obligations before an appropriate criminal jurisdiction. Both systems not only aim to protect individuals but also the rights of minorities in relation to international criminal violations. For example, the system of international criminal law strongly prohibits any type of crime against minorities or any type of discrimination against the individuals of a group or a nation. Clear examples of these prohibitions in the system of international criminal law can be examined in many documents of the United Nations concerning racial discrimination, apartheid, genocide and also in a large number of documents as well as instruments of international human rights law.

Islamic international criminal law also has a considerable number of rules protecting minority groups. These rules can be found in particular in the main source of Islamic law i.e. the *Qur'ān* and many other sources of this law. For example, Islamic law prohibits the killing of an individual or individuals who have not engaged in criminal conducts and it strongly prohibits the mass killing of groups. Discrimination is not only prohibited, but is also, recognised as a serious crime against Islamic human rights. There should thus be no difference between Muslims and non-Muslims in all aspects of social relations. In the words of jurists, the basic principle of the system of international relations in Islam is, "the Muslims and non-Muslims are equal (sawa')."[26] The 2004 Arab Charter which was singed and ratified by Arab States has also emphasised the importance of the principle of equality.[27] It reads that "Persons belonging to minorities shall not be denied the right to enjoy their own culture, to use their own language and to practice their own religion. The exercise of these rights shall be governed by law."[28]

Although Islamic law does not use the legal terminologies of international criminal law such as genocide or apartheid in its sources (since

[26] *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 94.

[27] The Charter was first ratified by Algeria, Bahrain, Jordan, Palestine, Syria, Libya and the United Arab Emirates.

[28] Article 25.

both words are new innovations under the United Nations Organization), its rules and principles obviously prohibit any type of apartheid or genocide. Islamic law goes even further and not only prohibits apartheid at a national level, but also, prohibits it at an international level and recognises it as a serious violation of the law of equality between all nations. This is rather different in the case of international criminal law. This is because in international criminal law apartheid is a practice initiated against a group or nation by an occupying power,[29] exercised under the national legal system, or carried out internally by a regime such as in South Africa—officially abolished in 1991.[30] According to *Islamic law* the inequality which may exist in the constitution of an organization concerning the majority of members in favour of a few permanent members can be regarded as a type of apartheid against the majority members' population within the same organization. This theory cannot easily be defined under the provisions of the Convention on Apartheid in international criminal law. In this respect one can perceive that Islamic international criminal law goes further and creates a stronger concept of discrimination and/or apartheid. This is because *according to Islamic law all men must be equal before the law and before any type of assembly*. It is on this basis that Islamic law offers a very high respect to the equality of representatives of parties to a conflict and accordingly no priority should be given to other matters in an authentic and equal assembly.

This conclusion means that the obligations of the system of international criminal law governing the crime of genocide and apartheid have been long accepted in Islamic international criminal law and that it has given much stronger character to these categories of international crimes.[31] However, the Islamic concept of criminal law is much more spiritual in nature, whereas the system of international criminal law is more conventional. This means that the latter is an accumulation of regulations and when these regulations are respected and fulfilled the law is affected. States may still commit criminal acts without necessarily being criminalized in the system of international criminal law. For example, the international crimes of genocide and apartheid were not criminalized

[29] Richard A. Falk and H. Weston Burns, 'The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada', 32 *Harvard International Law Journal* (1991), pp. 129–157.

[30] For further analysis see Malekian, *International Criminal Law*, vol. I, pp. 324–375. White South Africans handed over power to blacks as a result of democratic election in May 1994.

[31] See the relevant chapters.

until the years 1948 and 1973 respectively. Both crimes could be committed and were committed during numerous wars including the First and the Second World Wars without any particular punishment. The Islamic system of international criminal law does not however build the concept of international criminal law on conventional obligations between states, but on the fact that certain principles are violated the violation of which constitute crimes under its system. One of the chief differences between these two systems of international criminal law is that one is independent and can be enlarged accordingly, without any need for codification and ratification, while the other is not.

Almost, all the new obligations and rules of the system of international criminal law must always, in one way or another, be formulated, adopted, and thereafter ratified by different states. Thus, one of the basic weaknesses of the system is that certain states avoid ratifying certain international criminal conventions and thereby escape their obligations by invoking their non-ratification *e.g.* the international Convention on Genocide was not ratified by the United States until 1988. The Convention on the Rights of the Child is not either ratified by the same state. Furthermore, the provisions of different conventions have seriously been violated in the international conducts of states such as in Iraq by the United States and the United Kingdom, Rwanda and the territories of former Yugoslavia. Similarly, the non-ratification of many other international criminal conventions has also created great difficulties for the international criminal law in enforcing its obligations on the perpetrators of international crimes. For instance, during the invasion of Iraq, mainly by the United States, many crimes were committed such as crimes against humanity, war crimes, genocide, torture and serious violations of the international humanitarian law of armed conflicts. Since the United States was not party to the Statute of ICC, no criminal rules were applicable to its nationals and more seriously, the president of the United States received no prosecution and punishment for his heinous crimes against the Iraqi nation. In accordance with the concept of Islamic international criminal law, no state can escape its Islamic criminal obligations.[32] However, they do in actual practice. All obligations are equally applicable to all states without any need for their ratification.[33]

[32] These violations are very frequent. Many Muslim authorities may be found criminals for the violations of both systems of international criminal law, if they would be brought before an authoritative court.

[33] See chapter one.

3. Sources

3.1. *Sources of International Criminal Law*

3.1.1. *Conventions*

One of the first legal values of the obligations in the system of international criminal law arise from the provisions of a large number of international criminal conventions applicable to a number of international crimes.[34] International criminal conventions have, therefore, occupied an invaluable place in the system of international criminal law and are considered an important part of the system. The international conventions of criminal law character constitute the first source of international criminal law. These legal documents or international conventions, agreements, treaties, protocols, declarations, pacts and codes have been signed or ratified from the middle of the nineteenth century up until the present time. All states have not however participated in the drafting and ratification of all these international criminal conventions. Nevertheless, the legal value of these conventions is impossible to decline.

3.1.2. *Customs*

The second source of international criminal law is the provisions found in customary international criminal law.[35] This source has long been accepted by states as an effective reason for the development of the law without any type of characterization required for the obligations in conventional criminal law. Customary international criminal law is thus that part of international criminal law which relies exclusively on the acceptance of certain rules and principles in the practice of states. Clear examples of customary principles are those applicable in times of armed conflicts and these are regarded as an integral part of the law of armed conflict including some of the rules contained in the international humanitarian law of armed conflicts e.g. the prohibition of the use of certain weapons—the use of which creates unnecessary suffering, wilful destruction and the devastation of civilian objects and attacks on those who are considered non-combatants.[36]Another example is the provisions of customary international criminal law applicable to the international crime of piracy.[37]

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[34] Malekian, *International Criminal Law*, vol. I, pp. 27–28.
[35] Id.
[36] Id., p. 149.
[37] Id., pp. 489–492.

The customary international criminal law may come into existence by the repetition of certain behaviour or may be taken from the provisions of certain conventional international criminal laws. For example, the provisions of the 1949 Geneva conventions are, not only, regarded as an integral part of the international conventional criminal law, but also, as an integral part of the customary international criminal law.[38] Provisions of many international conventions have in fact been taken from the earlier provisions of customary international criminal law and regulated into international criminal law. Thus, customary international criminal law and conventional international criminal law may over and over again come back to the importance of the same provision and interchange each others' provisions and therefore coincidently develop one another.[39]

3.1.3. *Decisions*

The third source of international criminal law is the jurisdictional decisions and practices which have come from the result of the work of national, regional or international criminal tribunals or courts. We cannot, however, disagree with the fact that the system has been largely developed through the provisions of the International Military Tribunals in Nuremberg and Tokyo[40] and to some extent from the practice of domestic criminal laws having jurisdiction over international crimes.[41] The most significant development started after the establishment of the *ad hoc* international criminal tribunals such as the ICTY, the ICTR,[42] the Court for Sierra Leone[43] and also the ICC. This source of international

[38] Id., pp. 139–141.

[39] Id., p. 139.

[40] For these international military tribunals see Malekian, *International Criminal Responsibility of States*, pp. 59–67.

[41] Malekian, *International Criminal Law*, vol. I, pp. 503–506.

[42] Consult John A. Berry and Carol Pott Berry (eds.), *Genocide in Rwanda* (1999); Napoleon Abdulai (ed.), *Genocide in Rwanda* (1994); African Rights, *Rwanda: Death, Despair and Defiance* (1995); Amnesty International, *United Nations International Criminal Tribunal for Rwanda: Trials and tribulations*, AI Index IOR 40/03/98 (1998); Amnesty International, *Rwanda: The Troubled Course of Justice*, AI Index AFR 47/10/00 (2000); Belgian Senate, *Parliamentary Commission of Inquiry concerning Rwanda/Commission d'enquête parlementaire concernant les événements du Rwanda*, Report/Rapport, Brussels/Bruxelles, 6.12.1997. Larsen Laurence Burgorgue (ed.), *La répression internationale du génocide rwandais* (2003); Jacques Castonguay, *Les Casques Bleus au Rwanda* (1998); Jean Pierre Chrétien, *Le défi de l'ethnisme: Rwanda et Buruni, 1990–1996* (1997); Jean Pierre Chrétien, *The Great Lakes of Africa: Two Thousand Years of History* (2003).

[43] C. Sriram, 'Wrong-sizing International Justice? The Hybrid Tribunal in Sierra Leone', 29 (3) *Fordham International Law Journal* (2006), pp. 472–506; Konstantinos

criminal law has, particularly, been effective in the development of laws governing the prosecution and punishment of crimes against humanity, war crimes and genocide. While the practice of domestic criminal courts, domestic military tribunals and admiral courts have been effective in the development of the system of international criminal law, the effect of these courts must not be exaggerated, due to their limited authorities over international cases.[44] However, one cannot deny the effect of the growing machinery of the system of international criminal justice and its decisions on the development and consolidation of certain international crimes such as torture, apartheid, trafficking, rape and various violations of the international humanitarian law of armed conflicts. They are practically useful to all states in their application as a source of international criminal law. This is because the changing structure of the system of international criminal law strongly encourages all states to apply within their domestic criminal systems, the sources of international criminal law. It is on this basis that the third source of international criminal law has become one the strongest sources of the law within national, regional and international legal community as a whole.[45]

It must also be added that the decisions and directives of the International Court of Justice demonstrate the existence of the tendency of states towards the internationalization and consolidation of provisions of conventional and customary international criminal law. An illustrative example is the genocide convention, the provisions of which have had without doubt, the effect of conventional international criminal law on the contracting parties and also the effect of customary international criminal law on all states regardless of their participation in the process of achieving those provisions.[46] The provisions of the Convention are considered an integral part of the international law of *jus cogens*.

D. Magliveras, 'The Special Court for Sierra Leone: A New Type of Regional Criminal Court for the International Community?' 17 *International Enforcement Law Rep.* (2001); David M. Crane, 'The Special Court for Sierra Leone', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. III (2008), pp. 195–218.

[44] The Statute of the International Court of Justice also refers to 'the general principles of law recognised by civilized nations' as a source of international law.

[45] See Malekian, *The Principal Function of an International Criminal Tribunal*.

[46] Malekian, *The System of International Law*, p. 19. The International Court of Justice recently formulated an order concerning the genocide of Muslim inhabitants of Bosnia-Herzegovina which has undoubtedly the effect of the third source of international criminal law. See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (8 April, 1993, Order), 25 pp.

3.1.4. *Publicists*

The fourth and subsidiary source of international criminal law is the collective opinions of the most distinguished publicists in this field;[47] Views of certain publicists who are well recognised in the system of international criminal law may be considered subsidiary sources in the system. Although the fourth source of the system of international criminal law may be opposed by the opinions of some writers and states, this does not mitigate the value of opinions by publicists who give a balanced and unbiased presentation of the system of international criminal law.[48]

The views of publicists have not the effect of law making power and cannot be regarded as a definite legal interpretation in the system of international criminal law. This is on the basis of their various political, economic, social and cultural involvements when they are expressing their views. For instance, one writer may recognize the very serious infringements of international law during the Vietnam War constituting genocide and another may not.[49] Consequently, the views of publicists do not constitute positive law, but may be useful, in solving certain legal dilemmas. Furthermore, the views of publicists may, to a great extent, be useful in the legislation and promotion of international criminal conventions.

3.1.5. *Resolutions*

Another source of international criminal law is the resolutions of the United Nations. These are those resolutions of the organization which have a creative law making strategy and have been voted in favour by the majority members. For instance, resolutions of the General Assembly concerning the apartheid regime in South Africa have been considered as an integral part of international criminal law and been referred to as sources of the law. However, some of the resolutions of the Security Council may also be considered as sources of international criminal law, but, they are very restricted and therefore all the resolutions of

[47] See Article 38 of the Statute of the International Court of Justice.

[48] This source is nevertheless very controversial indeed.

[49] A clear example is the conclusion of the Bertrand Russell war crimes tribunal (a non-governmental) in London, Stockholm and Copenhagen. Many American jurists had opposite conclusions; however, Richard Falk from the Princeton University was of another view.

the Council cannot be considered as sources of the law. For instance, the resolutions of the Council relating to the Gulf War have been proved to be monopolized by the permanent members and the result of intrigues between the United States and the United Kingdom.[50] But, the resolutions of the Security Council regarding the establishment of the *ad hoc* tribunals are considered as an important part of international criminal justice.

3.2. *Sources of Islamic International Criminal Law*

Islamic law has a variety of sources for its definition, interpretation and application. This is the reason for the flexibility of Islamic law and it sometimes creates controversy concerning the enforcement of the law between the various doctrines within this law.[51] Some of the sources enumerated in Islamic law are the *Qur'ān*, custom, consensus, *qiyas*, preuves, pre-assumptions, equality, freedom, doctrine and cases. Since there is controversy among Muslims as to the validity of all these sources and no special agreement has been reached to that purpose, we will only study the more acceptable sources of Islamic law which are significant within the Islamic concept of international criminal law and for its understanding. General classifications of the Islamic sources are as follows:

i) The *Qur'ān*.
ii) The *Sunnah* or the traditions of the Prophet.
iii) The Orthodox practice of the early *Caliphs*.
iv) The practice of the other Muslim rulers not repudiated by the jurist consults.
v) The opinions of celebrated Muslim jurists:
    a) Consensus of opinion or *Ijma*;
    b) Individual opinions *Qiyas*.
vi) The arbitral awards.
vii) The treaties.
viii) The official instructions to commanders, admirals, ambassadors and other state officials.
ix) The internal legislation for conduct regarding foreigners and foreign relations.

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[50] Farhad Malekian, *The Monopolization of International Criminal Law in the United Nations, A Jurisprudential Approach*, 2nd ed. (1994).

[51] Chibli Mallat, *The Renewal of Islamic Law, Muhammad Baqer as-Sadr, Najaf and the Shi'i International* (1993).

x) The customs and usage.
xi) Public interest or *Istislah*.

According to a well known Islamic Persian lawyer the following classification of the sources of Islamic law is challenged by Islamic jurisprudence.[52] These are:

a) The *Qur'ān*.
b) The *Sunnah*.
c) Wisdom.
d) Consensus or *Ijma*.
e) Individual opinions or *Qiyas*.
f) Preuves.
g) The principle of Justice.
h) The principle of Equality.
i) The principle of Liberation.
j) Doctrine.
k) Case Law.
l) Custom and usage.
m) Presumptions of fact.

The study of all these sources is obviously impossible here. Only four basic sources of Islamic law are briefly studied in the following sections. These are a) the *Qur'ān* which constitutes the chief source of Islamic law, b) the Sunnah which means the authentic traditions of the prophet Muhammad, c) *Qiyas* which means an analogy of one case to another case by a jurist and d) *Ijma* denoting the existence of consensus between opinions.

3.2.1. *The* Qur'ān[53]

The *Qur'ān* has the purpose of uniting the world[54] whether with the worlds of God or with the collections of rules, provisions, regulations, norms and principles which are already accepted or will be accepted by states representing the rights and duties of their individuals towards the international community as a whole. It does not therefore aim to introduce the Islamic rules all together, but as a model in order to achieve

[52] Jafary Langaroody, *Islamic Law*, p. 15. According to Langaroody, the basic sources of Islamic law are the *Qur'ān, Sunnah*, analogy and consensus. Id., p. 20.
[53] See also part one, chapter four.
[54] *The Glorious Holy Qur'ān*, translated by Jullundri, p. 1.

to international community law based on the consent of all individuals and states of the universe. The *Qur'ān* is not only the source of Islamic international law, as we have discussed in the preceding chapters, it is also the basic source of Islamic international criminal law. It not only provides the manner of social life and methods of cooperation between the members of the society, but also the law, rules and regulations which must be respected and applied in the relations of individuals, entities and states. Within these regulations, it introduces many provisions which are, without doubt, the provisions of Islamic international criminal law which have not, separately, been dealt with in the previous analysis of Islamic law. This is also a fact regarding the system of international criminal law which has, originally, been an integral part of public international law. The *Qur'ān* is known as the law of God, its principles and words are as complete as those which represent the methods of sociology, psychology, family law, civil and taxation law, trade law, human rights, criminal law, procedural law, criminology and for our part the basic rules for the system of Islamic international criminal law.

While certain severe provisions of the *Qur'ān* governing the punishment of criminals may be criticized by some writers this does not diminish its legal value,[55] since those punishments have almost been discontinued/abolished and those provisions should be read (like many other laws) in conjunction with one another. The *Qur'ān* is a very acquiescent constitution and one should be acquainted with the fact that its rules, principles and humanitarian aims can already be found within the system of international criminal law. This is one of the most important values of the *Qur'ān* which has influenced the history of international criminal law. The reason for this is that the writers of the European law of nations were impressed by the Islamic humanitarian law and adopted many of the principles of Islamic international criminal law within their provisions. For instance, "most of the modern law of war relating to the repression of war criminality has evolved, historically, in a European setting … though borrowing, substantially, from Koranic law through long and close contact with the Moslem civilization."[56]

The *Qur'ān* and its norms concerning criminal law and international criminal law may be interpreted (like many other systems of laws) in different ways and therefore different conclusions may be reached

[55] These sever punishments should be regarded as abolished.

[56] Gerald I.A.D. Draper, 'The Modern Pattern of War Criminality', 6 *Israel Yearbook on Human Rights* (1976), p. 9.

concerning the same issue such as aggression and *Jihad*. This depends on personal judgements and the social status of the person interpreting and for what purposes the political diplomacy of the *Qur'ān* concerning Islamic international criminal law is going to be employed.[57]

The *Qur'ān* expects cooperation between all individuals, groups, clans and states for the purpose of the implementation of international criminal justice and the prevention of aggressors from further violations of the fundamental rights of mankind. Its basic function is to create workable and acceptable principles of the international human rights law in the relation between individuals and states and to promote the principles of equality, justice and brotherhood for all without any form of discrimination in national and international life. The invaluable function of the *Qur'ān* in the development of the Islamic international humanitarian law of armed conflicts and human rights principles cannot therefore be denied from either a jurisdictional or natural law point of view. This should be judged with the consideration of the law which was presented fourteen centuries ago and not with the laws which are formulated during recent times. Even though, it is a fact that the Qurʾān is not the source of contemporary international criminal law, it is obviously its preceding source from a historical aspect. This is based on the fact that the system of international criminal law has made use of its principles significantly. The Qurʾān therefore remains the historical source of Islamic international criminal law.

3.2.2. Sunnah[58]

The second source of Islamic international criminal law is the *Sunnah* including the *hadith*[59] which means the total sum of the statements,

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[57] For political concepts of the *Qur'ān* see Sayyid Abul Aʾla Maududi, *Islamic law and Constitution*, 7th ed. (1980), pp. 153 seq.

[58] See also part one, chapter four.

[59] For further clarification it must be stated that although *Sunnah* and *hadith* constitute the second sources of Islamic international criminal law their legal characterizations must not be confused with one another. *Sunnah* means the manner or mode of life of the Prophet during his lifespan. One of the legal reasons for *Sunnah* constituting a second source in Islamic law is that *Sunnah* represents and interprets the Qurʾān. In other words it is the actual practice of the *Qur'ān* during the life of the Prophet. *Sunnah* not only interprets the *Qur'ān* but also aids in its practical implementation and enforcement. *Hadith* means the narrations of the Prophet conveyed to man through revelations or hearing. One may say that the second source of Islamic law consists of two interrelated subjects complementing one another's purposes and more or less representing the same subject matter.

behaviour and authentic social traditions of the Prophet Muhammad[60] concerning certain acts which should be prevented, eliminated, prosecuted and punished when the principles of the law of humanity are violated. A general interpretation of this source also encourages the full respect of the international humanitarian law of armed conflict and the implementation of the principles of the human rights law in war or peacetime. *Sunnah* has also been enumerated as one of the most reliable sources of Islamic international law.[61] The Qurʾān ordains in several passages the importance of this source. It reads, for example, that 'whatsoever the Messenger gives you take it and whatsoever he forbids, abstain from it.'[62] The *Sunnah* implies an interpretation and enforcement of Islamic international criminal law from a historical aspect due to the traditions of the Prophet.[63] The *Sunnah* must, therefore, be regarded as an invaluable source of Islamic international criminal law because of the very strong connection between it and the chief source of this law. In other words, the Sunnah promotes the progressive development of international humanitarian law, not only juridically, but also, from a practical point of view in order to prevent genocide, apartheid, crimes against humanity, war crimes, torture, unnecessary killings, unnecessary suffering of individuals and rape.[64] It is for this reason that the *Sunnah* can,

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For further study on *hadith* see M.M. Azami, *Studies in Hadith Methodology and Literature* (1977); M.M. Azami, *Studies in Early Hadith Literature* (1978); R. Bosworth-Smith, *Mohammed and Mohammedanism* (1889); M. Abul-Fazl, *Sayings of the Prophet Muhammad* (1980).

[60] For *hadith* see Azami, *Studies in Hadith Methodology and Literature*; Azami, *Studies in Early Hadith Literature*.

[61] See the proceeding chapters. See also Hamidullah, *The Muslim Conduct of State*, p. 18.

[62] The *Qurʾān*, 59:7.

[63] Jafary Langaroody, *Islamic Law*, p. 43.

[64] The Prophet granted charter to the Christians of Mount Sinai. This is the place where Moses received the Ten Commandments and also an integral part of the history of Christians. In the Judeo-Christian region of the Middle East, Mount Sinai is recognised as one of the four main sacred mountains. According to the charter, "This is a message from Muhammad Ibn Abdullah, as a covenant to those who adopt Christianity, near and far, we are with them. Verily, I, the servants and helpers, and my followers defend them, because Christians are my citizens; and, by God, I hold out against anything that displeases them. No compulsion is to be on them; neither are their judges to be removed from their jobs, nor their monks from their monasteries. No one is to destroy a house of their religion, to damage it, or to carry anything from it to the Muslims' houses. Should anyone take any of these, he would spoil God's covenant and disobey His Prophet. Verily, they are my allies and have my secure charter against all they hate. No one is to force them to travel or to oblige them to fight. Muslims are to fight for them … Their churches are to be respected." Syed Imad-ud-Din Asad, *Myth of Islamic Intolerance*, www.islamicity.com/articles/Articles. asp?ref=DW0603–2948. Visited on 2009-10-14.

especially, be referred to in Islamic international criminal law when certain questions of the law are not clear and need particular clarification in their application. There are, for instance, numerous examples of the application of the law by the Prophet when an international armed conflict occurred between two or several states.[65] The rules of Islamic international criminal law found in the traditions of the Prophet are, nevertheless, inferior to the *Qur'ān*.[66]

3.2.3. *Consensus*[67]

The third source of Islamic international criminal law is *Ijma* which means here consensus of opinion concerning certain international criminal matters. This source denotes the high value of collective opinion in agreeing upon an international criminal case and the need to a democratic jurisdiction between different members of the universal community as a whole. There are different opinions concerning the key elements of *Ijma* or consensus. According to one class, consensus in international criminal matters does not mean the majority opinion but rather a complete agreement between all those who have participated in the arrival at a decision relating to international criminal case. This consensus is of unanimous agreement.[68] Clear examples of these types of consensus compared with the system of international criminal law are those reached in the General Assembly by the members of the United Nations such as resolutions of the Assembly governing apartheid, racial discrimination and those relevant to the rights of the struggles of the Palestinian population for liberation and freedom from unjustified occupation. Without doubt all these resolutions coincide with the system of Islamic international criminal law, including its sources, aims and requirements in order to achieve universal peace, equality and justice.

According to another class, consensus is achieved when an overwhelming majority of opinion is reached due to the examination of

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[65] A line of these provisions of humanitarian law of armed conflict can be seen in the order of caliph Omar Bin Khattab when in 638, Jerusalem was conquered by Muslims. He declared that "I grant them security of lives, their possessions, their children, their churches, their crosses, and all that belongs to them … Their churches shall not be impoverished, nor destroyed; neither endowments, nor their dignity … Neither shall the inhabitants of Jerusalem be exposed to violence in following their religion; nor shall one of them be injured." www.paklinks.com/…/208894-islamic-humanitarian-law.html. Visited on 2009-10-14.

[66] Hamidullah, *The Muslim Conduct of State*, p. 18.

[67] See part one, chapter four.

[68] Jafary Langaroody, *Islamic Law*, p. 68.

certain international criminal matter.[69] The third class expresses that it is sufficient that a specific group agree upon the existence of a certain matter and that the matter is widely known by others and that they do not object to or are silent towards its existence.[70] This may be compared with the contents of some of the resolutions of the Security Council, in the voting process of which the majority of states do not participate, but their aim clearly overlaps with the system of international criminal law and Islamic international criminal law. These are such as those resolutions which recognize the establishments of *ad hoc* tribunals for the prosecution and punishment of accused individuals within the territory of the former Yugoslavia and Rwanda. Other clear examples are the resolutions which condemn the human suffering in Darfur. Consensus is thereby achieved because of the clear human rights supports within the content of resolutions. Although within the system of Islamic law there are three different overall opinions concerning the process of the legal validation of the principle of consensus, none of these opinions can reject the existence of consensus as a source of Islamic international criminal law. Obviously, the validity of the principle of consensus within Islamic international criminal law is not whether unanimity has been reached among all Muslim jurists relating to certain international criminal matters, but whether the practice or non practice of certain subject matter has a common value for the universal community as a whole. This is because if a jurist or several jurists do not agree on the matter of consensus, they can simply express their opinions in accordance to the principle of equality of speech and as a consolidated principle of Islamic law—a later consensus may abrogate the former.[71] This source of Islamic international

[69] Id.

[70] Id.

[71] Hamidullah, *The Muslim Conduct of State*, p. 22. This is for two essential reasons. Firstly, an objection to a consensus by analogy to the ethic, jurisprudence and the philosophy of Islamic law is a right of any jurist. Secondly, the purpose of abrogating the former consensus through the later consensus is to promote, adapt and develop the concept of Islamic law into the modern need of the community and the practice of various nations in order to achieve peaceful settlement of international disputes. The principle of consensus in Islamic international criminal law does not therefore necessarily mean unanimity between the opinions of jurists but, according to modern deduction and interpretation, a concurring vote of the majority of participators in a recognised Islamic assembly. Thus, consensus in Islamic international criminal law is an action which creates a sanction against the criminal conduct of certain individuals, groups or states, the criminality of which has already been proven in international community, but has not been specifically identified, in the form of a consensual resolution against the given criminal conduct.

criminal law can also be compared with those principles of the system of international criminal law which have come into existence in the process of time and have not been necessarily codified or regulated within especial agreements, but are respected and sometimes considered an integral part of customary international criminal law and sometimes have been abolished by another principle.

The principle of consensus in Islamic international law and international criminal law can be compared with the high majority of decisions normally achieved in the General Assembly of the United Nations in the form of resolutions relating to certain issues.[72]

3.2.4. *Juridical Analogy*[73]

A juridical analogy, analogical reasoning or Qiyas constitutes the fourth and subsidiary source of Islamic international criminal law. A juridical analogy is essentially based on the opinion of an individual jurist who by analogical reasoning applies the existing decision of a jurisdiction, a rule of Islamic international criminal law in the *Qur'ān* or the traditions of Mohammad relating to certain practices of Islamic international humanitarian law to another case. A certain similarity must always exist between the subjects of Islamic international criminal law being compared with another subject such as racial discrimination, humiliation on race or religion. A juridical analogy by a jurist is, essentially, based on his deductions and interpretations which according to him coincide with another matter and can consequently be implemented to solve the given case.

A juridical analogy by a jurist in Islamic international criminal law may be compared with the fourth source of the system of international law i.e. publicist as the subsidiary means for the determination of the

[72] Many of these resolutions deal with questions of international criminal law including crimes against humanity, war crimes, crimes against peace, genocide, apartheid, international humanitarian law of armed conflicts, the invalidity of occupations, intervention, self-determination, drug offences and terrorism. The historical review of the work of the General Assembly implies that most of these resolutions have been rejected by one or several of the permanent members of the Security Council. This means that unanimity was not reached in the General Assembly. However, this does not preclude the validity and enforcement of the relevant resolutions of the General Assembly. The reason for this is that the type of the consensus achieved in the adoption of resolutions of the General Assembly is not only the result of the voting process but is also highly important in the elimination of criminal activities conducted by certain groups or states. Farhad Malekian, *The Monopolization of International Criminal Law in the United Nations, A Jurisprudential Approach*, 2nd ed. (1994), pp. 76–89.

[73] See also part one, chapter four.

rules of international criminal law. A juridical analogy by a jurist may only be referred to if a given case cannot easily be treated by and in accordance with other sources of Islamic international criminal law. The opinion of a jurist may be found in the collections of judicial decisions called *Fatawa*, in the relevant works of the writers of Islamic international law, responsa prudentium, proceedings of conferences and the modern works on Islamic international law.[74]

A considerable amount of caution must be exercised in the case of an international criminal juridical analogy by a jurist. Accordingly, a juridical analogy cannot be made to any law or decision which has already stated the actual reason for its existence.[75] This means that Islamic international criminal law does not prevent different criminal juridical analogies for the solving of certain international criminal issues such as prohibitions of rape, torture and recognitions of genocide. Nevertheless, it simultaneously bases all analogies on rational reasons and not biased understandings. For example, the juridical analogy between many of the decisions of the ICTY and ICTR may be useful; this should be based on the conditions of each case and whether or not such juridical analogy helps the practical and just settlement of the case. In any event, the basic law of each tribunal must be taken into juridical consideration.

The application a juridical analogy for the solving of certain questions of humanitarian law of armed conflicts promotes and makes the system of Islamic international criminal law an adaptable and acquiescent law. This means that the provisions of the system of international criminal law may easily be accepted within the Islamic system due to the fact that they would not have been ratified by Islamic nations if their purposes had been against the principles of Islamic law. Consequently, in a broader perspective, a juridical analogy encourages the solving of international problems with international criminal analogical reasoning and the use and application of different methods for promoting pacific settlements of international criminal disputes such as the prohibition of the use of dangerous weapons. The use of this source is particularly important in Islamic international criminal law which does not employ the new legal terminologies of the system of international criminal law in its original form.

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[74] Hamidullah, *The Muslim Conduct of State*, pp. 23–24.
[75] Jafary Langaroody, *Islamic Law*, p. 83.

3.3. *A Comparative Examination of Sources*

Whilst sources of international criminal law are comparatively the creation of the human race and the human will for the promotion of international peace, security and justice, they overlap in many aspects with the Islamic concept of international criminal law and therefore the possibility that there should be a particular set of principles in order to apply to the area of Islamic international criminal law, but with variations to fit into the characteristic features of the Islamic concept of law, is indeed incorrect. It is true that Islamic international criminal law is formulated in accordance with divine command, but, it has certain principles, rules and regulations which are not contrary to the basic elements in the system of international criminal law and actually promote the system in many aspects.

Both systems desire peaceful international relations and the promotion of peaceful settlements of international conflicts. Whilst the main source for the system of international criminal law may be said to be conventional international criminal law, the basic provisions of these conventions such as conventions on genocide, apartheid, the Geneva conventions on the law of armed conflicts, the conventions on the protection of natural environment or those of cultural protection display more or less similar values to Islamic international criminal law. One may even assert that Islamic international criminal law gives full respect to all provisions of the international criminal conventions, as long as, they overlap with the chief principles of Islamic law for the protection of man and nature from all forms of violations. A similar conclusion can be drawn about other sources in both systems. As a general rule, the other sources of Islamic international criminal law are, essentially, the development and evolution of their basic source i.e. the *Qur'ān* and therefore cannot be opposed to its framework.[76] In general, to examine these comparatively common values in the context or purpose of law makes interrelations between both systems possible and therefore may solve many international conflicts between states.

[76] This is because "the relevant portions of the Qur'ān and the *Sunnah* form permanent positive law of the Muslims in their international dealings; state legislations and treaty obligations establish temporary positive law; and all the rest provide non-positive or case law and suggested law respectively." Hamidullah, *The Muslim Conduct of State*, p. 36.

4. Subjects of Both Systems

The subjects of international criminal law in general, and the subjects of international law in particular, have been discussed from various points of view. There has been a lot of controversy as to what does or does not constitute a subject under international law. Many writers have expressed different opinions and the general impression is that states and certain international organizations are considered the main subjects of the system of international law respectively. Similarly, many writers have expressed that individuals are also the subjects of international law. Their position is still unsettled. One explanation for this is that individuals in the system of international law do not fulfil the traditional conditions required for their admissibility such as a juridical character—which states and certain international organization own; furthermore, any complaint made by an individual is presented by his/her state. One cannot, however, disagree with the fact that individuals may bring a case before regional juridical bodies such as the European Human Rights Court. This Court, unfortunately, has an exclusively beneficiary function and not the role of admissions of individuals as the main subjects of the law. Even if one accepts that individuals are subjects of international law, their legal position is surely infinitely different to other types of subjects under international law. It may therefore be asserted that individuals are, at present, considered as subjects of international law, but, with a limited aspect. However, their position as subjects has, very significantly, been settled within the provisions of international criminal law.[77]

Contrary to the above, Islamic international law gives special consideration to individuals and recognises them as the basic subject of its law.[78] Furthermore, "the Muslim law of nations was ordinary binding upon individuals rather than territorial groups. For Islamic law, like all ancient law, had a personal rather than a territorial character and was obligatory upon the Muslims, as individuals or as a group, regardless of the territory they resided in … from a philosophical viewpoint, … Islam, as a universal religion, laid emphasis on individual allegiance to a faith which recognised no boundaries for its kingdom: for under a system which claims to

[77] See Malekian, *International Criminal Law*, pp. 30–49.

[78] See, for instance, Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, pp. 127–128.

be universal territory ceases to be a deciding factor in the intercourse among people."[79]

Islamic international law also accepts states and organizations as its subjects and therefore its provisions can, equally, be applied to all these subjects without creating any serious contradiction.[80] The reason for this is that Islamic law is, originally, divine command and therefore builds its recognition of subjects on the spiritual personality of an individual and not on the fulfilment of juridical conditions, territorial acquisitions and military installations. The philosophy underlying this reason is that superficial qualifications do not constitute an integral part of an individual. Thus, Islamic international criminal law provides equality before the law for all its subjects. States and organizations remain its beneficiary subjects.

5. The Concept of Crimes in Both Systems

What and what does not constitute an international crime has been variously discussed. It is for this reason that there is not yet an acceptable list of the most consolidated international crimes in the system of international criminal law. One of the most essential reasons for this is that not all states have participated in the conclusion of all the international criminal conventions and therefore do not submit themselves to provisions to which they have not given their written consent. This situation has existed for a long time and was especially notable after the Second World War. For this reason, there have been various movements within the United Nations to codify international crimes and bring the most consolidated international crimes under the provisions of one overall code. Earlier attempts by the United Nations in this field began in early 1948 and continued up to 1954. The result was a Draft Code of Offences

[79] Khadduri, *War and Peace in the Law of Islam*, pp. 45–46. Furthermore, "Piety and obedience to God were the criteria of a good citizen under the Islamic ideology, rather than race, class, or attachment to a certain home or country. Failing to achieve this ideal, the Muslim jurists did not give up the concept of the personality of the law, that is, its binding character on individuals, not on territorial groups." Id., p. 46.

[80] According to one writer the subjects of Islamic international law are *i)* every independent state which has some type of relations with foreign states, *ii)* part sovereign states *iii)* rebels who have acquired a power and a territory having independent international legal personality, *iv)* pirates and highwaymen, *v)* resident aliens in Islamic territory, *vi)* citizens of Muslim states who reside in foreign countries, *vii)* apostates, *viii)* internationally protected persons who are subjects of a Muslim state. Hamidullah, *The Muslim Conduct of State*, p. 11.

against the Peace and Security of Mankind submitted to the International Law Commission in 1954. Although the draft Code was not successful, it did become an essential reason for the future development of the system of international criminal law. The 1954 Code was suspended for several reasons, one of which was the very controversial question as to what constitutes aggression. After the Definition of Aggression in 1974, the draft Code was again reconsidered in the United Nations in 1978. The International Law Commission worked on the question of what constitutes an international crime under the provisions of the Code of Crimes against the Peace and Security of Mankind and a Draft Code was submitted to the Commission by the special Rapporteur in 1991. The Code was taken up in 1996 but no agreement has been reached to date.

However, one cannot disagree with the fact that many of the crimes listed in the Code have been integrated into the core crimes within the Statute of the ICC in 1998. The Statute does not present an international draft code. It nevertheless underlines some of the most significant aspects of international criminal law and creates one of the most important codes for the recognition of certain international crimes such as crimes against humanity, genocide, apartheid, discrimination, war crimes, torture, slavery, rape, trafficking and violations of international humanitarian law of armed conflicts.

5.1. *The List of Crimes*

It may be useful to enumerate the international crimes which are recognised in the system of international criminal law (I.C.L.), the Code of Crimes against the Peace and Security of Mankind (the Code) and Islamic international criminal law (Islamic I.C.L.).[81] Below is the list of international crimes which appears in the Code or international criminal law or Islamic international criminal law:

1. Aggression
2. War Crimes
3. Intervention
4. Colonial domination and other forms of Alien Domination

[81] Crimes under Islamic law may be divided into the following categories; firstly, those which constitute crimes against a person such as murder, fornication, adultery or bodily harm. The second crimes are crimes against property such as theft and highway robbery. The third category is crimes against honour such as calumny against chastity, the consumption, sale, purchase, importation or exportation of alcohol and narcotics or involvement in prostitution.

5. The Unlawful Use of Weapons
6. Mercenaries
7. Slavery
8. Crimes Against Humanity
9. Genocide
10. Racial Discrimination/Apartheid
11. Torture
12. The Crime of Unlawful Medical Human Experimentation
13. Piracy
14. Hijacking
15. Taking of Hostages
16. Crimes Against Internationally Protected Persons
17. Terrorism
18. Drug Offences
19. Crimes against Cultural Property
20. Crimes against the Natural Environment
21. Unlawful Acts against Certain Establishments on the Sea and Maritime Navigations
22. Mail Offences
23. Falsification and Counterfeiting Currency
24. Obscene Publications Offence
25. Prohibitions on Alcohol (Islam)

5.2. *Differences*

The above list of crimes demonstrates that there are indeed few differences between the two systems. Needless to say the Code of Crimes against the Peace and Security of Mankind is an integral part of the system of international criminal law and many of its core crimes are entered into the Statute of ICC and also the ICTY or the ICTR. What is really important here is that the differences between the two concepts are more political than juridical and to this it must also be added that the legal or political implementation of both systems relies on the interpretation of their provisions and therefore their implementation may, in certain circumstances, vary from one another.

In certain situations, the list of crimes which are enumerated in accordance with Islamic international criminal law may be extended to other crimes which are not recognised in the system of international criminal law, or to those crimes which have been recognised in the early twenty century as national or international crimes but whose recognition has

later been abolished. A clear example of this is the prohibition of the importation of alcohol into certain countries. For instance, at the beginning of the twentieth century, it was prohibited for alcohol to be imported into the United States and there were severe regulations and penalties against those who committed that crime. This crime, which does not constitute a crime now, may still be a recognised crime in accordance with Islamic international criminal law and is also regulated into the criminal system of certain Islamic states such as Iran. But, it should be stated that its violations are indeed very profound within these states and even its recognition as a crime in Islamic law should be considered abounded because of the circumstances of the time and the progressive development of the knowledge of mankind. This type of non-criminalization and criminalization of certain acts can also be examined in other areas of these two systems.

6. Punishment

6.1. *Lack of Methods in International Criminal Law*

One of the chief purposes of the system of international criminal law is to bring the perpetrators of international crimes before an appropriate jurisdiction and apply an acceptable punishment for the commission of activities constituting international crimes. While this constitutes one of the chief purposes of international criminal law, the system has scarcely identified all its methods, levels and degrees of punishment. This is one of the more serious problems in the implementation of the system of international criminal law and the system is indeed incomplete for this reason.[82] The system owns, a large number of international criminal conventions for the recognition of criminality, but no direct method

[82] This lack of method, degree and level of punishment in the system of international criminal law was also considered in preparing the Charter of the International Military Tribunal in Nuremberg. The enforcement of the system of international criminal law on the perpetrators of international crimes had two major difficulties during the Second World War. The first difficulty was that the United States, the United Kingdom, the Soviet Union and France were faced with the non-existence of an international criminal court to enforce the provisions of the system of international criminal law. The second difficulty was that there was no method, degree and level for the punishment of the Major War Criminals due to the lack of an international criminal court. Both difficulties were passed over by the implementation of a retroactive law and the military strength of the strong political powers. Consequently, difficulties were not fundamentally examined and resolved.

of punishment can be found within the actual system. All that can be said is that the system of international criminal law largely depends on the provisions of national criminal courts, which are not equivalent to one another and their methods of implementation and provisions vary greatly.[83] One of the essential reasons for the non-existence of a decisive method, degree and level of punishment is that there are not yet unanimous regulations between various international criminal tribunals. On the one hand, the ICTY[84] and ICTR apply certain punishments to guilty individuals. On the other hand, they have still not followed or established especial acceptable rules concerning the methods, levels and degrees of punishments. Furthermore, both tribunals were incapable of creating a clear line for the punishment of violators of international criminal law. The show tribunal in Iraq concerning the trial of Saddam Hussein has also proved this fact. This was because the case of Saddam clearly demonstrated the insufficiency and inadequacy of the rules of punishments between *ad hoc* international criminal tribunals and the monopolized court.[85] Presumably, the Statute of the ICC is considered a complete code under the present circumstances of the time being. It does not have a complete code of punishment either.

6.2. *Punishment in Islamic International Criminal Law*

From a juridical point of view, the Islamic concept of criminal law provides methods, degrees and levels of punishment. In other words, in Islamic international criminal law, jurisdiction and punishment constitute an integral part of the law and therefore there is no need for the adoption of certain regulations and rules for the enforcement of its provisions. There are a number of punishments enumerated in the main source of Islamic law (the *Qur'ān*) against the perpetrators of crimes and most of these methods may be heavily criticized when compared with the provisions of the modern system of international human rights law. Neverthe-

[83] Take for example the death penalty; Swedish criminal legislation abolished its enforcement long ago, while in China and the United States the death penalty is one of the methods of punishment of criminals. The Chinese authorities apply the punishment even to political prisoners.

[84] In February 1993, the Security Council of the United Nations decided "that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."

[85] Farhad Malekian, 'Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal', 38 (3) *Cornell International Law Journal* (2005).

less, the Islamic concept of criminal law is very *supple* and the methods, degrees and the levels of punishment can *adapt* themselves to the needs of the modern time.[86] They may enthusiastically bend without deforming or breaching its principal functions. This means that many of the harsh and cruel punishments which have been carried out within the historical evolution of Islamic law have no longer any legal binding force, although they are applied by some fanatical regimes in the world.[87]

The methods, degrees and levels of punishments in Islamic international criminal law may not be the same as in the system of international criminal law. In contrast, the methods, degrees and levels of punishments in the system of international criminal law may easily come under Islamic international criminal law because of their modern characterizations and be adapted into Islamic law as long as they fulfil its purposes and functions.[88]

[86] Some of the punishments in Islamic criminal law have been very severe and therefore their direct enforcement without modifications and re-considerations are surely contrary to the methods of punishment in most criminal systems of the world. At the same time, one must not put aside the fact that the methods of punishment have also been very harsh and complicated within criminal systems of many states in Europe, Asia, Africa and the United States, although they did not apply Islamic criminal law within their system. Thus, one may conclude that historically, the criminal law of many systems in the world applied very heavy punishments which are seriously condemned under the modern philosophy of criminal law.

[87] The Islamic criminal law recognizes three different classifications of punishments. These are fixed penalties, retribution, and discretionary punishment as decided by an Islamic court. Fixed penalties are generally applicable to seven categories of crimes. These are adultery, false accusation of unlawful intercourse, highway robbery, theft, rebellion against the Islamic authorities, drinking alcohol, and apostasy. The fixed penalty may be compared with punishments for international crimes of genocide which is seriously condemned under the provisions of international criminal law and the commission of which demands long imprisonment.

[88] This means that Islamic nations should adapt their laws to the methods of punishment which are applied by the international criminal courts and therefore should avoid any punishment which is not in accordance with modern philosophy of human rights norms. See further part III.

CHAPTER TEN

AGGRESSION

1. Aggression in International Criminal Law

States have, frequently, waged war in their international relations. The concept of just or unjust, lawful or unlawful, legitimate or illegitimate war has long been considered in the writings of numerous international writers. There have been profound arguments as to what does or does not constitute a just or unjust war. Both wars have various advocates.[1] These arguments have been particularly discussed in the writings of classical international writers from Europe on the Law of Nations like Francisco Victoria (1480–1546),[2] Balthazar Ayala (1548–1584),[3] Hugo Grotius (1563–1608),[4] Samuel Pufendorf (1632–1694),[5] Cornelius van Bynkershoek (1673–1743),[6] Christian Wolff (1679–1754),[7] and others. These arguments were however the evolution and the development of the idea of the classical philosophers such as Heraclitus, Plato, Aristotle, Cicero,[8] and Augustine.[9]

Two of the most significant developments in the concept of just and unjust war came as a result of the First World War and the employment of

[1] William Ballis, *The Legal Position of War: Changes in its Practice and Theory From Plato to Vattel* (1937), pp. 131–134.

[2] Francisco De Victoria, 'De Indis et Ivre Belli Relectiones', in James Brown Scott (ed.), *The Classics of International Law* (1917).

[3] Balthazar Ayala, 'De Jure et Officiis Bellicis et Disciplinac Militari Libri', in James Brown Scott (ed.), *The Classics of International Law*, vol. II (1919).

[4] Hugo Grotius, *De Juri Belli ac Pacis Libri Tres: Classics of International Law*, vol. II, translated by Francis W. Kelsey (1925).

[5] Samuel Pufendorf, 'De Jure Naturae et Gentium Libri octo', in James Brown Scott (ed.), *The Classics of International Law*, vol. II (1934).

[6] Cornelius van Bynkershoek, 'Quaestionum Juris Publici Libri duo', in James Brown Scott (ed.), *The Classics of International Law*, vol. II (1934).

[7] Christian Wolff, 'Jus Gentium Methodo Scientifica Pertractatum', in James Brown Scott (ed.), *The Classics of International Law*, vol. II (1934).

[8] Ballis, *The Legal Position of War*, p. 31. Cicero's opinions on the question of war were in contrast to those of Plato and Aristotle. Cicero emphasised the "juridical status of war". Id.

[9] Id., pp. 30–31.

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the terminology 'aggressive war' in the context of certain treaties between states. The First World War resulted in the formation of the Commission on the Responsibility of Authors of the War, the Peace Treaty of Versailles in 1919[10] and the Enforcement of Penalties.[11] The 1919 Peace Conference referred to 'war of aggression.'[12] The 1919 Covenant of the League of Nations is another important instrument condemning aggressive war between states in international relations.[13] Articles 10 and 16 of the Covenant had an important function in the whole framework of the League of Nations. The League aimed at the promotion of peace through the peaceful settlement of disputes and the prohibition of war.

Three other important instruments dealing with aggressive war and aiming at its prevention were the Protocol for the Pacific Settlement of International Disputes, 1924,[14] the Treaty of Mutual Assistance, 1925,[15] and the General Treaty for Renunciation of War as an Instrument of National Policy (which is known as Kellogg-Briand Pact or Pact of Paris), 1928.[16] All the above mentioned and many other agreements were however violated during the Second World War. The International Military Tribunal was not successful either in the settlement of the definition of 'aggressive war', even for reasons which were the basis of its establishment.

The problem of defining 'aggression' was again raised in the drafting of the Charter of the United Nations and became the most controversial dilemma after the ratification of the Charter. Articles 2 (4), 39, and 51 of the Charter have dealt with this controversial international crime. Article 2 (4) of the Charter without any reference to the term 'aggression' emphasises that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

[10] The Treaty of Versailles was singed on 28 June 1919 and entered into force between the Contracting Parties on 10 January 1920.

[11] Malekian, *International Criminal Responsibility of States*, p. 55; Malekian, *International Criminal Law*, vol. I, p. 57.

[12] Malekian, *International Criminal Responsibility of States*, p. 103; Malekian, *International Criminal Law*, p. 57. See also Ian Brownlie, *International Law and the Use of Force by States* (1963), p. 52.

[13] The Covenant of the League was signed in Versailles in 1919 and entered into force on 10 January 1920.

[14] The Protocol was signed in Geneva, on 2 October 1924.

[15] It was signed in Locarno, on 16 October 1925 and entered into force on 14 September 1926. 54 L.N.T.S., p. 289.

[16] It was signed in Paris, on 27 August 1928 and entered into force on 24 July 1929. 94 L.N.T.S., p. 57.

independence of any state, or in any other manner inconsistent with the purposes of the United Nations.' Article 39 refers to the term 'aggression' by stating that 'The Security Council should determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.' Article 51 concerns the matter of aggression and self-defence.[17]

The unclear terms and provisions used in the context of the above articles are the reason why it took the United Nations, because of various political controversies, almost thirty years to define the term 'aggressive war'. It finally ended in a resolution entitled the Definition of Aggression. Article 1 of the Definition reads that 'Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.' This definition is completed with the words of Article 2. It reads that 'The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.' A careful reading of the above provisions in conjunction with the provisions of Articles 3 and 4 indicates that the definition of aggression can still be subjected to juridical and particularly to controversial political arguments without any effective conclusions. These articles read:

> *Article 3*. Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;

[17] For the article see chapter two, section 4.

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4. The Acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

The concept and definition of aggression has also been entered into one of the Articles of the Draft Code of Crimes against the Peace and Security of mankind.[18] The definition of aggression in the Draft is similar to the definition in the resolution on aggression adopted by the General Assembly of the United Nations in 1974. Both the resolution and draft recognize aggression as constituting an international crime, the perpetrators of which should be prosecuted and punished. The draft must, however, be completed and should receive the certain necessary support from states. The adoption of the draft because of the present juridical and political situation in the world has indeed been very doubtful. It is for this reason that the Statute of the ICC in 1998 did not define the term aggression or this serious international crime. It only refers to it as an international crime, but not prosecutable under the provisions of the Court. This is, as long as, the Security Council has not permitted the Court to initiate an investigation concerning a case which is suspected of being recognised as aggression. This also means that although the ICC is an international legal person and has full international personality, it has to seek the permission of the permanent members of the Security Council for the investigation of questions dealing, one way or another, with the matter of aggression. It is for many reasons that the crime of aggression has been taken into examination by the Assembly of States parties to the Statute in

[18] Report of the International Law Commission on the work of its forty-first session, 2 May–21 July 1989, General Assembly official records: forty-fourth session supplement No. 10 (A/44/10), pp. 173–179.

the Review Conference on the Rome Statute of the International Criminal Court (ICC) in Kampala, Uganda from 31 May to 11 June 2010. Among some valuable works of the Review Conference are the resolution on the definition of aggression and the Kampala Declaration which deals basically with the reaffirmation of the commitment of states to the Rome Statute. The definition has not legal validity until 2017. The position of the Statute and the resolution depends on the positive reaction of the Assembly of States Parties. Consequently, the launch of jurisdiction of the ICC concerning to crime of aggression is subject to the decision of member states and ratification or acceptance of the amendments of the Statute by 30 states. The International Criminal Court is not permitted to *exercise* jurisdiction over the crime of aggression before the conditions in the above are fulfilled.

2. Aggression in Islamic International Criminal Law

2.1. *Definition*

Under Islamic international criminal law aggression may be defined as an action or inaction which directly or indirectly jeopardizes the jurisdictional independence and security of another state by means of ideological conflicts and/or armed invasions.[19] A war which is conducted, in one way or another, for the purpose of glory or economic gains is certainly considered an aggressive war. Islamic international criminal law permits war in certain situations for the path of brotherhood or for the protection of the rights of man from unjustified acts of aggression and therefore a war which does not contain these aims or is combined with the purposes of luxury is considered unlawful. A war which is conducted for the purpose of occupation, colonialization, and seizure of territories or to reduce a territory to the status of trusteeship is also considered an aggressive war and is thus prohibited under Islamic international criminal law.[20]

The scope of aggression in Islamic international criminal law is rather broader than that found in the system of international criminal law. This is because the former recognises at least two types of aggression. These

[19] The term 'aggression' was first employed in Islamic international criminal law. Thirteen centuries later, the term was introduced into the Western system of international criminal law, at the beginning of the twentieth century.

[20] The *Qur'ān*, 2:190–193.

are ideological and armed aggressions. Whilst in the system of international criminal law, aggression is limited by the 1974 resolution to armed force—if the Security Council does not recognize other acts as constituting aggression.[21] However, one cannot reject that the international crime of aggression may be defined by the Assembly of States parties to the Statute of the ICC. The result may be more satisfactory than its present situation.

2.2. *Prohibitions*

Aggressive war is considered a prohibited act under the concept of Islamic international criminal law. Islamic law contrary to interpretations by Western writers, not only does not permit war, but also, restricts the waging of war in certain inevitable situations in relations between states. This is because Islamic law basically promotes peaceful relations between all mankind and this theory should not be modified by the causes of war. Aggression is evil and against the moral and legal philosophy of divine law. For this reason, the *Qur'ān* vividly clarifies its basic attitude towards aggression and states that 'God does not love the aggressors.'[22] This basic philosophy has also been developed in the context of other verses of the *Qur'ān* and it is a consolidated principle of Islamic international criminal law that war should not be waged as long as other elementary channels for the peaceful settlement of international disputes have not been exhausted.[23] This means that under Islamic international criminal law states are prohibited from conducting war against those states which offer peace and are brave enough to face the real elements of conflicts by means other than war. The *Qur'ān* commands the conflicting parties

[21] Although it is true that the concept of ideological aggression was introduced into the system of international criminal law by the Communist regime of the former Soviet Union, this concept of aggression was not successful in the international legal realm and therefore eventually lost relevance.

[22] The *Qur'ān*, 2:190.

[23] According to one writer, "Islamic States today have widely accepted the general prohibition of 'threat or use of force' in international relations, as embodied in Art. 2 (4) of the UN Charter. The question whether it curtails the scope and application of Jihad may be considered as follows: (*a*) as the obligation to wage Jihad, in the form of an armed struggle, underlies the Koranic injunction 'not to begin hostilities' and the ethical admonishment 'Allah loveth not aggressors'. (Q 2:190), the prohibition of resorting to the use of force in contemporary international law does not represent an antithesis to the Islamic obligation of Jihad; (*b*) since Jihad, in the form of an armed struggle, is a collective obligation, and its invocation lies within the authority, judgement, and discretion of the head of State or responsible State institutions, the Membership of contemporary Islamic

to refrain from armed conflict by stating, 'say not unto one who offers you peace.'[24] This statement can be examined within other verses of the *Qur'ān* and especially the basic philosophy of Islam i.e. peace is strongly advocated in the relevant verses. The *Qur'ān* clarifies, 'And Allah summoned to the abode of peace.'[25]

2.3. *Peaceful Settlement of Disputes*

Peace is imperative in the jurisprudence of *Shari'ah or Islamic law*.[26] Disputes must be solved by peaceful means and parties to a conflict are obliged to exhaust all possible means for a peaceful settlement. These include negotiation, arbitration, mediation and conciliation. The law of arbitration has, especially, been developed under Islamic jurisdiction and the *Qur'ān* provides a number of provisions regarding the scope and the validity of arbitration. One of the verses of the *Qur'ān* runs that 'Allah doth command you to render back your trusts to those to whom they are due; And when you judge between man and man, that you judge with justice: Verily how excellent is the teaching which he give you! Allah hears and sees all things.'[27] One of the strongest reasons for the development of this *Qur'ānic* verse was the practice of Muhammad—the Prophet of Islam—whose arbitration for the peaceful settlement of disputes reached the highest level of justice in the Islamic world.[28] Since the second source of Islam i.e. *Sunnah* constitutes the traditions, mode of life and the statements of the Prophet, the peaceful settlement of international disputes for the prevention of war, including aggressive war, must be regarded as the most reliable method for the prevention of hostilities between conflicting parties. *Ijma*—the third source of Islamic

States in the UN system and their undertaking to resort to force only in accordance with international law has limited the right of invoking Jihad to cases of self-defence." Hasan Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-Operation among its Member States: A study of the Charter, the General Agreement for Economic, Technical and commercial Co-operation and the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the OIC* (1987), pp. 31–32.

[24] The *Qur'ān*, 4:94.

[25] The *Qur'ān*, 10:25.

[26] For some considerations on the terminology of Shari'ah see W. Watt Montgomery, *Islam and the Integration of Society* (1961) pp. 199–209.

[27] The *Qur'ān*, 5:8.

[28] Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (1990), pp. 14–17.

law—also confirms the important validity of arbitration for the peaceful settlement of international disputes.[29]

In order to stop bloodshed and aggressive activities between conflicting parties, the peaceful settlements of disputes and especially by nomination of arbitrators are recognised as one of the most important methods of solving political disputes under Islamic international criminal law. Ali Ben Abi Taleb, the first of the twelve recognised Imams in Islamic religion (*shi'a*),[30] in order to prevent bloodshed accepted the arbitration institution as an effective method of stopping aggressive activities by a conflicting party. This was when Muawiyat Ben Abu-Sufyan refused to recognize the right of Ali Ben Abi Taleb to attain leadership (Caliphat) in the Islamic world.[31] This case indicates the importance of settling disputes through peaceful channels. It should however be noticed here that the conflict on the leadership had more of a political character than a conventional one and it had nothing to do with the main purpose of Islamic law. That is to say that the division of *Sunni* (the majority) and *Shia* (the minority) is indeed superficial to the legal structure of Islamic law. In particular, the division goes against the spirit of Islamic law which emphasises that creating sects within Islam is not permitted and violates the chief intention of Islamic law concerning the common aspiration of faith to universal union. That is why Islamic law strictly forbids any kind of division concerning its substance.[32]

2.4. *Inevitable Situations*

Islamic international criminal law permits resorting to war only in certain inevitable situations and therefore recognises it as a defensive action or defensive war. Otherwise, a war may be recognised as an aggressive war and constitute a violation of its certain regulations governing lawful war. A war which is conducted for the following reasons may be recognised as lawful:

2.4.1. *Defensive War*

A war which is conducted for the purpose of self-protection or self-defence cannot be recognised as an aggressive war, as long as the principle

[29] Id., p. 15.
[30] The first fourth Rashidin Caliphs were Abu Bakr, Umar, Uthman and Ali.
[31] El-Ahdab, *Arbitration with the Arab Countries*, pp. 16–17.
[32] The *Qur'ān* 30:32.

of proportionality is respected during the war.[33] Thus, according to Islamic international criminal law it is the recognised right of a state to fight for the purpose of self-defence or self-protection. This right is regarded as an integral right in the independent sovereignty of states. Consequently *jihad* (under this section) means a defensive war and not an aggressive war. This means that the terminology of *jihad* may be qualified as terms of self-defence against those who have initiated an armed attack.[34] Moreover, this implies that any interpretation of *jihad* meaning an aggressive war is without grounds. *Jihad* aims to prevent unlawful acts. Accordingly, 'The *jihad* … is a measure of reprisal in self-defence or self-help.'[35] Self-defence is also a fact in the system of international criminal law and under Article 51 of the United Nations Charter. Although the terminology '*jihad*' is not used in the system of international criminal law, it does permit defensive war for the purpose of self-defence. Consequently, the Charter permits '*jihad*' for the purpose of self-defence, with the reservation that it does not directly employ the terminology '*jihad*' used in Islamic international criminal law, but instead, it employs the term 'self-defence'.[36]

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[33] See also chapter twenty-seven, section 5.

[34] According to one writer, "the basic assumptions derived from the Koranic obligation to wage Jihad in the form of armed struggle qualify it to be considered as the *bellum justum* of Islam because it is to be waged for a just cause as a consequence of some wrong or injury inflicted upon the Muslims; it includes the inherent right of self-defence; and it must be conducted in accordance with upright intentions and not for material gains or the sake of glory and power. On the other hand, the duty to wage Jihad, that is, a perpetual struggle against all that is evil and against disbelief distinct from armed struggle, remains … The right to invoke and wage Jihad in the form of an armed struggle by modern Islamic States has undergone fundamental changes in the light of contemporary international law which prohibits the threat or use of force in international relations." Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-Operation among its Member States*, p. 28.

[35] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 177.

[36] Article 51 of the Charter of the United Nations reads that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

2.4.2. *Assisting Victims*

When a war is conducted in order to repel acts of aggression against a nation which is the victim of an aggressive war, such conduct does not constitute an act of aggression.[37] According to Islamic international criminal law when a state has been the target of an aggressive war, other states—both Muslim and Non-Muslim have an international legal right to give assistance to that state. This assistance is given to the victim state in order to restore peace and justice as commanded by universal law. This principle of Islamic international criminal law has, precisely, been advocated in the system of international criminal law, but under the direction of the Security Council of the United Nations. Article 43 of the Charter reads that 'All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.'[38]

Islamic international criminal law, because of its theological foundation was, mostly, implemented in Islamic states in ancient times, but it had many rules equivalent to the rules of contemporary international criminal law. For instance, Islamic international criminal law like the system of international criminal law permits, in certain circumstances, assistance between states. For this reason, assistance may be given to other societies, nations or states by Muslim states for the purpose of defeating an aggressive armed force. In other words, a broader interpretation of this principle of the right to struggle against aggressors under Islamic law is that Islamic international criminal law recognises the legal right of any state to give assistance to any other state which is the victim of an *absolute* act of aggression. As a consequence, it is the illegal or unlawful notion of an act which identifies it as aggressive and religious factors are not necessarily decisive. This means that Islamic international criminal law protects all nations from acts of aggression regardless of their religion. This theory is based on two principles. These are equality between humans and brotherhood. Both principles constitute two of the prominent reasons for the development of Islamic law in general.

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[37] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 209.

[38] For further consideration see, generally, Malekian, *The Monopolization of International Criminal Law in the United Nations*.

2.4.3. *Protection of Fundamental Rights*

According to Islamic international criminal law a war which is conducted for the purpose of protecting certain fundamental rights recognised under Islamic system cannot be considered an aggressive war. This is for example, 'to allow the followers of revealed religions to practise their faith freely.'[39] In other words the theory of Islamic international criminal law protects human rights law and where these rights are systematically violated by the authorities of a notorious state, other states may resort to armed force in order to protect individuals who are the victims of infringements of human rights law. This is called humanitarian intervention under the system of international criminal law and is the subject of controversial discussion.[40] Nonetheless, the United Nations has, systematically, resorted to armed force by means of peace-keeping operations, where according to it there have been systematic violations of the principles of international law. This is with the reservation that economic and political interests in the Security Council have, normally, taken priority over other factors.[41]

2.4.4. *Fulfilment of Serious Obligations*

Islamic international criminal law may also permit war if its purpose is to force a state to fulfil its certain *necessary* obligations in treaty provisions with an Islamic state and which have not been accomplished according to the terms of the treaty. According to Islamic international criminal law the principle of *pacta sunt servanda* must be fully respected by the parties to a treaty.[42] In other words, parties are to abide by their obligations. These are such obligations as respecting the rights of certain Muslim minorities who are under the jurisdiction of non-Muslim state(s), to redress wrongs and to pay different types of taxation agreed upon by the terms of a treaty. A contemporary example is serious violations of the provisions of conventions relating to genocide, apartheid or humanitarian law of armed conflicts. Similar provisions can be found

[39] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 209.

[40] Richard Falk, *Human Rights and State Sovereignty* (1981).

[41] The United Nations does not act, for example, against the Israeli authorities who have committed war crimes, crimes against humanity, unlawful use of weapons and serious violations of international humanitarian law of armed conflicts in Gaza strip in 2009. It did not act either against the Chinese government which was guilty of restricting the legitimate rights of Tibetans.

[42] See part one, chapter one.

under the system of international criminal law, which may permit certain states to wage war against a state which has not fulfilled its serious international obligations towards the international legal community as a whole. For instance, Article 2 (5) of the Charter of the United Nations reads that 'All members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.' This sub-paragraph should be read in conjunction with chapter VII of the Charter governing action with respect to threats to the peace, breaches of the peace, and acts of aggression.

2.5. *Jihad*

2.5.1. *Definition*

In Islamic international criminal law the term '*jihad*' is basically a combination of both the legal and literal definitions of the word. This gives the term a special characterization and should be discussed in conjunction with the relevant provisions found in the verses of the *Qur'ān*. Importantly, the definition of 'war' in Islamic international criminal law has been poorly analysed in relation to the definitions of the term '*Jihad*' by most European writers; their definitions are not authentic and thereby misleading. For example, one of the most well-known Professors of public international law from Oxford University and the previous Judge of the permanent International Court of Justice, the Hague, defines *jihad* as 'holy war'. This means "a war against the unfaithful."[43] However such a serious misinterpretation without exhausting the relevant literature is understandable when one realizes that such western sources refer to jurists who have wrongly interpreted the term *jihad*.[44] There is actually another word in the *Qur'ān* which may be translated as meaning war.

[43] Ian Brownlie, *International Law and the Use of Force by States* (1963), p. 6.

[44] According to one writer, "There is no doubt that the institution of Jihad exists in Islamic theological and legal doctrine, and there is equally no doubt about its mention in the Koran and the hadith of the Holly Prophet. However, the precise scope and concrete application of the doctrine has, in our opinion, been a matter of great controversy and, perhaps, even misinterpretation. From the foregoing discussion of the basic Koranic provision on warfare it has become clear that *the Koran does not sanction a state of permanent warfare against the non-Muslim world*." Emphasis added. Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-Operation among its Member States*, p. 26.

This is the word *qital* and essentially means fighting and not necessarily war either.[45]

Jihad is basically constructed from the word *jahada* which means struggle, strive, attempt, endeavour or effort. Thus, *Jihad* does not necessarily mean war, but, a continuous struggle for the purpose of the establishment, re-establishment, building, rebuilding and promotion of various social institutions or relations. It includes but not excludes the struggles for universal jurisdiction, the establishment of international human rights' institutions, the implementation of international human rights law and the bringing of international criminals before the jurisdiction of ICC or other international criminal tribunals established by the United Nations organization.

Jihad in Islamic international criminal law also means to mobilize oneself against that which creates inequality between nations. This does not necessarily mean that a nation is at war with another nation(s).[46] *Jihad* may also refer to the legitimate right of a state to conduct war which is exclusively for the purpose of *self-defence* or has the character of a *defensive war* when certain necessary conditions are fully respected.[47] Therefore the term 'war' in the system of Islamic international criminal law may be variously defined but not referring to an aggressive conduct.[48] This is also true for the system of international criminal law. It is important to emphasize that *jihad* does not mean holy war against other nations or non-Muslims.[49] This is because waging war is prohibited as a whole

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[45] In Arabic '*harb*' also means war.

[46] Khadduri, *Islamic law of Nations: Shaybani's Siyar*, p. 15. See also further section 2.5.2., p. 58.

[47] See chapter twenty-seven, sub-section 3.

[48] In one sense, the term 'Jihad in the technology of law is used for expending ability and power in fighting in the path of God by means of life, property, tongue …' Hamidullah, *The Muslim Conduct of State*, p. 150.

[49] According to one writer, "Let us to conclude this brief exposé with some words on a question which is most misunderstood in non-Muslim circles. It refers to the notion commonly held of the holy war. The entire life of a Muslim, be it concerning spiritual affairs or temporal ones, is a discipline regulated by the Divine law. If a Muslim celebrates even his service of prayer without conviction (for ostentation, for instance), it is not a spiritual act of devotion, but a crime against God, a worship of the self punishable in the Hereafter. On the contrary, if a Muslim takes his meals, for the purpose of having necessary force to perform his obligations regarding God, even if he cohabits with his wife, as an act of obedience to the Divine law, which orders him that, these acts of need and pleasure constitute saintly acts, acts of devotion, meriting all the divine rewards promised for charity … Such being the concept of life, a just struggle cannot be anything except a holy act. All war is forbidden in Islam, if it is not waged for a just cause, ordained by the Divine law. The life of the Prophet shows only three kinds of wars: defensive, punitive and

under Islamic international criminal law and war should only be conducted when it is for the purpose of self-defence, otherwise it constitutes an aggressive or offensive war. *Jihad* may therefore, in certain circumstance, be defined as a defensive action against the already existing war of aggression.

Of course, we do not deny that the *Qur'ān* in certain verses refers to the waging of war against those who are violators but these verses should not be interpreted in isolation from other relevant verses and especially from relevant *historical* events.[50] Such verses supported those Muslims whose covenants were repeatedly violated by '(i) the pagan Arabs and (ii) the Jews.'[51] The scope of applicability of those verses should not therefore be interpreted as constituting continuous war. Furthermore, historically 'the Muslims became more accustomed to a state of dormant jihad rather than to a state of open hostility.'[52] In addition, the original Islamic law was not against any religion in order to wage war. On the contrary, Islamic law protected all individuals from all concepts on equal footings and prevented hostility against them. It aimed to promote justice between all individuals and nations and establish a mutual understanding for the creation of universal justice.

Islamic religion is principally a religion of peace and it is against its principle of 'immunity' to embrace Islam through force. Verses containing phrases such as 'war', '*qital*', 'fight', 'attack' and 'disbelievers' should certainly be interpreted within their historical context, where Muslims were endangered by the aggressive threats or criminal activities of other groups. Some of these verses were especially revealed during times of crisis for Muslims. Verses containing these phrases are not therefore general orders under the Islamic system of law, but are particular orders given to certain Muslims in given historical contexts to defend themselves (under

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preventive … To establish liberty of conscience in the world was the aim and object of the struggle of the Prophet Muhammad, and who may have a greater authority in Islam than he? This is the 'holy war' of the Muslims, the one which is undertaken not for the purpose of exploitation, but in a spirit of sacrifice, its sole object being to make the World of God prevail. All else is illegal. *There is absolutely no question of waging war for compelling people to embrace Islam; that would be an unholy war*." Emphasis added. *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 144.

[50] For this misinterpretation see M.K. Nawaz., 'The Doctrine of 'Jihad' in Islamic Legal Theory and Practice', 8 *The Indian Year Book of International Affairs* (1959), pp. 32 ff, pp. 47–48.

[51] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 179.

[52] Khadduri, *Islamic law of Nations: Shaybani's Siyar*, p. 17.

the command of God) from aggressive or hostile conduct by those who were against the Islamic religion and especially at the time of its revelation and consequent development.[53] It is not therefore surprising to see that the *Qur'ān* contains verses against offensive activities and war. By

[53] The above verses were revealed because of conflicts or disagreements of other parties with Muslims or because a given party had a strong tendency to violate their treaty obligations. Thus, they are applicable to the conditions under which Muslims suffered from the unlawful acts of other groups and thus they have no aim to embrace those who were impartial and not aggressive against Muslims. They run that:

"1. A Declaration of immunity from God and His Apostle to those of the polytheists with whom you made an agreement of mutual alliance (because they acted treacherously against the agreement.)

2. So you walk about through the land freely for four sacred months, and know that you cannot weaken God and surely God will bring disgrace to the unbelievers.

3. And as an announcement from God and His Apostle to the people on the day of the Great Pilgrimage the God and His Apostle are free from liability to keep the agreement of alliance with the polytheists; but if you polytheists repent and take the right way, it will be better for you, and if you turn back to act treacherously against God and His Apostle, then know that you cannot weaken God; and proclaim grievous chastisement to those who acted treacherously.

4. Except for those of the polytheists with whom you made an agreement, so they have not failed in anything in their agreement because they did not go against you in the least, and they did not back any one against you, so fulfil their agreement to the end of their term, surely God loves the righteous.

5. So when the Sacred months have passed away, slay the polytheist warmongers wherever you find them, and seize them as captives and besiege them and lie in wait for them in every ambush; but if they repent and take the right way and offer prayers and pay the poor-rate then leave their way clear and release them, surely God is Great Forgiving, Most Merciful.

6. And if anyone of the polytheists seeks asylum, grant him asylum, till he has heard the message of God, then escort him to his place of security; this is because they are a people without knowledge.

7. How can there be an agreement between the polytheists and God and His Apostle, except for those you have made a treaty at the Sacred Mosque? Therefore as long as they adhered to their agreement with you, you should also adhere to your agreement with them, surely God loves the righteous.

8. How can an agreement be made with them, when they overcome you, they do not pay regard in your case, to the ties of kinship nor of covenant? They please you with their mouths, but their hearts are averse from you; and most of them are transgressors.

9. They took a mean and impure price as a recompense for reversing and making severe and impractical the Commandments of God, so in this way they hindered people from His Way; indeed most evil are those deeds what they do.

10. They do not pay regard to ties of kinship nor of covenant in the case of a believer, and these are they who have transgressed the limits.

11. Yet if they repent and take the right way and offer prayer and pay the poor rate, then they are your brethren-in-faith; and We relate Our Commandments in detail for those people who have knowledge and can understand.

12. And if they violate their oaths of peace, after their agreement and revile your religion, then you too fight against these leaders of unbelief; surely they are violators of

the same token this is also true in the case of Christianity which was prevented by the Emperors of Romans at the time of its revelation. A glance at the history of international criminal law also demonstrates this fact. The law which primarily existed within the provisions of public international law permitted many wars which should not be overestimated at the present time and be considered with due regard to the evolution of international criminal rules.

2.5.2. Jihad *As a Means of Defeating Aggressors*

In order to understand the meaning of the relevant verses of the *Qur'ān* relating to the word *jihad*, they must not only be considered in conjunction with one another but must also be examined in relation to their revelations. These verses were revealed in order to defeat an aggressor or to resort to the right of self-defence.[54] This means that one should not

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their oaths, therefore your oaths are not for them; in this way they may desist from doing mischief.

13. Will you not fight against a people who violated their oaths, and aimed to expel the Apostle, and they attacked you first; do you fear them? So God is most deserving that you should fear Him, if you are believers.

14. Fight against them and God will chastise them by your hands, and bring disgrace on them and assist you against them and relieve the hearts of a believing people.

15. And remove the rage of their hearts, and God turns mercifully to whom He wills, and God is Knowing, Wise." The *Qur'ān*, 9:1–15.

[54] Islamic external relations had, essentially, from the time of the revelation of Islamic religion, a defensive and not offensive function. The efforts of the Prophet Muhammad, beginning from the City-State of Medina, were mostly to unite the Arab nations and this was the sole purpose of the Islamic religion at that time. For this reason, since pagan Arabs and some others such as Jews were waging war against the Prophet and his followers, the external policy of some of the verses of the *Qur'ān* were used against those who were aggressors and conducted offensive war against Islamic development. The words used in these verses do not imply the waging of war against other nations for any other reason. For this reason one must state that "the precedents taken from the Muslim diplomatic history of that period cannot serve as an adequate basis for the future conduct of the Islamic state towards non-Muslim states. Several injunctions dealing with this topic are confined to the Arabs and incumbent only on them as such. The legal and political theory of Islam gives a special regard to the Arabs and considers their unification in a politico-religious community of primordial importance as this unity would be the kernel of the propagation of the Faith … Presumably, even the acts which some may qualify as acts of aggression against the pagan Arabs, (they) do not constitute models for the future policy of the Islamic state towards the unbelievers outside Arabia. However, neither towards the pagan Arabs nor towards the unbelievers the Islamic state, during the life time of Muhammad, was aggressive." Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 181. All activities of Muslims during the life span of the Prophet Muhammad must also be analysed in relation to the oppressive activities of others against his life when he had to seek refuge constantly and at the same time

interpret them in isolation to their legal and historical contexts. Here, we examine several verses which have important functions in Islamic international criminal law. These are verses 190 to 193 which may be interpreted as an integral part of the very broad status of the term *jihad*.

The historical event concerned was the conclusion of the treaty of *Hudaybiyah* when Muslims were troubled by religious doubt concerning several important matters. The reason for this was that Muslims were conducting a pilgrimage and were not sure whether the Meccans would permit them to practice their rituals and the question arose as to whether it was right to fight against the Meccans if they resorted to force within a sanctuary and during the sacred months.[55] For this reason the 193 verse was revealed. The verse therefore runs that you should "fight against them until there is no more persecution or tumult."[56] This verse stipulates the right of self-defence for the victim and also creates sufficient right for them to defeat their enemy or aggressor. This verse must also be analysed in connection with the aforementioned verses in the *Qur'ān*.[57]

Jihad greatly encourages the right of self-defence but not war. According to one of the verses of the *Qur'ān* relating to the right of self-defence and defeating aggressors, '*Fight in the way of God against those who fight against you, but begin no hostilities; surely God does not love the aggressors*.'[58] The words of this verse are indeed clear when analysed in their historical context. The verse also states, 'fight in the way of God'. This means that one should struggle for the promotion of human rights in general and human dignity, respect and the freedom of religion in particular. The second phrase completes the right to fight with the stipulation that this is only to occur 'against those who fight against you, but begin no hostilities'. This means that a fight can only be carried out in self-defence. In other words, this phrase emphasises the right to resort to self-defence

promote Islam. Consequently, "the Prophet's war like policy was confined to defensive measures. He never envisaged a war of aggression." Id., p. 183. This means that the events during the life span of the Prophet could in no way advocate "the theory of aggressive *jihad* as maintained by Muslim classical writers." Id., p. 183. One of the main reasons for this misinterpretation by certain Islamic and Western writers is that the terminology and phrases in the *Qur'ān* and *hadith* have been badly translated by these writers and another reason is that the Western writers, some with and some without prejudice, have given different interpretations to Islamic law. See, for instance, Bo Johnson, *Islamisk rätt: Studier i den islamiska rätts- och samhällsordningen* (1975), pp. 32-*seq*.

[55] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 166.

[56] The *Qur'ān*, 2:193.

[57] See the above sections.

[58] The *Qur'ān*, 2:190.

and also the principle of proportionality. Hostility must not be carried out against those who are not aggressors. The third phrase denotes this important fact. It states that 'surely God does not love the aggressors.' This also implies that an aggressor is condemned under divine law.

The above provisions are also strengthened by the provisions of the next verse of the *Qur'ān* which reads, 'And slay them whenever you find them, and turn them out from where they have turned you out; persecution and tumult are worse than slaughter; but fight them not at the Inviolable Place of Worship unless they first attack you in it, but if they do fight you, then slay them, such is the reward of the infidels (who oppress the innocent).'[59] 'But if they cease, God is Oft-forgiving, Most Merciful.'[60] This verse permits and prevents a number of activities during actual fighting. These are the following seven points:

Firstly, when one is being attacked one is legally permitted to attack for the purpose of self-defence.

Secondly, the principle of proportionality must be respected at all times.

Thirdly, 'persecution is worse than slaughter.' This phrase implies the importance of the freedom of religion and lays blame with those who persecute others for religious reasons; as in the case of Muslims who may have been persecuted by non-Muslims or Meccans in early historical times. This means that interference in the matter of religion is prohibited by Muslim law and no one should be forced to accept other religions or to be persecuted by others on the grounds of their religion, whether on Muslim or non-Muslim territory.[61]

Fourthly, a fight must be carried out in certain recognised places or war should not be conducted where it is prohibited. This very important and significant principle reads that 'but fight them not at the Inviolable Place of Worship unless they first attack you in it.' A broader and proper modern interpretation of this principle is that one should

[59] The *Qur'ān*, 2:191.
[60] The *Qur'ān*, 2:192.
[61] However, we do not disapprove that this principle has often been violated by many Islamic authorities who have claimed to propagate Islamic law. Thus, the Islamic concept of religion has been forced on other nations from a historical perspective. A clear example of this is the enforcement of Islamic religion, culture, rules and laws on the population of Persia (Iran).

not attack civilians, civilian installations, hospitals, agricultural fields, schools, churches, mosques or any other places which are not traditionally and conventionally recognised as places of war. All civilian needs must be recognised as inviolable and places of worship must be provided for by both conflicting parties. Attacks should only be carried out against military installations and military activities. The above principle must be recognised as one of the most important principles of Islamic international criminal law and has been regulated into the provisions of the 1949 Geneva Conventions and 1977 Protocols governing the protection of civilians and civilian's installations. That is why many of those acts may be recognised as serious violations of the international humanitarian law of armed conflict and therefore prosecutable and punishable due to the provisions of the Statute of the ICC.

Fifthly, it is a recognised right of those who are attacked in an inviolable place of worship to attack enemies for the purpose of self-defence. This principle is limited by the next principle in order to implement the status of proportionality in time of conflict.

Sixthly, one who has been attacked should cease to attack if the enemy desist from such an attack. This is one of the most significant developments in the humanitarian law of armed conflicts under Islamic international criminal law and is not even found in the modern system of international criminal law.[62]

Seventhly, the one who has been attacked should give amnesty to those who have ceased to attack. This is the principle of forgiveness or the principle of mercy and is strongly advocated by Islamic international criminal law.[63]

The above seven principles constitute an integral part of the framework of the term '*jihad*' and its broad motivations against violators or enemies. These principles also clarify various misunderstandings of the term '*jihad*' in Western juridical writings and politics.[64]

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[62] See Farhad Malekian, *Condemning the Use of Force in the Gulf Crisis*, 2nd ed. (1994).

[63] Hamidullah, *The Battlefields of the Prophet Muhammad*, p. 35. That is why Muhammad is also called the 'Prophet of Mercy'. See also the *Qur'ān* on a general Amnesty, 2:58.

[64] See, for instance, Johnson, *Islamisk rätt: Studier i den islamiska rätts- och samhällsordningen*, pp. 32–41.

The third and sixth principles are strengthened by the provisions of the next verse of the *Qur'ān*. According to this verse, 'And fight against them until there is no more persecution or tumult, but everywhere Justice of God prevail. Domain and Jurisdiction is only for God Almighty; but if they cease, then there is no hostility except against the oppressors.'[65] It must be emphasised that the phrases and provisions of this verse must be read in conjunction with one another and it should not be deduced that all men must be forced to embrace the principles of the Islamic religion.[66] This is because Islamic law or religion means obedience to the law by and through individual access, in which the awareness of the conscience of an individual is the most determining factor in being recognised as a Muslim under divine law. In other words, Islam should not be imposed on others and one should achieve Islam by external and internal individual peace—by what is known as the principle of the free born consent.

2.6. *Acts Constituting Aggression*

The Islamic system of international criminal law qualifies any of the following acts as an act of aggression and therefore constituting a crime within the system. It must however be emphasised that the expression 'a Muslim state' in the following sections does not make any distinction between i) a state which is exclusively ruled by Islamic law and authorities, ii) a state, the majority of the population of which are Muslims and iii) a state, the constitution of which broadly contains Islamic provisions. Any of the following acts constitutes as an act of aggression:

a) A serious violation of obligations of a treaty, the violations of which may endanger the national or international security of a Muslim state.
b) Any armed attack by a state against the territorial jurisdiction of a Muslim state.
c) Invasion, occupation, colonialization or any other act by a state which may isolate a part of the territorial jurisdiction of a Muslim state.
d) Ideological attacks by a state which are directed against a Muslim state which may seriously destabilize its political jurisdiction.

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[65] The *Qur'ān*, 2:193.

[66] Islamic law respects a person who respects others and this is regardless of religious belief.

e) A deliberate and intended attack on the Muslim or non-Muslim citizens of a Muslim state who are in the territory of another state. The attacks may be carried out by the direct or indirect contribution of the authority of the host state.
f) A deliberate and intended attack by a third state on the nationals of a Muslim state who are inhabitants under the territorial jurisdiction of another state.
g) Attacks on the refugee camps in the territory of one state by the armed forces of another state.[67]

The above list does not however exhaust the other actions or inactions which may be identified under the crime of aggression. What is important here is that aggression constitutes a crime under Islamic international criminal law and is prohibited by all means. This also means that the Islamic system recognises the provisions within the system of international criminal law concerning the recognition of the crime of aggression and the scope of its prohibitions under Resolution 3314 (XXIX) of the General Assembly in 1974. Any other further development for the recognition of the crime in the system of international criminal law may also coincide with the scope of definitions in Islamic international criminal law. This is, as long as, it does not go against the fundamental principles of Islam concerning self-defence, self-protection and reciprocal or equal respect in international legal and political community as a whole.

[67] Especially attacks by other groups or idolatrous tribes against the Prophet of Islam, who sought refuge in one place or another, were recognised as acts of aggression.

CHAPTER ELEVEN

WAR CRIMES

1. War Crimes in International Criminal Law

The system of international criminal law has developed the concept of war crimes on many occasions. War crimes were essentially categorized in the constitution of the International Military Tribunal for the Prosecution and punishment of the Major War Criminals. They were the only international crimes in the procedures of the Nuremberg Tribunal which were not juridically speaking retroactive and had some origin in the customary and conventional international criminal law. The development of this type of international crime in the positive international criminal law may be divided into five constructive periods, which are particularly important in the recognition and legal characterization of certain acts as constituting war crimes.[1] This development has not been effective in the prevention and prohibition of the commission of certain acts during armed conflicts. The development has rather a helpful function and effect in the establishment and consolidation of certain principles of ICC which exercises jurisdiction over the perpetrators of crimes against humanity, genocide and war crimes.[2]

1.1. *The First Development*

The first development toward the regulations of rules of war was under the 1907 Convention IV, Respecting the Laws and Customs of War on Land. According to this Convention any attack or bombardment for whatever purpose on dwellings, villages, towns or any building which is undefended is prohibited. The Convention also prohibited the

[1] It must be emphasised here that violations of other international criminal conventions may also be recognised as constituting war crimes, but because of their broad application, we have mentioned them in other relevant sections.

[2] A clear example is the establishment of the United Nations Committee (1992) in order to investigate the creation of a temporary international criminal tribunal over the perpetrators of war crimes in Yugoslavia.

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commission of other acts in war time.[3] These imposed certain responsibilities on the conflicting parties concerning the prohibition of attacks on the life of non-combatants and the property of municipalities, damages to the institutions of religions, charity and education, works of art and historic monuments.[4] The 1907 'Convention integrated natural law and customary law into international conventional law and it was a step towards the creation of international humanitarian law.'[5]It is from this time that the international conventions open the door for the direct recognition of the existence of a legal body for the protection of the civilisation of the world in the beginning of the twentieth century.

1.2. *The Second Development*

The second development on the recognition of war crimes occurred after the First World War in the Preliminary Conference of Paris in 1919. This Peace Conference established a Commission to investigate which acts constituted violations of the rules of war and were therefore war crimes. The Commission enumerated thirty two acts as constituting war crimes, many aspects of which overlap with the concept of war crimes in Islamic international criminal law.[6] In order that one can examine the similarities between the war crimes in these two legal systems we are obliged to list them here.[7] It must however be emphasised that the below list is more representative of customary international criminal law than conventional law. The reason being that international conventional criminal law governing the law of armed conflicts had not yet been developed at that time. These are:

(1) Murders and massacres; systematic terrorism.
(2) Putting hostages to death.
(3) Torture of civilians.
(4) Deliberate starvation of civilians.
(5) Rape.

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[3] Article 25.
[4] Articles 46, 50 and 56.
[5] Malekian, *International Criminal Law*, vol. I, p. 105.
[6] See *infra*.
[7] The United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), pp. 34–35. See also Malekian, *International Criminal Law*, vol. I, pp. 106–107.

(6) Abduction of girls and women for the purpose of enforced prostitution.
(7) Deportation of civilians.
(8) Internment of civilians under inhuman conditions.
(9) Forced labour of civilians in connection with the military operations of the enemy.
(10) Usurpation of sovereignty during military occupation.
(11) Compulsory enlistment of soldiers among the inhabitants of occupied territory.
(12) Attempts to denationalize the inhabitants of occupied territory.
(13) Pillage.
(14) Confiscation of property.
(15) Exaction of illegitimate or of exorbitant contributions and requisitions.
(16) Debasement of currency, and issue of spurious currency.
(17) Imposition of collective penalties.
(18) Wanton devastation and destruction of property.
(19) Deliberate bombardment of undefended places.
(20) Wanton destruction of religious, charitable, educational and historic buildings and monuments.
(21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew.
(22) Destruction of fishing boats and relief ships.
(23) Deliberate bombardment of hospitals.
(24) Attack on and destruction of hospital ships.
(25) Breach of other rules relating to the Red Cross.
(26) Use of deleterious and asphyxiating gases.
(27) Use of explosive or expanding bullets, and other inhuman appliances.
(28) Directions to give no quarter.
(29) Ill-treatment of wounded and prisoners of war.
(30) Employment of prisoners of war on unauthorised works.
(31) Misuse of flags of truce.
(32) Poisoning of wells.
(33) Indiscriminate mass arrests (added by the United Nations War Crimes Commission).[8]

[8] For no. 33 see The United Nations War Crimes Commission, id., p. 478.

1.3. *The Third Development*

The third development in the system of international criminal law regarding war crimes was under the Charter of the International Military Tribunal for the Prosecution and Punishment of Major War Criminals. The Charter originally defined the concept of war crimes and was also the first international organ established by the victorious states which officially used the terminology of 'war crimes'.[9] This historical definition became an important reason for the development of the concept of war crimes in the system of international criminal law under the Charter of the United Nations and in particular the 1949 Geneva Conventions and its 1977 Protocols.[10] The Charter of the International Military Tribunal in Nuremberg reads that war crimes are 'violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.'[11] The above definition obviously secures its legal applicability by defining its scope under both positive and customary law.[12] The article describes whether war crimes are violations of the laws of war and/or the customary rules of armed conflicts. The enumeration of what acts constitute war crimes have only illustrative purposes and are therefore not conclusive. This means that many other acts may also be recognised as constituting war crimes and give rise to the concept of the criminality of perpetrators.

1.4. *The Fourth Development*

The provisions in the 1949 Geneva Conventions are the fourth development in the recognition of war crimes under the system of international criminal law. These Conventions have not only an important function in the recognition of this category of international crime but also have an important role in the legal framework of international humanitarian law of armed conflicts. These conventions are the 1) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in

[9] See Malekian, *International Criminal Responsibility of States*, pp. 62–66.
[10] Malekian, *International Criminal Law*, vol. I, p. 122.
[11] Article 6 (b).
[12] Malekian, *International Criminal Law*, vol. I, p. 112.

Armed Forces in the Field, 12 August 1949, 2) the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 3) the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, and 4) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.[13]

The conventions lay down a number of provisions, the violation of which can constitute war crimes. These crimes include murder, extermination, violence to life, mutilation, torture, humiliating, cruel and degrading treatment, taking of hostages, prevention of aid to the sick and wounded, attacks against medical services and attacks against hospital ships, reprisals against the wounded, the sick and personnel, unlawful acts or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war, scientific experimentation and any act which is contrary to the normal procedure in hospitals and executions without previous judgment pronounced by a regularly constituted court.[14]

These four Geneva Conventions have, in particular, specified that the commission of certain acts in an armed conflict constitute grave breaches. This is a new innovation in the law of armed conflicts. Earlier relevant conventions have not achieved to such identification. Importantly, the grave breaches in the Geneva Conventions are, more or less, similar to those breaches which Islamic international criminal law prohibits during armed conflicts, such as wilful killing and destruction not justified by military necessity.[15]

The content of one of the Geneva Conventions exclusively relates to the protection of civilian populations from unlawful armed activities. This subject is developed under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.[16] According to this Convention a number of acts constitute grave breaches under its provisions;[17] Among these are wilful killing, wilful causing of great suffering or serious injury to body or health, torture, degrading and inhuman treatment, including biological experiments, compelling

[13] Id., pp. 122–141.
[14] Id.
[15] See *infra*.
[16] The Convention was signed in Geneva on 12 August 1949 and came into force on 21 October 1950. 75 United Nations Treaties Series, p. 287.
[17] Article 147 along with Articles 50, 51 and 130 is common to the first three of the four Conventions of 1949.

a protected person to serve in the forces of a hostile power, unlawful deportation or transfer or unlawful confinement of a protected person, wilful deprivation of the rights of a protected person to a fair and regular trial, the taking of hostages and the extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

1.5. *The Fifth Development*

The fifth development of the law of armed conflicts and the recognition of certain activities as constituting war crimes can be examined in the Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977 and the Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977. These Protocols contain some of the rules of armed conflicts not regulated into earlier conventions. They also have a complementary character regarding subjects which were not clarified by earlier conventions.

Protocol I especially emphasises that the term 'armed conflict' includes those conflicts in which peoples are fighting for the purpose of liberation and freedom from colonial domination and alien occupation and against racial regimes in the exercise of their right of self-determination; as provided in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[18]

Some of the important provisions of the Protocol I contribute to the treatment of the sick and shipwrecked in a humanitarian way. The Protocol has especially prohibited (*a*) medical or scientific experiments, (*b*) the removal of tissue organs for transplantation and (*c*) physical mutilations. The Protocol emphasises that medical units shall be respected and prohibits attacks of reprisal against medical personnel, religious personnel and medical units.[19] Other important provisions concern the protection of civilians, civilian populations and civilian property from inhuman attacks, including indiscriminate attacks such as attack by bom-

[18] Resolution 2625 (XXV) of October 24, 1970 of the General Assembly of the United Nations.

[19] Article 20.

bardment, reprisal and an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination of these activities. The protocol also prohibits attacks on un-defended or demilitarized zones, dams, dykes and nuclear electrical generating stations. Certain persons in special situations should be treated with priority; Such as rape victims, women, pregnant women, and mothers having dependant infants as well as children, who are arrested, detained or interned for reasons relating to the armed conflict.[20]

Wilful violations of some of the above provisions may be considered as grave breaches, such as attacking civilian populations, installations potentially harmful to civilian objects if damaged or destroyed, non-defended localities and demilitarized zones, transference by an occupying power of parts of its own population into the territory it occupies, or the deportation or transference of the population of the occupied territory, unjustifiable delay in the repatriation of prisoners and racial discrimination or *apartheid* practices.[21]

The Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 1977 has a similar characteristic to Protocol I.[22] Protocol II however, specifically relates to any 'non-international armed conflict' which may occur due to internal reasons: 'The scope of Protocol II in comparison with Protocol I is very restricted.' Protocol II contains three important humanitarian principles. The first relates to the fundamental guarantees protecting those who do not take a direct part in armed activities.[23] The second concerns those persons whose liberty has been restricted.[24] The conflicting parties must respect certain rules regarding persons such as the wounded and sick, who shall be protected and receive medical care, they shall be allowed to practise their religion, women shall be held separate from men, except in the case of family unity and places of internment and detention shall not be located close to the combat zone. The third humanitarian principle relates to the respect of generally recognised principles for penal

[20] See Articles 76 and 77.

[21] See Article 85 of Protocol I.

[22] The Protocol was opened for signature in Berne, on 12 December 1977 and came into force on 7 December 1978. U.N. Doc. A/32/144 Annex II; International Committee of the Red Cross, *Protocols Additional to the Geneva Conventions of 12 August 1949, Geneva*, Geneva, 1977, pp. 89–101; 16 ILM (1977), p. 1442.

[23] See Article 4.

[24] See Article 5.

prosecutions such as the principle of innocence until proven guilty, the right to defence, conviction on the basis of individual responsibility and the application of the law in force and not retroactive law.[25] The Protocol also protects, by various means, medical units and prohibits, in one way or another, attacks on civilian populations and their objects such as agricultural areas for the production of foodstuffs.

1.6. *International Criminal Tribunals*

Some of the concrete reasons for the development of the definition of war crimes in international criminal law are the Statutes of the ICTY, the ICTR and the ICC. All these statutes have been useful in the development and consolidation of the scope of war crimes and their application in international levels. The Statute of the ICTY has particularly dealt with the concept of war crimes in two different articles.[26]They concern grave breaches of the Geneva Convention of 1949 and the violations of the laws or customs of war. Grave breaches are like wilful killing, torture and taking civilians as hostages.[27] Examples of violations of the laws of war are employment of poisonous weapons, attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings and the plundering of public or private property.[28] Similar rules can be found within the law of the ICTR or the Sierra Leona Court. The Statute of the ICC has also provided a long list of war crimes.[29] The Court is entitled to prosecute "the most serious crimes concern to the international community as a whole."[30] This means that the list of war crimes in the Statute have a very significant purpose for the recognition of acts that are not permitted under the system of international criminal law. Significantly, many of the actions listed within the provisions of the Statute overlap with the provisions of Islamic international criminal law.[31] These are such as grave breaches, torture, wilfully causing great suffering, the extensive destruction of property, deliberately directing attack against civilians or civilian objects, killing wounded who have laid down their arms and deliberately directing attacks against buildings

[25] See Article 6.
[26] These are Articles 2 and 3.
[27] Article 2.
[28] Article 3.
[29] Article 8 of the Statute of ICC.
[30] Article 5(1) of the Statute.
[31] See the below section.

dedicated to religion, charitable purposes, hospitals and places where the sick and wounded are housed, owing to the fact they are not used for military objectives.

2. War Crimes in Islamic International Criminal Law

2.1. *Codification*

Islamic international criminal law was, almost, the first system of criminal law to codify rules for the conduct of international and non-international war. Islam provides for the precise rules during a state of war.[32] Islamic international criminal law prohibits war between Muslims, Muslims and non-Muslims. The reason for this is that it basically prohibits war and recognises that conflicts between nations must be solved through negotiations, mediation, sending of diplomats, arbitrations and other peaceful means of settlement.[33] The second reason is that Islamic law considers itself a universal law applicable to all social relations between human beings including war, which is morally evil and creates unnecessary suffering.

Islamic international criminal law has, therefore, placed great emphasis on the solving of international conflicts through consultation and

[32] The *Qur'ān*, constituting the main source of Islamic law, has devoted a number of verses concerning the law of war. The relevant provisions of Islamic international criminal law must however be analysed and examined with regard to other systems of law principally based on and developed from the rules of war; For example the system of 'law of nations' was created and developed from the rules of war. One can scarcely reject the fact that the rules of war were the main reasons for the creation and development of the international humanitarian law of armed conflicts. The League of Nations and the United Nations were both established because of the events of the two World Wars. A great majority of international criminal conventions have been regulated and ratified as a result of numerous international wars. Although we obviously do not support a state of war as an essential reason in the development of the system of international law, it is also true that most modifications, alterations, abolitions, prohibitions, criminalizations, modernizations and humanizing legal systems have effectively been promoted by the consequences of various wars.

[33] This philosophy and rule can be seen in Article 2(3) of the United Nations, which reads that 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered.' The provisions of Article 53(1) concerning the Pacific Settlement of Disputes complete the context of the above sub-paragraph. It reads that 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

negotiation between chief members of both conflicting parties.[34] This is, in fact, a tradition of the Prophet Mohammed who prohibited war as long as peaceful agreements could be concluded between the conflicting parties. Yet, even if no agreement could be reached, unlimited war was still not permitted; certain principles such as declaration of war, invitation to cease fire in order to help the wounded persons and a definite human morality, governed warfare.[35] Consequently, in the final stage, if a conflict of armed forces occurred the principles of morality and legality had to be respected by the conflicting parties.[36]

In general Islamic international criminal law, contrary to the system of international criminal law, forbids reprisals and struggles for the maintenance of the principle of proportionality in all time. The *Qur'ān* (the main source of Islamic law) states that 'All prohibited things are under the Law of Retaliation; if then anyone acts aggressively against you, inflict injury on him according to the injury he has inflicted on you, and fear God, and know that God is with those who refrain from doing evil deeds and are righteous ones.'[37] Thus, Islamic international criminal law has recognised (as does the system of international criminal law) the right of self-defence and also fundamentally bases the concept of self-defence on the proportionality principle.[38] A defensive war can take two forms.

Firstly, the enemy has invaded a Muslim territory. Secondly, the enemy has not invaded any territory but its activities are in contradiction with prevailing conduct.[39] The relevant version of *Qur'ān* concerning self-defence emphasises that 'Fight in the path of God against those who fight against you, but do not transgress. Lo! God does not love transgres-

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[34] Khadduri, *War and Peace in the Law of Islam*, pp. 98–101.

[35] Abdullah Allahdin, *Extracts from the Holy Quran and Sayings of the Holy Prophet Mohammad*, 7th ed. (1933), p. 193.

[36] See sub-section below.

[37] The *Qur'ān*, 2:194.

[38] See chapter two, sections 4 and 5.

[39] Hamidullah, *The Muslim Conduct of State*, p. 154. According to one writer there may be other reasons for waging a war. These are *i)* a violation of an agreement by a party, *ii)* considering certain religious duties not obligatory such as taxation, *iii)* hypocrisy and *iv)* apostasy. Id., p. 156. Another writer asserts that Islamic international criminal law, in the early days of its development, recognised five different periods regarding the status of war against non-Muslims. These were: '(i) a period of trust, forgiveness and withdrawal, (ii) a second period summoning them to Islam, (iii) a third period of fighting in self-defence, (iv) a fourth period of aggressive fighting at certain times, (v) a fifth period, of aggressive fighting in general or absolute terms.' Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 74.

sors.'[40] This version of Islamic international criminal law denotes without doubt respect for the principle of proportionality in all situations. It also indicates the fact that in all situations which end in resorting to military forces, the law of war must be respected. A serious violation of the law of armed conflicts may therefore be recognised as a war crime under Islamic international criminal law.[41]

2.2. *Acts Constituting War Crimes*

Islamic international criminal law has a wide range of rules applicable to an armed conflict.[42] These rules must not be violated and should be taken as the most serious and effective rules for the implementation of the Islamic international humanitarian law of armed conflict. These rules are not only applicable to international armed conflicts, but also, to non-international armed conflicts including also internal armed conflicts. The following classified acts are strictly prohibited in time of an armed conflict and are considered war crimes in accordance with Islamic international criminal law.[43] These are:

A.

1) Massacre or holocaust,
2) Killing and destruction which are not necessary.
3) Killing of non-combatants.
4) Killing of those who accompany combatants but are considered non-combatants and do not assist the actual fighting in any way.
5) Killing hostages.
6) Killing hostages for retaliation.
7) Killing envoys.
8) Killing envoys for the purpose of retaliation.

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[40] The *Qur'ān*, 2:190.

[41] The system of Islamic international criminal law may legitimize giving assistance in certain circumstances to a nation which seeks humanitarian help. The *Qur'ān* 8:72. See also part two, chapters twenty-seven and twenty-eight.

[42] See part two, chapters twenty-seven and twenty-eight.

[43] For some of these prohibitions see, generally, Hamidullah, *The Muslim Conduct of State*, pp. 204–213; Hamidullah, *The Battlefields of the Prophet Muhammad*, p. 17; Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, pp. 148–150; Khadduri, *War and Peace in the Law of Islam*, pp. 103–104; Allahdin, *Extracts from the Holy Quran and Sayings of the Holy Prophet Mohammad*, p. 193; Khadduri, *Islamic law of Nations: Shaybani's Siyar*, pp. 76, 87. See also Abdel Rahman Arabi, *L'Islam et la guerre à l'Epoque du Prophète Mahomet* (1954); A.A.A. Fyzee, *Outlines of Muhammadan Law* (1955).

9) Continuing to kill after vanquishing the enemy.
10) Cruel and tortuous killing of enemies.
11) Killing for the purpose of glory.

B.

1) Violations of acts which are prohibited according to the existing treaties.
2) The employment of poisonous weapons.
3) To force prisoners to fight against their own armed forces.
4) Killing those who are impartial concerning the result of the war.
5) Killing of refugees (Mustamin).
6) Killing all those who are traders, merchants, business men and under any other position who does not actually fight.
7) Inflicting death by burning a prisoner.
8) Amputation of the parts of a body.
9) Mutilation of dead bodies.
10) Cutting a part of a dead body and using for various purposes.[44]

C.

1) Killing minors.
2) Killing slaves or servants.
3) Killing women.
3) Killing mothers who have dependent infants.
4) Killing those who are incapable of fighting such as those who are handicapped, blind, insane, lunatic, delirious, old men and women.
5) Killing minors who have not take part in the actual fighting.
6) Rape.
7) Adultery and fornication with families.
8) All types of sexual abuse.
9) Killing parents not for the purpose of self-defence.
10) Killing monks, priests and hermits.
11) killing insane or those who are legally recognised as psychiatrically ill.
12) Killing a national of the enemy state who is already resident under the jurisdiction of another.

[44] In the early history of Islam, cutting the head off the chief enemies could be rewarded by the superiors. However, this action soon became unpleasant and was prohibited in practice. Many soldiers during the Vietnam War cut the ears of the dead and hung the ears about their necks, suspended by a string. They were proud of their work as well.

13) Killing neutrals, including physicians and reporters who do not take part in the actual fighting.
14) Mistreatment of prisoners of war in one way or another.
15) Torture.
16) Excess and wickedness.
17) Degrading treatment of sick and wounded and prisoners of war.
18) Humiliation of men.
19) Treachery, treason as well as perfidy.

D.

1) Killing civilian populations.
2) Destruction of civilian establishments.
3) Any type of wanton destruction.
4) Destroying water ways for the civilian.
5) Destroying medical supplies.
6) Taking civilian's food by force or other means of threat.
7) Forcing civilians to fight.

E.

1) Killing peasants.
2) Destruction of properties unnecessarily.
3) Destruction and devastation of agriculture.
4) Destruction and devastation of forests (crimes against the natural environment).
5) Mutilation of beasts.
6) Slaughtering beasts which are not necessary for food.
7) Burning an animal.

2.3. *Treatment of Prisoners*

The treatment of prisoners of war has been one of the central subjects of Islamic international criminal law. A wrongful treatment of prisoners of war may be regarded as a violation of the sources of the law and therefore constitutes a war crime. Due to this recognition, there are certain rules that have to be respected in the course of war in order to prevent violations of the rights of prisoners and not to commit war crimes. The following inexhaustible list underlines what acts against prisoners constitute war crimes due to original sources or traditional adaptation:

- killing of a prisoner
- punishment of prisoners based on belligerency or their state is at war with the enemy

- holding prisoners responsible for acts of belligerency
- killing prisoners or causing lose of life during the belligerency
- torturing or humiliating prisoners because the belligerent state has damaged their properties
- unfair treatment of the integrity of prisoners
- deliberate starvation of prisoners
- placing prisoners under heat of sun-shine with the intention to cause death or harm them
- placing prisoners in cold weather conditions or the like in order to harm or eventually to murder them,
- various physical, psychological or mental influences on prisoners in order that they gradually commit suicide
- providing no necessary clothing in order to harm their health conditions
- destroying the wills of a prisoner regarding the property at home when the prisoner is no longer alive
- separating infants from their mothers in order gradually to kill them
- separating children from their mothers with the intention of harming both sides
- raping, abusing sexually, sexual use of prisoner man or woman
- placing female prisoners with male prisoners with the intention of rape or any other sexual abuses
- separating members of family with the intention of harming their physical or mental conditions
- consideration of the natural needs of female being ignored with the intention of harming their gender
- imposing pressure on prisoners in order to change their religious beliefs
- proselytising prisoners
- imposing labour on prisoners in order to cause different harms
- using prisoners for the purpose of slavery
- punishment of a recaptured prisoner on the grounds of his/her success in escaping prison and fighting again under his/her own state authority
- the breach of parole should not be a reason for his/her punishment
- imposing capital punishment on the prisoners on the ground of unconditional surrender and acts of belligerency
- amputation of different parts of the body of a prisoner
- beheading of prisoners of war

- seriously disturbing the security system of services employed with the intention of handing over transferable prisoners
- disturbing the immunity of the exchangeable prisoners

CHAPTER TWELVE

UNLAWFUL USE OF WEAPONS

1. International Criminal Law

There has long been controversy concerning the prohibition and criminalization of the use of weapons of mass destruction in the system of international criminal law. The 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare is one of the first international legal documents forbidding the use of chemical and biological weapons. However, the provisions of the Protocol were, from the beginning, disregarded along with the contents of the reservations of the contracting parties. Due to them, the reserving party could violate the provisions of the Protocol if such weapons were used against them. Whilst such arguments opened the question of proportionality, they violated the principal function of the agreement simultaneously. The Protocol came into force in 1928 but has, since its official operation, repeatedly been violated in international relations. From that time a considerable number of international agreements have been formulated and ratified in order to prohibit chemical and biological weapons, but none of them have been successful.

Conventions restricting the use of weapons and recognizing certain acts as international crimes are indeed many. For instance, the agreement falling into the same line of prohibition of the use of unlawful weapons is the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) signed in 1967 and which came into force in 1969. The purpose of the Treaty is to forbid the use of nuclear weapons in the region. But, one of the international agreements is the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. It came into force in 1983. In addition, there are also five Protocols which are attached to the Convention. The fifth Protocol was amended in 1996. The intention of the Protocols is to strength different areas of the prohibition of the use of certain weapons such as the restriction on weapons with non-detectable

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fragments, landmines, booby traps, incendiary weapons, blinding laser weapons and obligations of the conflicting parties to clear the armed fields from explosive bits and pieces of weapons of war. The aims of the Convention and the Protocols have been completed with the provisions of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction signed in 1997. This is also known as the Ottawa Treaty. It came into force in 1999.

Despite the existence of a number of international legal materials applicable to the category of unlawful use of weapons, this crime has repeatedly been committed. Two of the most notorious cases are the employment of atomic bombs on Hiroshima and Nagasaki in 1944 and the use of poisonous weapons in the Vietnam War up to 1969.[1] More recent examples are the use of unlawful weapons against Iran by Iraq, the Muslim population in Bosnia Herzegovina by Serbs, the Kurdish population in Iraq by the regime of Saddam Hussein and the Palestinian population in Gaza Strip by Israeli armed forces.

2. Islamic International Criminal Law

The prohibition of the use of poisonous weapons in warfare is another important criminalisation under Islamic international criminal law.[2] Accordingly, 'Le poison est donc considéré comme moyen de guerre illicite.'[3] This principle is one of the main principles in the humanitarian law of armed conflicts and has not yet been properly consolidated in the system of international criminal law.[4]

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[1] For further analysis and references see J. Duffett, *Against the Crime of Silence* (1968); see also Richard A. Falk (ed.), *The Vietnam War and International Law* (1969), 2 vols.

[2] Muhammad al-Amir, *Kitab al-Iklil Sharh Muktasar Khalil* (A.H. 1224), p. 160; Hilli, *Tabsirat al-Muta'allimin* (A.H. 1342), p. 103. Quoted in Khadduri, *War and Peace in the Law of Islam*, p. 104. See also C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988), p. 138; Nagendra Singh, *India and International Law*, vol. I (1973), p. 216.

[3] Ahmed Rechid, 'L'Islam et le Droit des Gens', 2 *Recueil des Cours, Académie de Droit International* (1937), pp. 371–506, here p. 481.

[4] The problem is that states of the world are still seeking to arm themselves with different tactics and methods. Ironically, the five permanent members of the United Nations have political, juridical and military permission to have nuclear atomic bombs. One may also add to this list, the countries which have, in one way or another, obtained atomic bombs such as Israel, North Korea, India and Pakistan. All of these states have a good international relationship with one or several of the permanent members of the

The prohibition of poisonous weapons under Islamic international criminal law has been for two essential reasons. Firstly, the Islamic law of armed conflicts commands that armed attacks must always be waged in a humane manner—denoting the bravery of the soldiers in the actual fight.[5] Secondly, armed attacks which are based on poisonous weapons are against the natural aspects of human dignity and are consequently against divine law.[6] Islamic law does not therefore permit the use of weapons which violate the traditional concept of weapons. These are weapons which do not cause unnecessary suffering and do not increase problems for human beings, animals and the natural environment as a whole.

3. Absolute Prohibition within Both Systems

The spirit of Islamic international criminal law like the system of international criminal law prohibits all types of weapons which are dangerous and cause unnecessary suffering. This is because Islamic law prohibits aggression, immoral actions, unjustified behaviour, illegal methods and intrigues which cause unnecessary human life suffering during war or peacetimes.[7] The prohibition of the use of unlawful weapons in Islamic international criminal law may also be extended by analogy to war crimes based on the fact that unlawful weapons have the same effect on human civilisations and may even cause more harm and destruction.

In Islamic law, the unlawful use of weapons may be recognised as crimes against mankind. According to Islamic law the killing of human beings or their suffering is not permitted unless there are legal reasons due to the provisions of the law. Therefore, it says that "whosoever kills

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United Nations. The five permanent members, namely, the United States, the United Kingdom, Russia, China and France are considered to be nuclear weapon states which have international permission under the provisions of the Nuclear Non-Proliferation Treaty. The treaty came into force in 1970. South Africa has also developed a nuclear weapons capacity. However, it disassembled its arsenal because of entering into the Nuclear Non-Proliferation Treaty. In 1979, South Africa even tested a nuclear bomb in the Indian Ocean in cooperation with Israel.

[5] Rechid, 'L'Islam et le Droit des Gens', p. 481.

[6] It is appropriately stated by Professor Weeramantry that 'In the context of nuclear weapons, chemical warfare and defoliation of the countryside which are concerns of importance to contemporary international law, the Islamic tradition is of vital significance as contributing an important strand with which to strengthen current norms of humanitarian law.' Weeramantry, *Islamic Jurisprudence*, p. 138.

[7] See the relevant chapters *supra*.

a human being, … *it shall be like killing all mankind*."[8] Apparently, both systems of international criminal law aim at the protection of mankind, but, by different methods. One is based on the power of legislation and the other on the spirit of human nature. Nevertheless, both have the same function.

While the new conventions between the super powers order the prohibition of the use of various weapons of mass destruction, the provisions of these agreements apparently do not bind all states and the nuclear weapon capabilities of a considerable number of states are still untouched.[9] This is also unclear in the case of Islamic nations which may pass the capacity of nuclear weapons.

[8] The *Qur'ān*, 5:32.

[9] For instance, see The Protocol on Blinding Laser Weapons Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1996.

CHAPTER THIRTEEN

CRIMES AGAINST HUMANITY

1. Criminalization in International Criminal Law

The term 'crimes against humanity' was first formulated in the Declaration of 1915 concerning the genocide of Armenian by the Turkish government. It was later reformulated in the Charter of the International Military Tribunal in Nuremberg for the prosecution and punishment of Major War Criminals.[1] Crimes against humanity were defined as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in the execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'[2] This definition has, rapidly, been developed and enlarged in the system of international criminal law by the establishment of the United Nations Organization and the formulation of a number of international criminal conventions applicable to crimes against humanity. Some of the most recognised instruments which have been ratified by a great number of states include, the Convention on Prevention and Punishment of the Crime of Genocide, 1948, the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, the Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection

[1] Malekian, *International Criminal Law*, vol. I, p. 267.

[2] Article 6 (c) of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945.

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of Victims of International Armed Conflicts, 12 December 1977 and the Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977 and a number of conventions relating to the crime of slavery.[3] All these conventions have formulated provisions recognizing the commission of certain acts in both war and peacetime as constituting crimes against humanity. This recognition is regardless of the race, colour, national or ethnic origin of an individual or group. These provisions have even been extended within the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY) and the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States (ICTR). They have also been strengthened and consolidated within the Statute of the permanent International Criminal Court (ICC) in 1998. The Statute of the ICC is one of the most authoritative legislations governing the recognition of crimes against humanity in international criminal law.

2. Criminalization in Islamic International Criminal Law

In Islamic international criminal law it is not necessarily the acceptance of certain regulations and the legislation of certain rules within the domestic and the international criminal systems which identifies which acts do and which acts do not constitute a crime. It is the effect and basic elements of the natural or moral law which prohibits and criminalizes given international criminal conduct.[4]

One must not forget the fact that an individual under Islamic law is recognised as an integral part of the human community and from a more far reaching aspect, an integral part of a universal human life. This

[3] For further analysis and discussions see, generally, Malekian, *International Criminal Law*, vols. I and II.

[4] The term "natural law" is also used as moral law. This means God's eternal law, revealed law in the Old Testament, the law of the spiritual commandments or law of the Gospel. Moral law has also developed to express civil law too.

means that injury to a person or discrimination between two persons is considered a crime against the entire international human society. However, the practice is different in the Muslim countries.

It must therefore be emphasised that the provisions regulated within the content of conventions applicable to crimes against humanity in international criminal law are *not*, regarding Islamic international criminal law, innovative and consequently do not contradict the provisions of Islamic law or the provisions of Islamic international criminal law. For example, the Nuremberg Tribunal recognised murder and the extermination of civilians as constituting crimes against humanity. Islamic international criminal law prohibited the murder and mass killing of civilians long ago and identified such crimes as against the fundamental principles of divine law. The same is true in the case of deporting those who do not take part in actual fighting, even though they have other religions, political and ethnical origins.[5] Islamic international criminal law, like the system of international criminal law, criminalizes the extermination and murder of individuals. The practice of deporting individuals (for whatever reason) constitutes crimes against humanity once the practice has occurred. Islamic international criminal law essentially prohibits the persecution of individuals on religious, racial and political grounds.

Accordingly all these acts may constitute crimes regardless of whether or not an individual, group or government which has committed such crimes was aware of their criminalization under Islamic international criminal law. This is because (according to Islamic theory) it is not the awareness and information about the criminalization of an act which prevents the commission of related criminal conduct. Rather, it is the nature and the ill characterization of an act which provides the necessary information as to whether it constitutes a criminal conduct in accordance with the principles of legality. Ignorance and/or negligence concerning the law or the order of the law do not prevent the prosecution and punishment of a person who has committed crimes against humanity. Thus, in the case of committing a crime by a person, he/she cannot, due to the plea of non-awareness of the nature of criminality of certain acts, escape from the consequences of the criminal conduct. *The system of Islamic international criminal law has, in other words, a very high degree of moral force, while this is almost lacking in the system of international criminal law. The former not only bases its legal sanctions on the principle*

[5] See part two, chapter on War Crimes.

of legality but also on the natural and moral wrong of criminal conduct, while the latter on the recognition of the system by each individual state.[6] This means that the criminalization of the given conduct in the system of international criminal law depends on each individual state's decision and whether or not they sign or ratify relevant international criminal conventions. In contrast, the law or obligations are already fixed under Islamic international criminal law and do not need to be ratified. Thus, violations of the system of international criminal law by Islamic leaders have two types of characteristics. These are violations of international criminal law and Islamic international criminal law as a whole. For instance, the Omar Hassan Ahmad al-Bashir case illustrates the position.

The criminalization of a given conduct in Islamic international criminal law therefore has a legal characterization which cannot be ignored and deleted by way of interpretation; this can only be accomplished through the humiliation and monopolization of legal and moral power. Thus, when one speaks of the criminalization of apartheid and discrimination under Islamic international criminal law, one does not need to decide whether the state in which such activities are carried out is Muslim or non-Muslim. This is because in Islamic law it is the spirit of human beings which is identified with dignity and not necessarily the system of law.[7] It must, of course, be emphasised that *the principle of legality* has long been revealed in the system of Islamic international criminal law.[8] The system is for that reason relevant when one deals with the types of crimes against humanity committed during the Second World War, the Vietnam War, in the former Yugoslavia and Rwanda. The crimes committed in the relevant wars create the accountability of the accused persons and call upon their punishability. This is also true in the case of other accused persons under the provisions of the ICC. This is because the vocabulary of the ICC regarding crimes against humanity overlaps with the provisions of Islamic international criminal law in war or peacetime.

3. Islamic Elements of Crimes against Humanity

The system of Islamic international criminal law as the system of international criminal law recognises certain elements for the recognition

[6] For the principle of legality in Islamic international criminal law see chapter two sub-section 6.2.

[7] See, generally, chapter two.

[8] Moreover, subjects in Islamic law are not authorized to codify the law.

of crimes against humanity. This means that in order for an act to be recognised as crimes against humanity in Islamic law, certain elements must exist. Some of the most important elements of this law are:

3.1. *Wisdom of Committing a Wrongful Conduct*

The system of Islamic international criminal law like the system of international criminal law clearly points out the fact that in order for an act to constitute crimes against humanity, the perpetrator must understand that his/her act is wrong and violates the general principles of Islamic law. Similarly, in the system of international criminal law one of the most significant elements for the recognition of certain acts as crimes against humanity is based on the term "knowledge of the attack". As the system of Islamic international criminal law the term considers the principle of *mens rea*. This means both systems recognize that one of the primary conditions of the recognition of act as crimes against humanity is the intent to commit an action which is recognised as being wrong within the provisions of both systems. The difference between these two systems is that the Islamic uses the term "knowledge" but the other applies the term "wisdom" which is, in reality, a synonym of the former. This is because the tem "knowledge" speaks about the awareness of a person in committing an offence and the term "wisdom" talks about the necessity of understanding or perception. The term "knowledge" has been defined in both systems in the following ways.

According to *Kayishema* case in the ICTR:

> The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused. This requirement further complements the exclusion from crimes against humanity of isolated acts carried out for purely personal reasons.[9]

[9] *Kayishema* (*ICTR-95-1-T*), Judgement, 21 May 1999, paras. 133–134.

According to the above definition, the accused cannot therefore escape from his/her criminality by reasoning that he/she had not the knowledge of criminal conduct. Consequently, a specific intent to commit crimes against humanity is seen as a necessary condition. But, a constructive knowledge or an understanding that one is going to commit an offence in international criminal law or unacceptable acts in Islamic international criminal law may in itself be sufficient for the proof of guilt.

3.2. *The Existence of the Principle of Intention*

Whilst both systems of international criminal law speak about knowledge or wisdom, the two interchangeable terms, the term knowledge also contains the principle of intention for the commission of an offence while the term "wisdom" does not necessarily refer to intention. This is because in the system of Islamic international criminal law, the term "wisdom" has the role of proving that one has obtained sufficient information about something or has, in one way or another, been informed of the criminal conduct. In other words, the wisdom or understanding of a person does not necessarily denote the intention. This means that an intention constitutes another part of the term "knowledge" but not necessarily its integral part. Thus, an offence may be committed with a clear intention of a person to commit the act without necessarily proofing that the person had the sufficient knowledge of committing a crime against humanity. In other words, the term "knowledge or wisdom" is seen in both systems of international criminal law, a necessary condition for the recognition of crimes against humanity, it is not a decisive factor in the system of Islamic law. The reason is that the law gives a particular recognition to the principle of *mens rea* and this implies the intention of a person to commit crimes against a human being without due regard to his/her race, nationality, culture, ethnic origin, religion and language.

3.3. *A Wrongful Conduct*

Another condition for the recognition of crimes against humanity is the existence of a conduct which is recognised, as being wrong, according to the basic sources of Islamic international criminal law. Both systems of international criminal law imply the fact that in order for an act to be recognised as a crime against humanity, it must legally be accepted as an offence. Thus, the jurisprudence of Islamic law bases the concept of crimes against humanity on the principle of *de lege lata*. The system of international criminal law has, also similar to Islamic law, emphasised

that certain actions which may constitute crimes against humanity must have been codified within the law. Accordingly, the provisions of categories of international crimes in the Nuremberg Charter, the ICTY, the ICTR, the Sierra Leone Court and the ICC imply this fact. Due to the development of the law of those tribunals and the courts, crimes against humanity *inter alia* are i) Murder; b) Extermination; c) Enslavement; d) Deportation or forcible transfer of population; e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f) Torture; g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; i) Enforced disappearance of persons; j) The crime of apartheid; k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Without any hesitancy, acts enumerated in the above also constitute crimes against humanity in Islamic international criminal law and call upon the criminal responsibility of the perpetrator. For instance, due to a generally recognised norm of Islamic law, acts which violate the principles of Islamic law concerning non-violence against the physical or psychological integrity of others, are prohibited and constitute torture. Similarly, apartheid, rape, slave prostitution or forced pregnancy are all prohibited and constitute offences against the personal integrity of man.[10]

3.4. *A Criminal Plan*

The fourth stipulation requires that an act is designed to be carried out against a person or particular minority group. As a general rule, the system of Islamic law prohibits intrigues, conspiracies and trickeries against any person or a particular majority or minority group. This is because the true Islam encourages brotherhood, peace and justice. In Islamic international criminal law, the term "crimes against humanity" refers to specific acts of violence against persons or groups regardless of whether they are Muslims, non-Muslims, citizens or non-citizens of

[10] For the above list of crimes see the relevant chapters.

the state in which the criminal acts against them have been carried out. Similar principles are also recognised in the system of international criminal law. Accordingly, a crime against humanity refers to acts of violence against a particular group. A single act of violence should not however be recognised as crimes against humanity, as long as the other elements are not present. The reason for this is to avoid recognizing any acts of murder or other similar acts as crimes against humanity.

3.5. *No Policy of Widespread*

One of the predominant principles for the recognition of crimes against humanity in international criminal law is the policy of widespread. This policy has been recognised since the creation of the concept of crimes against humanity in relation to the murder of almost one million Armenians in Turkey in 1915. Since that time, it has become obvious that a single act of violence or isolated acts cannot be recognised as crimes against humanity and may be treated by other regulations.[11] However, in all circumstances, it is the intention of the perpetrators and the combination of other factors of evidence which denote the recognition of a crime as a crime against humanity. Nonetheless, in Islamic international criminal law it is not a policy of widespread which identifies an offence as a crime against humanity but its illegal nature which goes against the integrity of humankind as a whole. Because, it is a recognised principle of Islamic law that a crime against a person is recognised, as a crime against the generation of mankind simultaneously. This means that for the recognition of crimes against humanity, the condition of widespread has no effective role in the recognition of the criminal act, as along as, the criminal act has occurred with the intention of harming or damaging the victim. In any event, both systems of international criminal law have, more or less, a similar policy for the recognition of crimes against humanity. For instance, acts of Saddam Hussein against the Kurdish population in the early eighties can be acknowledged as crimes against humanity within the regulations of both systems. Similarly, acts of certain Islamic regimes against their population can, also, be recognised as crimes against humanity within the regulations of both systems of international criminal law. This is regardless of the motivation of those fanatical regimes.

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[11] W.J. Fenrick, 'Should Crimes Against Humanity Replace War Crimes?', 37 (767) *Columbia Journal of Transnational Law* (1999).

3.6. *Policy of Systematic*

The term "widespread" has a close relation with the term "systematic", but may not necessarily have the same definition. In the system of international criminal law both terms are used, some times separately and sometimes collectively in order to express the seriousness of a criminal act. The International Criminal Tribunal for Rwanda defines the term "widespread". Accordingly, the term "The concept of widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims." The same Tribunal defines the terms "systematic".[12] According to this definition, the " 'concept of systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy."[13]

Within Islamic international criminal law, similar to that of international criminal law, the concept of systematic refers to organised actions against a particular group. In law and in practice, such actions were prohibited and regarded as a violation of the law of God. However, Islamic law does not put, as does the system of international law, the condition of systematic for the recognition of crimes against humanity. The crime can be committed by any means without any particular need to prove that the action was systematic. However, a systematic or common policy of an action may be helpful for the identification of the crime and assistance to the victim. This means that the concept of crimes against humanity in Islamic international criminal law is not based on the repetition of an act as constituting one of the elements of the recognition of the crime, but, on the substantial value of human beings, the natural or positive privacy of whom is strongly violated.

3.7. *A Wilful Blindness*

A wilful blindness cannot reduce the recognition of crimes against humanity. A wilful blindness is not accepted within the theory of Islamic international criminal law. Similarly, the system of international criminal law rejects the defence of wilful blindness. The term "wilful blindness" refers to a situation in which the accused seeks to keep, himself/herself,

[12] *Akayesu* (Case No. ICTR-96–4-T), Judgment, September 1998, para. 580.
[13] Id.

away from criminal responsibility for the wrongful conduct. The fact is that he/she has deliberately avoided having the knowledge of certain information and in order to release himself/herself from the suspicion of committing the relevant crime. A clear example is when during a war, one attacks hospitals, schools and other similar public services but claims that he/she did not have any information about the localities and therefore lacked the requisite intent to break certain provisions of the law. Neither Islamic international criminal law, nor the system of international criminal law accepts the defendant theory. The basic argument is that the defendant should have known the result of his/her actions or omissions when committing the crime. For instance, due to the basic idea of Islamic law, religious buildings such as Churches and Mosques are instituted for worship and cannot be a target of attack. Depending on the circumstances of each case, any violation against these institutions may be considered crimes against humanity and war crimes. The reason is that Islamic law, in general, and Islamic international criminal law, in particular, does not allow attacks on religious buildings. One should also see what is permissible and what is not permissible in the Islamic jurisprudence as a whole. In other words, "man must always do what is good, and abstain from what is evil, and take scrupulous care of the intermediary grades of plausible, permissible and disliked."[14] Furthermore, the general idea of Islamic law is based on the promotion and encouragement of awareness and attenuation of blindness.

4. List of Crimes against Humanity

The system of international criminal law has, in the Statute of the ICC, provided the most recent list of crimes against humanity which are, without doubt, identical with the concept of crimes against humanity in Islamic international criminal law. This means that both laws have recognised certain actions as crimes against humanity and therefore punishable offences. The concept of crimes against humanity in Islamic international criminal law may therefore be listed as follows:

- killing, murdering, slaying, assassinating a person(s),
- slaughter or extermination of a large or small number of persons,
- imposing slavery conditions upon persons,
- forcible transfer of population by different manners including psy-

[14] Hamidullah, *The Muslim Conduct of State*, p. 3.

chological or physical force which ends in the deportation of one group of individuals to other areas,
- restricting the personal integrity of individuals through acts of imprisonment, detention, arrest, seizure, capture or any other methods such as the severe deprivation of physical liberty in violation of the fundamental rules of natural or positive law of the universe,
- torturing different individuals or groups for various cultural, religious, linguistic or other legal or illegal reasons,
- violation of sexual integrity of individuals by different methods including rape and sexual slavery,
- forcible matrimony or marriage
- prostitution of all types,
- pregnancy,
- enforcing different methods of sterilization on men or women with old or new techniques,
- harassment or maltreatment of individuals or groups based on religious, racial, ethnic, cultural or any other reason which demonstrates the specific position of those individuals or groups,
- disappearance of persons as a result of different acts of the perpetrators;
- categories of discrimination based on racial, ethical, religious, cultural, language, political or any other reason which makes discriminated persons different from that of the Muslim population,
- discriminating in one way or another between the gender
- intentionally causing physical or mental health problems to individuals or a particular group.

CHAPTER FOURTEEN

SLAVERY

1. Slavery in International Criminal Law

1.1. *Abolition*

Slavery is one of the oldest institutions practised by almost all nations of the world. The practice had legally been permitted by the European system of international law and there had not therefore been any effective movement against the institution of slavery up until the end of the nineteenth and beginning of the twentieth centuries. To sell and to buy human beings was considered an important branch of national and international trade.[1] It was basically upon the institution of slavery that the economy of some European countries and the United States in particular developed.[2] It must not however be ignored either that the criticisms made against this institution were also effectively started by the countries which had made a profound income from this cheap labour. The desire to abolish or maintain the institution of slavery in the United States was one of the most essential reasons for the American Civil War.[3] This and many other movements in European societies against the institution e.g. the long struggle for the creation of the right of visit and search of vessels which were suspected of having been involved in slavery became an essential reason for the formulation of the first agreements concerning the abolition of slavery.[4]

According to a new tradition which began in the life of navigation concerning the slow evolution of the right of visitation, trade in humans was assimilated to the crime of *piracy*, which meant the prosecution and punishment of those who carried slaves came under universal criminal jurisdiction. This assimilation was not even particularly useful as a whole. States which supported this practice could still engage in the trade by

[1] Malekian, *International Criminal Law*, vol. I, pp. 209–211.
[2] Id., p. 212.
[3] Id., p. 213.
[4] Id., p. 214.

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their vessels crossing territorial or international water ways. The legal problems concerning this issue were that firstly, under national systems the institution was not abolished and secondly, vessels could still trade without being suspected of carrying slaves. Thirdly, states which legitimated the institution did not capture the vessels involved in the trade. Fourthly, the institution of slavery was not prohibited by a positive international criminal law and could therefore easily be supported by domestic legislations.[5] Many bilateral and multilateral agreements were ratified by states from the period 1890–1938.[6] Nonetheless, none of these agreements was effective for the international abolition and criminalization of the institution of slavery.

1.2. *Criminalization*

Slavery was not internationally characterized as an international crime, even with the establishment of the League of Nations in which many states officially condemned the institution of slavery. The struggle for the abolition of the institution of slavery by states finally resulted in the adoption of the 1926 Convention on slavery. The Convention was reconsidered and amended by the establishment of the United Nations in the 1953 Protocol. The new amendment of the 1926 Convention was not however, satisfactory and did not apply to all forms of slavery—including the abolition of all types of slavery.[7] As a result a Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery was adopted at the United Nations Conference in Geneva in 1956. The new Convention is the extension of the scope of the 1926 Convention on Slavery and both the Convention and the Supplementary are assumed to cover all forms of slavery at an international level.[8]

The definition of the institution of slavery has been extended in the above instruments due to the needs of time. According to the 1926 Convention, slavery is the status or condition of a person over whom any or all of the powers attached to the right of ownership are exercised. The Convention has put more weight on the abolition of the slave trade and this is on the grounds that the slave trade has been most instrumental in

[5] Id., p. 217.
[6] Id., p. 221.
[7] Id., pp. 220–223.
[8] Id., p. 223. The instruments on slavery have also been accompanied by other instruments for the suppression of white slavery. See id.

the development and extension of the institution of slavery. The Convention therefore divides the slave trade into four types of categories. These are i) all acts involved in the capture, acquisition or disposal of a person with the intent to reduce him to slavery, ii) all acts involved in the acquisition of a slave with a view to selling or exchanging him, iii) all acts of the disposal by sale or exchange of a slave acquired with a view to being sold or exchanged and, iv) every act of trade or transport in slaves.[9] The Convention also emphasises the abolition of compulsory or forced labour and requires all state parties to take all effective measures which may seem necessary for the prevention of compulsory or forced labour extending into conditions analogous to slavery.[10] Although the Convention has prohibited slavery and the slave trade, it does not consider the territories placed under the sovereignty, jurisdiction, protection, suzerainty or tutelage of a contracting party as a strong reason for cases of slavery. In fact the international juridical position of these territories could be compared to the slavery of one country to another. This is on the grounds that such protector states almost had total control over all the economic resources of the relevant states. However, the system of international criminal law at that time was not prepared, as it is today, to recognize that the institution of slavery can exist, even though, the elements of slavery stated in the 1926 Convention do not exist. Secondly, states were and are very cautious regarding the scope and method of applicability of the system of international criminal law, especially where the system limits their activities within their territorial jurisdictions. These and many other reasons undermined the legal position of the 1926 Convention and caused its amendment by the 1953 Protocol and finally by the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. The Convention has developed and extended the concept of the definition of slavery and its institutions.[11]

[9] Article 1.

[10] Article 5.

[11] The most relevant articles of the 1956 Supplementary Convention are as follows:

Article 1: Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in Article I of the Slavery Convention signed at Geneva on 25 September, 1926:

(a) debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the

All these agreements and many others on white slavery constitute the main instruments applicable to the international crime of slavery under the system of international criminal law. The application of these instru-

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liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) any institution or practice whereby:
  (i) women, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
  (ii) the husband of a women, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
  (iii) a women on the death of her husband is liable to be inherited by another person;

(d) any institution or practice whereby a child or young person under the age of eighteen years is delivered be either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

Article 3: I. The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties.

2. (a) The States Parties shall take all effective measures to prevent ships and aircraft authorized to fly their flags from conveying slaves and to punish persons guilty of such acts or of using national flags for that purpose.

(b) The States Parties shall take all effective measures to ensure that their ports, airfields and coasts are not used for the conveyance of slaves.

3. The State Parties to this Convention shall exchange information in order to ensure the practical co-ordination of the measures taken by them in combating the slave trade and shall inform each other of every case of the slave trade, and of every attempt to commit this criminal offence, which comes to their notice.

Article 7: For the purpose of the present Convention:

(a) 'slavery' means as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and 'slave' means a person in such condition or status;

(b) 'a person of servile status' means a person in the condition or status resulting from any of the institutions or practices mentioned in Article I of this Convention;

(c) 'slave trade' means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance.

ments has not however been fully successful due to the creation of other types of slavery under various national systems.[12]

Unfortunately, the institution of slavery is growing very rapidly within the international community as a whole and becoming one of the most serious reasons for the violations of the system of international criminal law and justice. One of the most effective reasons for this is the high development of technical communication and internet technology. This is especially notable in the case of the trafficking of women and children who are the subjects as well as the objects of most serious international crimes such as trafficking, crimes against humanity, war crimes, genocide, rape, crimes against women and various violations of their international human rights law. Thus, women and children are today the most recognised victims and witnesses of modern slavery under international criminal law.

2. Slavery in Islamic International Criminal Law

2.1. *Manumission*

According to the legal, social, economic and political philosophy of Islamic international criminal law mankind is equal in all social phenomena. Islamic jurisdiction therefore prohibits any type of action degrading a person to the statute of slavery.[13] Therefore, slavery is 'unlawful' under Islamic law.[14] We cannot disagree however with the fact that during war taking slaves was, in certain circumstances, permitted in order to *prevent bloodshed*.[15] This is because the Islamic law of armed conflict basically consists of the law of battle and the humanitarian law of armed conflict. This regulation is neutralized by the command that priority is not given

[12] See, generally Awad Mohamed, *Report on Slavery* (1966); J. Thorsten Sellin, *Slavery and the Penal System* (1976).

[13] 'In the time when Islamic government was not founded in Arabia, the believers had to release the slaves of the disbelievers by giving ransom to them, but when Islamic government was founded then no one could keep slaves under their possession against Islamic Law. When Islamic government was founded then the Arabian Muslims abolished slavery from many parts of the world. They released many slave subjects from the possession of the great tyrant kings. In the Holy Qurʾān, God commands to the believers that they should release every kind of slaves in the path of God.' *The Glorious Holy Quran*, translated by Jullundri, p. 60.

[14] Id., p. iii.

[15] Rechid, 'L'Islam et le Droit des Gens', p. 474.

to Muslims as all are equal before the divine law.[16] Furthermore, 'La législation islamique déclare action 'laide' la vente de l'homme libre, parce que le mot 'vente' signifie échange de biens (choses), tandis que l'homme libre n'est pas un bien. L'homme esclave n'est pas non plus un bien. L'homme réduit à l'esclavage subit une punition temporaire pour s'être opposé par les armes au triomphe et à l'extension de la vraie religion. La durée de son esclavage est une épreuve qu'il traverse. Il dépend absolument de lui d'abréger la durée de cette épreuve par sa conduite. Une fois affranchi, il ne diffère en rien des autres membres de la société, quelle que soit sa couleur. Il a le droit de prétendre à tout ce que l'homme peut obtenir sur terre par son mérite et son travail.'[17]

Therefore, releasing slaves even became a custom and *tradition* of the Prophet Muhammad who basically condemned the killing of individuals and insisted that Muslims must, as much as possible, not conduct war and must come to peaceful solutions with their enemies. He was therefore against hostile conduct and according to him; war was against the principles of family unity. He emphasised the release of those captured during war and without taking any reward for such action.[18] For example, after one of the most recognised Islamic Wars i.e. Badr, the Prophet ordered the release of all those who were captured during the war and did not degrade them to the statute of slavery.[19] This order became one of the most well-known traditions of Islamic law governing the prevention of slavery and the development of Islamic international humanitarian law

[16] According to one writer, 'It is noteworthy that the divine injunctions deal only with the means of emancipation, non provided slavery as an imperative system. This is due to the fact that Islam tries to solve the problem of slavery on a pragmatic basis. When Islam emerged, slavery was a world wide recognised institution deeply rooted in all societies to the length that any abrupt banishment of the system would result in shaking the very foundations of society. For this, Islam's policy in putting an end to slavery is rather practical. Islam restricted the causes of slavery and widened the possibilities of freeing the slaves. Such device is capable, in the course of time, of abolishing the system of slavery without affecting the social values or entailing economic crisis.' Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 191. See also id., p. 190.

[17] Rechid, 'L'Islam et le Droit des Gens', p. 476.

[18] See *infra*.

[19] See also below sections. The Prophet has also stated that "There are three categories of people against whom I shall myself be a plaintiff on the Day of Judgement. … a man who sold a free person as a slave and appropriated his price, and a man who employed a worker and had him do the assigned work then failed to pay him his wages." (al-Bukhari and Ibn Majjah).

of armed conflicts. It actually opened a window for the future abolition of slavery within the Islamic nations and the respect for the high value of man before the divine jurisprudence.[20]

2.2. *Abolition*

Islamic international criminal law prevents acts of slavery in any form and it is a well recognised rule in the *Qur'ān* that in certain situations the punishment of a person who has committed a crime can be mitigated, discontinued or even neglected if he releases a slave(s). A number of verses in the *Qur'ān* deal with this radical matter concerning slavery and the common value of man in freedom, justice, equality and brotherhood. For example the *Qur'ān* states that:

> And it is not lawful for a believer to kill a believer except by mistake, and whoever kills a believer by mistake, he should free a believing slave, and blood-money should be paid to his (victim's) family, but first they should verify themselves that they are really the next-of-kin of slain person, and if the slain be from a tribe who is your foe and the slain is a believer, then a believing slave should be freed only, and, if he is from a tribe between whom and you there is a treaty, the blood-money should be paid to his (slain's) next-of-kin and a believing slave should be freed, . . .[21]

The existence of the institution of slavery under the Islamic jurisdiction must also be examined in the light of the time in which Islamic law was revealed to the Arab nations as the divine law and must be analysed and compared with the jurisprudence of various nations of the world

[20] "When Islam came, for the situations where people were taken into slavery (e.g. debt), Islam imposed Shari'ah solutions to those situations other than slavery. For example Islam clarified in relation to the bankrupt debtor that the creditor should wait until a time of ease for the debtor to pay. The Supreme (Allah) said in the Quran: "And if he is one in difficulty then waiting to a time of ease" ' . . . It (Islam) made the existing slave and owner form a business contract, based upon the freedom, not upon slavery . . . It forbade the enslaving of free people with a comprehensive prohibition . . . So Allah will deal with the seller of the free person. As for the situation of war, Islam prevented the enslaving of captives or prisoners of war absolutely. In the second year of the Hijrah, it clarified the rule of the captive in that either they are favoured by releasing without any exchange, or they are ransomed for money or exchanged for Muslims or non-Muslim citizens of the Caliphate." Taqiuddin al-Nabhani, *l-Shakhsiyah al-Islamiyyah (The Islamic Personality)*, volume 3, Slavery Section.

[21] The *Qur'ān*, 4:92. See also 2:177.

towards slavery such as the Greeks, Romans[22] and even the practices and tendencies of the various churches.[23]

It is also worth noting that the use of slaves was not prohibited in early religious practices. For instance in 595, 'Pope Gregory the Great sent a priest, Candidus, to Britain to buy pagan slave boys (*pueros Anglos*), seventeen to eighteen years old, to work on monastic estates.'[24] Christians in Europe considered slaves as 'the domestic enemy'. Therefore, they treated slaves as a legally unrecognised class of people who did not enjoy the protection of domestic laws. Female slaves were often preferred to male slaves. This was probably because females were easier to control.[25]They could also be used for sexual pleasures and rape.[26]

Islamic law permitted the institution of slavery on the one hand and promoted its abolition in social relations on the other hand.[27] This is exactly the policy of the provision which is enacted under the system of international criminal law concerning the first agreements concluded

[22] According to Professor Weeramantry 'slavery as practised in Greece, Rome or modern America was a condition of rightlessness which had no parallel in Islamic law … The master's authority was not unlimited or free of the control of the state as it was under the Greeks, the Romans or indeed in America. Further, the slave had equal rights before the criminal law and any body who committed his murder suffered capital punishment.' Weeramantry, *Islamic Jurisprudence: An International Perspective*, pp. 138–139.

[23] As mentioned in the previous section, it was from the middle of the nineteenth up to the beginning of the twentieth centuries that the abolition of slavery was encouraged by the European law of Nations.

[24] Daniel Evans, 'Slave Coast of Europe', *Slavery & Abolition*, vol. 6, no. 1 (1985), p. 43.

[25] Id., p. 47.

[26] Malekian, *International Criminal Law*, vol. I, p. 210. According to a comparative study 'Nous n'avons rencontré dans les livres célestes antérieurs au Koran, et tels qu'ils nous sont connus, aucune parole rappelant le genre humain à sa liberté primitive. Au contraire, dans le Lévitique (XXV, 44–45), nous lisons ce qui suit: 'Ton esclave mâle ou femelle, c'est des nations, tes voisins, que tu l'acquerras, ainsi que parmi les fils des passagers et des colons, qui habitent avec toi; c'est d'eux et de leurs familles, résidant parmi vous et ayant enfanté en votre pays, que vous tirerez vos esclaves, et ils seront votre propriété. Ce sera un héritage dont profiteront vos fils après vous et qu'ils posséderont perpétuellement.' L'Evangile n'a pu amener la suppression de l'esclavage; les moines, les prélats, les papes eux-mêmes, avaient des esclaves en foule. Les plus grands Etats chrétiens, proclamant la liberté de la personne humaine, se donnant la mission de propager la civilisation, ont eux-mêmes pratiqué l'esclavage pendant de longs siècles. La Grande-Bretagne, les Etats-Unis, l'Espagne, etc., ne l'ont aboli qu'au XIX siècle. En trois siècles, l'Afrique 'sortit' trente millions d'esclaves.' Rechid, L'Islam et le Droit des Gens, p. 477. www.pbs.org/wgbh/aia/part4/4p2956.html-; en.wikipedia.org/wiki/Slavery_in_the_ United_ States.

[27] See section below.

on the abolition of slavery.[28] Furthermore, one must always remember that the slave trade and slavery existed well before Islamic law and that the latter has, not only not promoted the institution of slavery, but is also, strictly speaking, against its practice. For example, when a slave woman has breastfed the baby of a Muslim woman who cannot herself provide milk, she must be given freedom immediately and should be regarded as if she had never been a slave.[29] Islamic international criminal law, in order to abolish the institution of slavery, provided certain priorities for a Muslim slave to be given amnesty. Thus, one could give mercy or quarter which meant the act of giving life to a defeated enemy.[30]

2.3. *Protection*

In order to gradually abolish slavery Islamic jurisprudence recognised certain rights for slaves and by this methodology proselytized non-Muslims. It recognises equality between a slave and his master with regard to food, clothing and a place of dwelling. Simultaneously, it must be emphasised that 'Islam does not allow compulsion to convert even slaves to Islam.'[31] The *Qur'ān* (the main source of Islamic international criminal law) has not only exhorted the liberation of slaves but has also emphasised that Muslim states should allot part of their budgets for the manumission of slaves. This meant that the income from taxation was to be paid to the masters of the slaves in order to release slaves from that condition. In other words, Islamic law has long struggled against the institution of slavery and insisted that the institution is a common problem and cannot be solved in isolation from other social phenomena. An old interpretation of this rule of the *Qur'ān* governing the liberation of slaves by manumission from state income was that a master should not refuse a suggestion by a slave who wishes to work and return his value.[32] For the purpose of a quick abolition of slavery the Prophet decreed that Arabs could not be enslaved.[33] According to one view the:

> Islamic classical institution of slavery is distinguished by two main characteristics, i.e. (I) the human treatment of the slave with the view to raise his morale. A slave should be treated on the same footing with his master

[28] Malekian, *International Criminal Law*, vol. I, pp. 217–230.
[29] Rechid, 'L'Islam et le Droit des Gens', p. 476.
[30] See chapter twenty-seven, section 4.
[31] Hamidullah, *The Muslim Conduct of State*, pp. 210–211.
[32] Id., pp. 210.
[33] Id., pp. 210.

> as regards food, clothing and dwelling and, (II) the wide possibility given to the slave to be emancipated. Both the Qur'ān and the tradition exhort pious Muslims, against considerable worldly and heavenly rewards, to free their slaves. The slave has also, under certain conditions, the chance of claiming his own freedom … slavery in traditional Islam was virtually meant to be an adequate medium of proselytizing non-Muslims rather than denigrating some individuals. Yet history records some deplorable incidents which occurred in spite of the legal precepts that Islam has advanced with a view to minimize slavery. Slavery however, persisted in some Muslim societies until recently when it was legally abolished in those countries.[34]

Although one cannot disagree with the fact that the Muslim Arabs (like many other generic groups) have taken slaves during wars with non-Muslims, this was exercised by all nations and was an old customary rule. One must not either forget that one of the core reasons for this practice in Islamic law was that the law was principally against the killing of individuals in any way and since prisoners of war under the old traditions could be killed,[35] Islam privileged the institution as long as it could be effective in stopping bloodshed.[36] One essential historical difference between the concept of slavery in the system of international criminal law and Islamic international criminal law is that according to the former the taking of slaves was lawful at all times whereas according to the latter the taking of slaves was only permitted in connection with and in the course of a war.[37]

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[34] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, pp. 149–150.

[35] For instance, after the battle of Badr, 'The prisoners were … treated in an exemplary manner in spite of the fact that the Muslims had least to favour them. The Prophet distributed them among his soldiery for safe custody, and enjoined them expressly to treat them well. The command did not remain unheeded: those of the prisoners who had no clothes were provided with dress … Some of the Muslims fed them with their bread and contented themselves with mere dates in view of the good treatment enjoined. Tabariy, History, p. 1337.' Hamidullah, *The Battlefields of the Prophet Muhammad*, p. 17.

[36] Id., p. 17. Therefore, 'according to the Holy Quran to make men or captives, slaves are not lawful for the believers. Everywhere in the Holy Qur'ān God commands the believers that they should release even the slaves of the disbelievers by giving ransom to their masters, then how those believers could keep their own slaves under their possession, so they at once freed their slaves in the way of God without taking ransom. God also commands about the prisoners of war that they also should be freed under obligation after the end of the war when the enemy lays down its arms.' *The Glorious Holy Quran*, translated by Jullundri, p. 60.

[37] It must therefore be emphasised that 'The object of permitting slavery in (pre-practice of) Islam is not the exploitation of an unfortunate follow-being. Far from that, its aim is first to provide shelter to the prisoners of war who have lost everything, and for

It was also admissible that if a Muslim or non-Muslim who fought for a Muslim army was taken prisoner by the enemy for the purpose of slavery, they should be recognised as a freeman again when they were released from the jurisdiction of the enemy state.[38] Islamic law also provided a similar rule for prisoners taken by Muslim armies but who actually succeeded in coming under another jurisdiction and even though they were 'slaves' were thereby recognised as freemen.[39]

As we have stated elsewhere, the virtue of Islamic law (including Islamic international criminal law) is that these laws can adapt themselves to various historical changes. Alterations can be made to Islamic international criminal law by specific and relevant interpretations of its certain principles, approaches and applications, while the basic philosophies and aims of this law remain unchanged. The early practices of Islamic international criminal law regarding the treatment of slaves in order to gradually abolish slavery can be seen in the light of its core principle concerning the equality of all man before the law and especially the promotion of the principle of brotherhood for all irrespective of race, colour, language, religion, ethnic origin, social position or political view.

2.4. *Criminalization*

The principles of Islamic international criminal law regarding the institution of slavery have the character of the methods used in the treatment of criminal behaviour in the science of criminology. In fact one can assert that the concept of Islamic international criminal law is principally characterized as criminological law. This is a law which has not only the rules and regulations governing the prohibition, prevention, prosecution and punishment of criminals, but also has the methods by which criminals and criminal behaviour may be cured and rehabilitated. It is in the light of these different types of values that the criminalization of slavery, slave trade and institutions similar to slavery come under a consolidated principle in Islamic international criminal law. For confirmation of this one can simply refer to the constitutions of all states which have in one way

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some reason or other are not repatriated; and secondly to educate them and give them the opportunity of acquiring culture in Islamic surroundings, under the government of God. Slaves are obtained only in legitimate war, waged by a government. Private razes, kidnapping or even sale of infants by their parents have no legal sanction whatsoever.' *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 63.

[38] See also part two, chapters twenty-seven and twenty-eight.

[39] Hamidullah, *The Muslim Conduct of State*, p. 243.

or another been affected by the principles of Islamic law and have ratified all relevant international conventions on the prohibition of slavery. A principal virtue of Islamic international criminal law is the modernization of its principles through adaptation and interpretations. Today, the abolition and criminalization of all types of slavery is a fact and reality in Islamic international criminal law which cannot be denied by any juridical, theological or philosophical argument.

However, this does not mean that the individuals of Islamic nations or states do not engage in slavery and slavery trade. Violations of the principles of Islamic international criminal law and the system of international criminal law regarding the prohibition of slavery are indeed very high and the most serious victims of this international crime are women and children. In addition, the sex trafficking of women and children including girls and boys is really high. This is particularly notable concerning those Islamic regimes which are ironically the banner of freedom and Islamic democracy. In addition, some Moslem nations have treated women worse than slaves and these violations are continued in contrary to the principles of human rights law in Islam and public international law.

CHAPTER FIFTEEN

GENOCIDE

1. Genocide in International Criminal Law

Genocide constitutes a consolidated international crime in the system of international criminal law.[1] The 1948 Convention on the Prevention and the Punishment of the Crime of Genocide was essentially formulated to condemn the mass killings of groups during the Second World War. While legislation against the crime of genocide is rather new, the crime has been repeatedly committed in the relations between states for many centuries. According to the Convention, in order for a crime to be identified as genocide several principles must exist. These are the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The following acts constitute genocide: (*a*) Killing members of the group; (*b*) Causing serious bodily or mental harm to members of the group; (*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (*d*) Imposing measures intended to prevent births within the group; (*e*) Forcibly transferring children of the group to another group.

[1] For the crime of genocide, see For further analysis and references see Id., p. 119. For example on the non-ratification of the international Convention on Genocide see J. Duffett, *Against the Crime of Silence* (1968). W. Michael Reisman, 'Legal Responses to Genocide and Other Massive Violations of Human Rights', 59 (75) *Law and Contemporary Problems* (1996); William L. Hurlock, 'The International Court of Justice: Effectively Providing a Long Overdue Remedy for Ending State-Sponsored Genocide (Bosnia-Herzegovina v. Yugoslavia)', 12 (299) *American University Journal of International Law and Policy* (1997); Beth van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', 106 (2259) *Yale Law Journal* (1997); John D. van der Vyver, 'Prosecution and Punishment of the Crime of Genocide', 23 (286) *Fordham International Law Journal* (1999); Mary Robinson, 'Genocide, War Crimes, Crimes Against Humanity', 23 (275) *Fordham International Law Journal* (1999); Willian A. Schabas, *Genocide in International Law* (2000); Matthew Lippman, 'Genocide', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. I (2008), pp. 403–435. In particular see the statements of Bertrand Russell and the Russell International War Tribunal held in Stockholm, Sweden, May 2 to 10, 1967 and Roskilde, Denmark from November 20 to December 1 1967. Sartre id. The Tribunal was essentially created as a result of different meetings in London in 1966.

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One of the serious criticisms against the crime of genocide in the system of international criminal law is that the legal application of the concept of this crime is very difficult and in most cases may be purely hypothetical. This is because the convention does not clarify the definition of 'intent' or 'intent to destroy' and many other terms such as 'in part', 'deliberately inflicting' and so forth.[2] All these terms are conditional and can therefore be interpreted differently. One difficulty is that one cannot assert when the 'intent to destroy' has begun. It is very doubtful whether the killing of just one member of a group is sufficient to constitute genocide. This is because the legal language of the Convention speaks of the crime of genocide 'in whole' and 'in part'. The definition of the term 'in whole' may be much more relevant than the definition of the term 'in part'. The term 'in part' can apply to any number of people and the legislator, by the term 'in part', did not only mean the killing of, deliberately inflicting on, imposing measures to, and forcible transferring of just one member of a group. These are some of the greater difficulties found in the application of the relevant provisions of the convention of genocide.

There is also another problem with the genocide convention, in most cases the perpetrators of the crime of genocide are those who decide about the enforcement of the provisions of the Convention. Although we cannot reject that some governments like the Iraqi and Turkish governments have been identified as having committed the international crime of genocide, this has never been implemented as a reason to stop the commission of acts of genocide. There have been many instances denoting the commission of the crime of genocide; nevertheless no government has admitted to having committed the crime of genocide. A clear example of this is the commission of genocide during the Vietnam War by the United States.

In recent decades, there have been some new developments in the system of international criminal law regarding the prosecution and punishment of those who have been engaged in the commission of genocide. These developments are especially notable in the case of the ICTY, the ICTR and the Special Court for Sierra Leone. All three courts are dealing with the questions of genocide of a very serious nature which have been the reason for the murdering of a large number of populations of the world. The Statutes of these courts have therefore formulated certain rules applicable to the crimes. The ICTR has in one of his judgments

[2] For further examination see Malekian, *International Criminal Law*, vol. I, pp. 295–299.

stated the difference between genocide and murder. According to it "A distinguishing aspect of the crime of genocide is the specific intent (*dolus specialis*) to destroy a group in whole or in part. The *dolus specialis* applies to all acts of genocide mentioned in Article 2(a) to (e) of the Statute, that is, all the enumerated acts must be committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.' It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder."[3]

The most recent example is the Omar Hassan Ahmad al-Bashir case, the Sudanese president, who has been accused of committing various crimes by the prosecutor of the ICC. The prosecutor has based the case on the Statute of the ICC which is dealing, at present, with three core crimes. These are crimes against humanity, war crimes and genocide.

2. Genocide in Islamic International Criminal Law

2.1. *Prohibitions*

Islamic international criminal law, like the system of international criminal law, prohibits the mass killing of individuals or groups for whatever purposes. This includes any form of plan and practice which is essentially intended to destroy a group and nation in any way and/or by whatever means. Mass killing constitutes a serious crime against humanity and a punishable crime under Islamic international criminal law. Even though, the law does not, necessarily speak of the type of genocide formulated in the genocide Convention, it does prohibit the killing of members of groups, regardless of whether the act has been committed in whole, in part or only against a single member of a given group. It is the intention of killing, causing serious bodily harm, destroying or imposing forcible measures upon the members of any group which constitutes a crime. This is regardless of whether the criminal act has been committed against several or a single member of a group. In Islamic international criminal law, it is the motive of ill-action which gives rise to the concept of crime and not the existence or non-existence of various elements enumerated in the genocide Convention. As a general principle of Islamic criminal law, bloodshed is basically prohibited by divine law and a person who has committed this crime cannot obtain mercy under the Islamic sovereignty

[3] *Kayishema* (*ICTR-95–1-T*), Judgement, 21 May 1999, para. 91.

of law, as long as certain specific punishments have not been inflicted. Still, mercy and amnesty largely depend on the character of a crime and whether or not the crime is a forgivable one.

2.2. *Classification*

Islamic international criminal law is against any type of mass killing and/or destruction and recognises such acts as being against the whole theory of the Islamic legislation in the *Qur'ān*. The legal reasoning in Islamic international criminal law rests on the effect of such crime on the community of nations as a whole. The crime of mass killing or genocide can easily be classified under one of the categories of crimes recognised as *Quesas* in Islamic international criminal law. *Quesas* (constituting the second category of crimes) do not necessarily have a fixed definition or penalty and they have basically evolved through various social needs including judicial process, analogy reasoning, political consideration and even the adaptation of modern philosophies of crime and criminology.

This category of crime in Islamic criminal law criminalizes among other things, murder and intentional crimes against a person. Since in the genocide Convention the intention to commit genocide constitutes one of the important elements for the recognition of the crime of genocide, the crime therefore simply falls under *Quesas* or the second category of crimes in the Islamic criminal justice system. The reason why the crime of genocide can be classified under this category is that this category guarantees both concepts of genocide. These two concepts are: murder which results in the death of the victim of the crime of genocide and the intention to kill but the action might not have resulted in the death of the victim.

2.3. *Criminalization in Human Rights*

Other reasons why mass killing is prohibited under Islamic criminal law are its principles of human rights under which murder, killing and intentional injury for whatever reason are prohibited and recognised as prosecutable and punishable crimes. The Cairo Declaration on Human Rights in Islam has, especially dealt with the question of genocide. The Declaration condemns acts of genocide and recognize it serious crimes against the philosophy of Islam. It reads that:

(a) Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to

protect this right from any violation, and it is prohibited to take away life except for a Shari'ah-prescribed reason.

(b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind.

(c) The preservation of human life throughout the term of time willed by God is a duty prescribed by Shari'ah.

(d) Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Shari'ah-prescribed reason.[4]

The value of Islamic international human rights and its rules and principles against the crime of mass killing or genocide can be especially examined under the rules of warfare.[5] Islamic international criminal law prohibits any type of collective killing of groups who are non-combatant and this is irrespective of whether the victims of the crime belong to other groups which have or have not the same nationality as one of the conflicting parties. It is upon this principle that Islamic international criminal law takes chronological priority to the system of international criminal law in the case of criminalizing genocide as an international crime. This means that the International Military Tribunal in Nuremberg could have recognised the killing of Jewish nationals as constituting the crime of genocide, if and only if, they had taken into consideration the long establishment of Islamic international criminal law against the perpetrators of war crimes and crimes against humanity including the international crime of genocide.[6]

[4] Article 2.

[5] See chapters eight and twenty-eight.

[6] While our purpose is only to present the facts and principles of Islamic international criminal law in the elimination of serious international crimes and we have only assumed here to draw comparative conclusions, no serious objections could have been made against the Tribunal if it had simply referred to the existence of a number of customary international criminal principles which had already been codified within the international laws of other nations in the international community as a whole. This would mean that the jurisdiction of the Tribunal would have been criticized less in the public history of international criminal law and the establishment of other international criminal tribunals might have been possible a long time ago.

CHAPTER SIXTEEN

APARTHEID

1. Apartheid in International Criminal Law

The system of international criminal law has widely recognised that discrimination between various races and groups constitutes an international crime. The strongest form of discrimination is called apartheid, which is the main reason for the recognition of discrimination as an international crime.[1] Apartheid is generally different types of segregation and discrimination committed against specific group of individuals. The crime of apartheid has therefore a broad chapter of its own in international criminal law and there are several international criminal conventions and a large number of resolutions as well as other instruments dealing with this international crime. The basic convention applicable to this category of international crime is the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973. Apartheid was originally practised by the South African government against the majority of its own population and it was for this reason that the Convention came into force. Apartheid was legally abolished in 1991. The root of discrimination however continues.

According to international criminal law, in order for a crime to be recognised as apartheid it must be committed against a group of individuals. The system of international criminal law does not however provide a particular definition for 'a group of individuals' and it is therefore very difficult to establish the criteria as to what constitutes a group in order for an act to be recognised as a crime under the provisions of the apartheid conventions.[2]

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[1] It must be emphasised here that both the terms 'genocide' and 'apartheid' were structured and defined after the establishment of the United Nations and did not earlier exist in the terminology of the system of international criminal law. However, the term 'genocide' was coined between the two World Wars by the Jurist Raphael Lemkin. Jean Paul Sartre, 'On Genocide' in J. Duffett, *Against the Crime of Silence* (1968), p. 612.

[2] L. Rubin, *Apartheid in Practice* (1971); Bernhard Graefrath, *Convention Against the Crime of Apartheid*, vol. XI German Foreign Policy (1972), pp. 395–402; J. Tomko,

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The 1973 Convention recognises that apartheid is a crime against humanity and this inhuman act is the consequence of the policies and practices of racial segregation and discrimination. It is also for this reason that the international crime of apartheid is considered an integral part of the core crimes in the Statute of the ICC which can be examined under the provisions of crimes against humanity. According to the Convention apartheid may be committed by individuals, organizations or institutions. The Convention has particularly stated that the crime of apartheid constitutes 'a serious threat to international peace and security.'[3] It therefore recognises all such individuals and entities as criminals. The term 'apartheid' has been more specifically defined by the Convention.[4] However, it must be noted that the provisions of the 1973 Conven-

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'Apartheid-medzinarodny zlocin proti l'undstvu', (summary in English) 58 *Pravny Obzor*, (1975), pp. 289–304; J.K. Feimpong & S. Azadon Tiewel, 'Can Apartheid Successfully Defy the International Legal System?' 5 *The Black Law Journal* (1977), pp. 287–311; Garry Seltzer, 'The Rule of the South Africa Criminal Code in Implementing Apartheid', 8 *Georgia Journal of International and Comparative Law* (1978), pp. 176–194; F.V. Gracia-Amador, 'The Crime of Apartheid: Responsibility and Reparations', *Review of Contemporary Law* (1981), pp. 31–38; International Conference on Sanction Against South Africa, UNESCO House, Paris, 20–27 May 1981, vol. I Main Documents, United Nations Center Against Apartheid (1981); Paris Declaration, International Conference on Sanctions Against South Africa (And Special Declaration on Namibia), 27 May 1981, Published by the United Nations Center Against Apartheid; Roger. S. Clark, 'The Crime of Apartheid', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. I (1986), pp. 299–323; Enuga S. Reddy, *Apartheid: The United Nations and the International Community* (1986); Enuga S. Reddy, 'India and the Struggle Against Apartheid', 26 *Indian Journal of International Law* (1986), pp. 551–567; Ge Ji, 'Apartheid—An Outstanding Issue in World Politics', 30 *Beijiling Review: A Chinese Weekly of News and Views* (1987), pp. 14–17; Malekian, *International Criminal Law*, vol. I, op.cit., pp. 324–375.

[3] Article 1.

[4] Article II of the Convention defines the crime of apartheid. It reads that: "For the purpose of the present Convention, the term 'the crime of *apartheid*', which shall include similar policies and practices and racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: (*a*) Denial to a member or members of a racial group or groups of the right to life and liberty of person: (*i*) By murder of members of a racial group or groups; (*ii*) By the infliction upon the members of a racial group or groups of serious bodily or mental harm by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; (*iii*) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups; (*b*) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; (*c*) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a

tion did not deal with different categories of apartheid and these shortcomings of the Convention were tried to be fulfilled by the provisions of the subsequent international conventions dealing in one way or another with the crime of discrimination or apartheid. These are such as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination[5] and the 1985 International Convention Against Apartheid in Sports. One of the chief reasons for the adoption of a series of international criminal conventions applicable to apartheid may be their total weakness of enforceability and another reason is that their provisions are mostly fusible because of their weak policy of implementation. This means that practices assimilated to apartheid can be denied by their perpetrators because of the very weak moral standard of their perpetrators. As a general philosophy of the law, it must be asserted that a body of law can hardly be effective as long as there is not sufficient true or moral support for its prohibitive provisions.

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group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognised trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association; (*d*) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof; (*e*) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour; (*f*) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*."

[5] According to Article 2 of the Convention "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations; (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division."

2. Apartheid in Islamic International Criminal Law

Obviously Islamic international criminal law neither employs the term apartheid in its constitution nor the definition provided in the apartheid convention. However it recognises a very serious form of discrimination, the scope of which is principally much broader than the definition of the crime of apartheid in the system of international criminal law. Islamic law has, since the time of its creation, internationalized the human society and has therefore recognised that individuals are the main elements in any social structure. It is on this basis that any criminal act against an individual constitutes a crime against the whole society and therefore a prosecutable and punishable crime. The same theory of the system of Islamic criminal justice has been entered into Islamic international criminal law, characterizing any criminal activities against an individual by individuals, groups and governments as constituting a crime against humanity.[6] The main reason for this is that an individual in Islamic international criminal law constitutes by himself/herself a form of society. This philosophy is precisely where the concept of Islamic international criminal law contradicts the legal philosophy of the system of international criminal law. In the latter, apartheid and discrimination are practised against a group irrespective of how the number of individuals integrated in a group are defined. Islamic international criminal law does not base the concept of discrimination on the existence of a group against which discrimination and apartheid are practised. Islamic criminal law has a wide range of rules applicable to the crime of discrimination and consequently recognises it as a serious crime against humanity, regardless of whether a criminal act was committed against a group or a single individual. The logic behind this philosophy is that in order to determine whether or not an act of discrimination or apartheid has been committed, one must refer to the purpose and aim of the criminal act and against whom it was committed and not to the number of individuals or the group of individuals against whom the criminal activities were carried out.

Islamic international criminal law prohibits, prevents and criminalizes any type of discrimination between race, colour, language, belief or nationality. This is because (according to Islamic law) all men are equal before its jurisdiction and this has therefore given an international char-

[6] See part two, chapters on crimes against humanity, genocide and slavery.

acterization to the principles of brotherhood, equality, liberation and an authentic criminal justice system. Under Islamic international criminal law discrimination constitutes an international crime against the fundamental rights of mankind. This even includes discrimination against other groups of people who have different religion, colour, race, sex, language, culture or political statutes. It is upon this basic consideration that other groups can also live side by side with Muslim groups in brotherhood, equality and justice. As a result of this basic aspect of Islamic law any type of apartheid or discrimination between men is essentially a prohibited crime and constitutes a crime against the social principles of equality. The legal and moral philosophy of this principle arises from one of the Verses of the *Qur'ān* reading that 'Surely we have accorded dignity to the sons of Adam.' This verse implies that all men have fundamentally come from one generation and therefore human spiritual dignity is the same all over the universe of God.

The Islamic international criminal justice system recognises the inherent right of all members of the community of nations to enjoy an equal standard of life, not only without any due consideration to race, colour, national or ethnic origin, but also from the practical aspects of equality, including an equal economic and living standard for all men. It is the manifestation of this type of consideration and re-consideration of the social structure that creates equality in pure Islamic philosophy. It therefore rejects and criminalizes all types of social and institutional priority between humans. The main source of the law reads that "Mankind was one single nation, and then God sent prophets … to judge thereby between people when they differ, but the People … did not differ among themselves, except through selfish contumacy." These provisions point to the fact that mankind should not be discriminated and that all practices of discriminations and apartheids are based on self-interested purposes and the persistent refusal to accept and respect one another's integrity, rights and appropriate duties and obligations.[7]

It may even be stated that Islamic law recognises two types of discrimination. One is open and the other hidden discrimination. The open discrimination is the direct practice of apartheid and the hidden is the indirect practice of apartheid which is denied by the perpetrators. Such is the practice within the territory of Iran exercised against the Baha'i community. The second type is also strongly condemned by Islamic law.

[7] The *Qur'ān*, 2:213.

For instance, the main source of Islamic law goes further and emphasises that "do not cover the truth with falsehood, and do not hide the truth when you know it."[8] The criticisms of the perpetrators of the discriminations, apartheids and other similar acts can be seen from the inspiration of the following verse. It reads that "do you enjoin right conduct upon people while forgetting it yourself while you study the Scripture?"[9] According to the same source, one has to do not only good to the nearest, but also, to all people and should treat them with fair and right principles that are not in violation of natural principles or the natural dignity of man. It therefore reads that "you shall do good deeds with your parents and kindred, orphans and those in need; speak fair to the people/human beings."[10] The provision of this verse implies the fact that one has to do good to all people and should not open any kind of hostility or apartheid with any group. Fairness or justice is recognised as one of the necessary elements of a social structure and respect for human dignity. The term "speak fair to the people" obviously condemns discrimination and apartheid and recognises those actions as violations of the universal law.

3. Elements of Apartheid

There are different elements for the recognition of apartheid in Islamic international criminal law and the system of international criminal law. The most significant function of these elements is to identify a conduct as the violation of certain rules, the violation of which constitutes a crime or great sin and therefore punishable before a criminal court. Due to an appropriate interpretation of Islamic rules, the following elements may be listed in the recognition of apartheid or discrimination. Apartheid or discrimination constitutes a crime against the basic principles of Islamic law. They may be the manifestation of:

- Discrimination based on the concept of religion by one racial group of persons over any other racial group of persons or of the same race as the perpetrator,
- Acts containing discrimination against cultural norms of one racial group of persons by the members of another racial group of persons or of the same race,

[8] The *Qur'ān* 2:42.
[9] The *Qur'ān* 2:44.
[10] The *Qur'ān* 2:83.

- Decrees or legislations which give priority to the members of one racial group of persons compared with another group of persons,
- Deliberate imposition of political, economic and theoretical conditions calculated to cause physical destruction on the members of a particular group or of the same race,
- Policies and practices of racial segregation over the members of one racial group of persons under the direct or indirect policies of the state in question,
- Discriminating, segregating and dictatorial rules, provisions, norms, regulations or codifications created by one racial group of persons over any other racial group of persons or of the same race,
- Acts resulting in discriminating between children in a social context including schools, social services and all types of charity by one racial group of persons over any other racial group of persons or of the same race,
- Acts resulting in the discrimination of men and women in all types of their social context by the social authorities of a state,
- Acts, conducts or decisions prohibiting movements of the members of a group in a specific area or limiting their movements to particular area,
- Prohibition of marriage between members of one racial group of persons by any other racial group of persons or of the same race,
- Governmental or authorized decisions enforcing much heavier juridical procedures over any racial group of persons or of the same race,
- Prohibiting social developments within one racial group of persons by another racial group of persons or of the same race,
- Disregarding the necessary social needs between the members of one racial group of persons or of the same race,
- Enforcing heavier taxation upon a particular group or of the same race,
- Any inhuman treatment carried out with the intention of maintaining domination over members of any racial group of persons or of the same race,
- Arbitrary arrest, detention, capture or seizure of members of a racial group or of the same race,
- Jailing the members of one group by the members of another group or of the same race without due regard to pure legislation,
- Torturing the members of one group by the members of another group or of the same race,

- Murdering, killing, amputating the members of a particular group or of the same race,
- Systematically oppressing, tyrannizing and afflicting the members of one group by the members of another group or of the same race,
- Immoral, unjust and unfair treatments of the members of one group or of the same race who are opposed to massive discrimination and apartheid.

CHAPTER SEVENTEEN

TORTURE

1. Torture in International Criminal Law

1.1. *Non-Criminalization*

Torture constitutes one of the most serious international crimes in the system of international criminal law.[1] This is however an innovation in the system, otherwise torture has been legally inflicted under most domestic legislations as an integral part of political, juridical and criminal procedures. This can especially be examined in the historical backgrounds of criminal jurisdictions where it was impossible for jurists to access evidence denoting the criminality of the accused who ordered the infliction of torture. They imposed torture in order to obtain confessions or information regarding the commission of certain criminal activities. Some states however did not officially permit the infliction of torture, but in practice, their criminal jurisdictions were profoundly combined with the institution of torture and torture constituted an effective instrument in order to obtain a confession. For instance, under the English system torture was considered an integral part of criminal procedures where there was no proof of criminality or it was insufficient to prove guilt. The English system especially employed torture when there was a crime against the monarch or when it was considered that a political crime against English sovereignty had been committed.[2]

The institution of torture was also employed in order to obtain confessions for the commission of certain acts by those who were considered political criminals or those whose activities were against the security of the State. Torture was also carried out on slaves who had, according to their owners, committed certain acts which were against their status.[3] The torture of political prisoners and slaves might also have other aims

[1] Malekian, *International Criminal Law*, vol. I, pp. 376–463.
[2] Id., p. 397.
[3] Id., pp. 387–389.

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such as humiliating the accused or frustrating other related persons.[4] In all cases, torture could also be inflicted as an effective punishment of the accused or actual criminals. For this reason, there was often no difference between those who were accused and those who were criminals. This was because torture was inflicted upon both those categories, even though the accused could be found innocent. The accused could even be killed under torture because of the strong physical and psychological effects of torture—even when no proof of guilt was found.[5] Thus, it was often impossible to distinguish between the procedure of torture for the person found guilty of commission of crimes and for the defendant as a whole.

1.2. *Criminalization*

The beginning of the twentieth century brought into consideration some of the most important legal principles regarding the institution of torture and it was considered that the infliction of torture was inhuman and should be abolished under criminal legislations. The criminalization of torture was not however effective until the establishment of the United Nations. Still, the early works of the Organization only had hortatory effect in the prohibition of torture, although some resolutions were adopted for such a purpose. The most important agreements and documents in international criminalization of torture are the followings:

i) The 1949 Geneva Conventions which in Articles 3 and 99 prohibits the use of torture;
ii) The Universal Declaration of Human Rights (1948), Article 5;
iii) The United Nations Standard Minimum Rules for the Treatment of Prisoners (ECOSOC Resolution, 1955, 1957), Article 31;
iv) The International Covenant on Civil and Political Rights (1966), Article 7;
v) The Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975), Article 3;
vi) The United Nations Code Conduct for Law Enforcement Officials (1979), Article 5;

[4] Id. pp. 393–395.
[5] Id., pp. 389–390.

vii) The United Nations Principles of Medical Ethics (1982), Principle 2;
viii) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
ix) The 1989 Convention on the Right of Child.
x) The Statutes of the ICTY, the ICTR and the ICC.

There are also some regional agreements applicable to this international crime which have been codified and developed due to specific requirements at a given time. Whilst these agreements have a regional perspective, they are considered of prominent importance in the prohibition of the institution of torture under the criminal jurisdiction of many states. These regional instruments are namely:

A) The prohibition of the use of torture in Article 3 of the European Conventions on Human Rights (1950);
B) The American Convention on Human Rights (1969), Article 5 (2);
C) The Draft Convention Defining Torture as an International Crime (Inter-American), 1980;
D) The African Charter on Human Rights (1981), Article 5;
E) The Draft European Convention on the Protection of Detainees From Torture and From Cruel, Inhuman or Degrading Treatment or Punishment (Inter-European) 1983;
F) The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987.

The most significant agreement under the system of international criminal law applicable to the crime of torture is the international Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984).[6] Because of the high humanitarian purposes of the Convention and the existence of a number of other international instruments applicable to this international crime, as well as the broad prohibition of torture under the legislations of most states, the provisions of the convention must be regarded as having approached the effect of customary international criminal law. This means that no state should deny the international legal effect of the convention concerning the criminalization and prohibition of the crime of torture. In fact, the provisions of the 1984 Convention have the effect of *international law of*

[6] Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. Report: A/39/708 and Corr. 2. Enter into force: 26 June 1987, in accordance with article 27(1).

jus cogens. This means that they are binding upon all states without due regard to their signature or ratification. In other words, they do not create rights or duties for the states of the world, but, compulsory obligation as an integral part of *obligatio erga omnes*.

According to the Convention, torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[7] This definition of torture is without prejudice to any other instrument on the prohibition and criminalization of torture which may apply provisions with wider perspectives.[8] For instance, the convention prevents states from the commission of other acts under their criminal jurisdictions such as cruel, inhuman or degrading treatment or punishment which do not amount to torture.[9]

Several other important matters concerning prohibition, criminalization, prosecution, punishment, extradition and other administrative matters are also stated in the convention. Accordingly, states are under conventional obligations to take effective legislative, administrative, juridical or other measures to prevent acts of torture and no circumstances should be reason for employing torture. This means that torture is prohibited during all times including war and no plea of superior order is acceptable for the justification of torture.[10] States are also prevented from expelling or extraditing a person when there is a risk of imposing torture on the accused.[11]

According to the Convention a state(s) is also obliged to 'ensure that all acts of torture are offences under its criminal law. The same applies to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.' States should punish those who have, in one way or another, committed or attempted to commit torture.[12]

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[7] Article 1 (1).
[8] Article 1 (2).
[9] Article 16.
[10] Article 2.
[11] Article 3.
[12] Article 4.

This even includes those who have come under their jurisdiction, but the extradition of whom is impossible for a particular political or juridical reason.[13]

The 1984 Convention also recognises the duty of states to assist one another regarding criminal proceedings in cases of the crime of torture in conformity with treaty obligations which may exist between them.[14] They should ensure that the prohibition governing the crime of torture is fully respected in the training of law enforcement personnel, civil or military personnel, medical personnel, public officials and other persons who may be involved in the interrogation, custody or treatment of any individual subjected to any form of arrest, detention or imprisonment.[15]

They should also guarantee redress for a person who is subjected to torture and a statement which is obtained as a result of torture shall not be invoked as evidence in any proceedings against the accused. The convention also encourages states in creating and participating in a Committee against Torture which can have the function of an impartial administration in the prevention of torture under the jurisdiction of states.[16]

The 1984 Convention has recognised the prevention, prosecution and punishment of the crime of torture. The crime has also been criminalized within other international instruments applicable to this international crime. Nevertheless, torture has been inflicted under the criminal and political jurisdictions of states and many governments have denied that they have committed the international crime of torture. A clear example of this is the infliction of torture by the United States agencies within and outside its territories. The most recognised of these are the water board torture and the Abu Ghraib prisoners. In the commission of the latter, the British government also had, directly and indirectly, international criminal responsibility for the participation and accomplishment of the crime. Other examples of torture are the British army employment of torture during interrogations on prisoners in Northern Ireland in 1970, the torture of Iraqi political prisoners by Saddam Hussein, the Iranian political prisoners by the Shah as well as the present Islamic regimes and

[13] Articles 5, 6, 7 and 8.
[14] Article 9.
[15] Article 10.
[16] Articles 14, 15 and 17–24.

within many Islamic nations. This crime has especially been committed by states which prevent all forms of political movements under their jurisdictions and thus the infliction of torture on political prisoners is one of the most prevalent forms of this international crime.[17]

[17] 'The events of the twentieth century prove that torture has frequently been employed by governments in order to impose their ideology upon the national population or upon foreign nationals particularly in the time of war. The prohibitions governing the institution of torture have not therefore been effective in eradicating the use of torture at national and international levels. The use of torture has especially been sanctioned as a weapon against dissident political movements. Reports prepared by international organizations confirm the fact that the victims of torture are very often individuals who have refused to conform to the ideology of the state. In other words torture is used as a means of maintaining political control. Torture is also used to maintain economic control without which political control is impossible.' Malekian, *International Criminal Law*, vol. I, p. 440. According to two writers, 'Thus, it may be concluded that no political system in any part of the globe is necessarily immune from the practice of torture, because overall circumstances may change, and adoption of torture is based on perceived expedience.' M. Cherif Bassiouni and Daniel Derby, 'The Crime of Torture' in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. 1, pp. 363–397, p. 370. The same writers also conclude that 'It is appropriate to mention here, however, that at least one reliable organization (Amnesty International) has recently compiled a world survey of torture that reports incidents and patterns of torture on every continent and in states of all cultural, political and religious characters.' Id. See *also* Amnesty International: Report on Torture (1975); Torture in the Eighties, An Amnesty International Report (1984). Amnesty International lists 67 states in which torture was employed. The employment of torture and other inhuman acts under national authorities is also reported by the General Assembly of the United Nations and other international bodies. For example see The opinion of the European Court of Human Rights in 1978. Council of Europe, European Commission on Human Rights, Applications N 5310/71, Ireland against the United Kingdom of Great Britain and Northern Ireland, Report of the Commission adopted on 25 January 1976 (Published version—Rule 29 § 3 of the Rules of Court of the European Court of Human Rights, Strasbourg). See also Annexes I and II to the Report of the Commission adopted on 25 January 1976, id. Council of Europe, European Court of Human Rights, Case of Ireland against the United Kingdom: Judgment (Strasbourg, 18 January 1987); Torture in the Eighties, An Amnesty International Report (1984), pp. 14–15, and 50–61. See *also* Torture and inhuman treatment of children in detention in South Africa and Namibia, Resolution 43/134, 8 December 1988, U.N. Press Release, Department of Public Information, Press Release G.A/7814, 19 January 1989, Resolutions and Decisions Adopted by the General Assembly During the First Part of Its forty-third Session from 20 September to 22 December 1988, pp. 404–405; Torture and inhuman treatment of children in detention in South Africa and Namibia, Resolution 44/143, 15 December 1989, Adopted without a vote, Report: A/44/827, U.N. Press Release, Department of Public Information, Press Release G.A/7977, 22 January 1990, Resolutions and Decisions Adopted by the General Assembly During the First Part of Its forty-fourth Session from 19 September to 29 December 1989, pp. 438–439. A further prohibition of the use of torture is emphasised in the 1989 Convention on the Rights of the Child annexed to Resolution 44/25. Adopted without a vote, Report: A/44/736 and Corr. 1, U.N. Press Release, Department of Public Information, Press Release G.A/7977, 22 January 1990,

2. Torture in Islamic International Criminal Law

2.1. *Definition*

Islamic international criminal law prohibits any harm or injury to individuals. For this reason information which is extracted under the infliction of torture is invalid. Torture is thus not permitted under Islamic international criminal law. The prohibition of torture under Islamic law rests on the fact that information which is extracted by the use of torture is not reliable, since the mind of the victim cannot function appropriately and information which has been given is the result of suffering and pain under torture and not a normal reflection of the mind of the victim.

Torture in Islamic international criminal law may therefore be defined as the enforcement of unlawful and immoral measures by force which are not acceptable in Islamic theory and are against the spiritual dignity of the victim or the accused as they are imposed by physical or psychological force. Here, the emphasis is on the intention to implement torture. This is regardless of whether the actual and relevant acts of torture cause any form of physical or psychological suffering. The reason for this is that Islamic law does not base the recognition of torture on the physical or psychological tolerance of the victim but on the theory that the spiritual dignity of man must be respected at all times regardless of the physical and psychological strength of the victim/accused. In Addition, the 2004 Arab Charter on Human Rights condemns acts of torture and recognises it as serious violation against human integrity. It reads that:

1. No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment.
2. Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.[18]

Resolutions and Decisions Adopted by the General Assembly During the First Part of Its forty-fourth Session from 19 September to 29 December 1989. See also pp. 143–144, *infra*.

[18] Article 8.

Contrary to the Islamic interpretation of torture, in the system of international criminal law for an act to constitute torture it must create physical suffering and although other cruel, inhuman or degrading treatments are prohibited they do not constitute torture. This means that the system has a restricted definition of the term torture and its scope of applicability may be limited in certain specific situations.[19] A clear example of this is the torture of Irish prisoners by the British forces. Unfortunately, the intensive torture of the prisoners was not recognised as torture but degrading treatment. The case would have been recognised torture once it has been treated by the provisions of Islamic international criminal law.

2.2. *Administration of Justice*

Islamic law places a significant weight on respecting the dignity of man and on appropriate methods of social relations between individuals and the administrative conduct of an Islamic state. This is because in Islamic law, rules must be carried out with full respect regarding each individual and as a fundamental principle of Islamic law a person must not be forced to accept certain information or duties. This principle is the extension of the principle of freedom and equality of all persons before Islamic law and relies on the fact that the pure Islamic philosophy should not force a person to embrace Islam. The development of this principle is the development of the principle of freedom of thought, information, equality, brotherhood, and more significantly the administration of civil and criminal jurisdiction in the favour of all individuals. In addition, the Arab Charter on Human Rights argues for a fair administration of justice. It reads that:

1. Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights.
2. Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights.[20]

[19] Malekian, *International Criminal Law*, vol. I, pp. 431–434.
[20] Article 13.

It is an acceptable principle in Islamic criminal justice system that the method of proof relies profoundly on an oath taken from the accused on the *Qur'ān* and this method is also applied to both the victim and witness.[21] This principle is obviously carried out on those who are Muslims and the principle loses its juridical effect in the case of a non-Muslim.[22] Thus, those who implement Islamic principles of criminal justice should accept the oath taken from the accused, victim or witness on the ground that every person is competent unless the contrary is proven. The logic behind this process is that Islamic criminal justice system is itself essentially based on the principles of the *Qur'ān* and it should not therefore simply disagree with the statements of an accused taken by an oath relying on the *Qur'ān*. The whole procedure is also based on the principle of good faith to the sovereignty of the *Qur'ān*. Obviously an improper oath is against Islamic criminal justice system and is punished with proportionate penalties. This should not however be interpreted that torture can be inflicted on the accused or a guilty person as a form of punishment.[23]

2.3. *Prohibitions*

Islamic criminal law or Islamic international criminal law prohibits torture for any purpose and by sudden means. This includes torture during various criminal procedures such as arrest, arbitrary arrest, pre-trial detention, detention and when an accused is found guilty. Under Islamic

[21] See also Bassiouni, 'Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System', in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System*, pp. 3–53, at 23.

[22] "Foreigners residing in the Islamic territory are subject to Muslim jurisdiction, but not to Muslim law, because Islam tolerates on its territory a multiplicity of laws, with autonomous judiciary for each community. A stranger would belong therefore to the jurisdiction of his own confessional tribunal. If he is a Christian, Jew or something else, and if the other party to the litigation is also of the same confession—no matter whether this other party is a subject of the Muslim State or a stranger—the case is decided by the confessional court according to its own laws. Generally no distinction is made between civil and criminal cases with respect to this jurisdiction … However, it is always *lawful for* non-Muslim to renounce this privilege and go before the Islamic tribunal, provided both parties to the suit agree. In such an eventuality, Islamic law is applied." Moreover, "the concern for legality has forced the Muslim jurists to admit that if a crime is committed, even against a Muslim, who is the subject of the Muslim State, by a foreigner in a foreign country, and this foreigner later comes peacefully to the Muslim territory, he would not be tried by the Islamic tribunals, which are not competent to hear a case that had taken place outside the territory of their jurisdiction." *Publications of Centre Culturel Islamique—Introduction to Islam*, pp. 95–96.

[23] Although torture has been prohibited by Islamic criminal law, it is frequently employed for various purposes by most Islamic nations.

criminal law the criminally accused is certainly innocent until proven guilty by an impartial and fair criminal court basing its judgement on the established law and evidences denoting the possible criminality of the accused. Under no circumstances should a criminally accused be subjected to torture and humiliation. Any intentional or even sometimes a non-intentional starvation of prisoners may constitute torture due to the examination of evidence. An intentional starvation means placing the prisoners in a condition where they have no access to food including drink. A non-intentional starvation implies the position where supplying food or drink has, in one way or another, been forgotten to be given to the relevant prisoners. All these constitute torture with the difference that the former may strongly come under the definition of torture while the latter may have the purpose of humiliation depending on the aims and the intention of the perpetrators. Consequently, the infliction of torture is prohibited regarding all the prisoners including the prisoners of war. According to one writer, 'Dans la lutte armée entre nations, le but qu'on se propose consistant à—pour mieux dire, devant être de—briser la résistance de l'ennemi, le soldat, qui en est l'instrument principal, une fois rendu inoffensif par la captivité, volontaire ou forcée, ne doit pas être mis à mort, ni subir de tortures.'[24]

One of the articles of the Cairo Declaration on Human Rights in Islam[25] points to the very important role of prohibition of torture under Islamic criminal justice system. The scope of the article also broadly covers all those who are taken by authorities for other reasons than criminal accountability such as political prisoners and prisoners of war. Accordingly,

> Right to Protection Against Torture
>
> No person shall be subject to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests.[26]

The provisions of the above article rely heavily on the system of Islamic criminal justice based on the sources of Islamic law, in particular the *Qur'ān* and their effect on the creation and development of Islamic cultural heritage including the maintenance of brotherhood, neighbour-

[24] Rechid, 'L'Islam et le Droit des Gens', p. 470.
[25] See Appendix.
[26] Principle VII.

hood, friendship and universal respect for the dignity of a person in all forms of social conduct. Infliction of torture is thus prohibited by Islamic criminal law and Islamic international criminal law and this should not be interpreted differently. More importantly, torture should not either be allowed in the case of urgent or emergency situation. This means that there is no ground for justifiable torture or resorting to the principle of legality due to the defence of necessity. In other words, the nature of excuses by the authorities, do not permit the infliction of torture on the prisoners. Torture is always wrong.

2.4. *Practice*

The constitutional legislations of Islamic states also denote the prohibition of torture and respect for the dignity of man in social conduct with all types of administrative justices. With an Islamic state, as we have mentioned elsewhere, we mean a State which is ruled in accordance with Islamic law and practice and also has a culture broadly based on Islamic religion.

One cannot disprove however the fact that Islamic criminal law in general and the legislations of Islamic states in particular are violated by many states exercising the Islamic legal system.[27] Torture is inflicted on the criminally accused and in particular political prisoners. This has been carried out irrespective of the motives of the politically accused and also regardless of the principles of Islamic international criminal law and the system of international criminal law. The infliction of torture on political prisoners has been carried out for several reasons such as extracting information, confession, punishment, prevention of certain acts and more often for the purpose of stabilizing and guaranteeing the authority of those who have political control in an Islamic State. A clear example of the infliction of torture is under the authority of the present regime of Iran. In particular, torture is inflicted on the political prisoners who have been arrested under the recent protests against the Islamic regime. This is not however surprising when one examines the commission of the same international crime and the violation of the principles of the system of international criminal law under the supervisions of other states. Clear examples of these are the infliction of torture under the

[27] Mohammad Arkoun, 'The Death Penalty and Torture in Islamic Thought', in F. Bockle and J. Pohier (eds.), *The Death Penalty and Torture* (1979), pp. 75–82.

power of permanent members of the United Nations such as China, Russia, the United Kingdom and the United States. Principally, where the permanent members of the United Nations who are assumed to keep peace, equality, justice and the maintenance of the principles of human rights, violate all these norms of the Charter, other members get indirect permission for the violations of the same norms. Among these are many Islamic states. Security can never be insured by the political authorities where they are also themselves the reason for insecurity in the world.

2.5. *Types of Torture*

There is no special list in the Islamic system of international criminal justice to underline what does and does not constitute torture. In general, the Islamic system protects the physical, psychological or mental integrity of human beings and this integrity should not be the object of direct or indirect violations. It must also be admitted that the aims of torture are not always for the extraction of information, but, it may simply be for the causing of harm or injuries to a person. The following are the sign of infliction of torture under Islamic international criminal law:

- Any physical harm with the purpose of obtaining information,
- Any mental harm with the purpose of reaching to some forms of confession,
- Verbally abusing a person in custody,
- Abusing a person's religious beliefs,
- Abusing a person's religious practices or traditions,
- Sexually abusing or insulting a prisoner's wife, daughter, sister, mother, family member or any other person close to his mind,
- Placing prisoners in a hot locality with the intention of breaking his/her morale or strength,
- Endangering in one way or another the prisoner's health condition,
- Creating conditions under which a person is under heavy pressure and anxiety,
- deliberately forcing a person to evacuate, in one way or another, his/her home or homeland,

Unfair or unjust treatment of prisoners may also be considered as torture. This may occur through discrimination and acts denoting the humiliation of the nationality, race, language or cultural attitudes of prisoners. It

is therefore a principle to "take heed of the recommendation to treat the prisoners fairly."[28] The principle has therefore emphasised the treatment of prisoners and their food.

[28] The recommendation by the Prophet in the Battle of Badr. Hamidullah, *The Muslim Conduct of State*, p. 207.

CHAPTER EIGHTEEN

CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS

1. Criminalization in International Criminal Law

The system of international criminal law has for sometime been codified by the rules and provisions of positive international criminal law, recognizing certain activities against internationally protected persons as constituting international crimes.[1] This conventional criminal recognition does not mean that the crime is new. This crime has long been recognised alongside the customary rules of international criminal law. The most important provisions which have been regulated concerning internationally protected persons can be found in the 1961 Vienna Convention on Diplomatic Relations. The Convention has, especially, emphasised that its provisions are drafted to ensure the official performance of diplomatic missions representing member states. According to the Convention diplomatic protection applies to the heads of official missions, which means ambassadors, ministers and *chargé d'affairs*.[2] Thus the Convention has, as a whole, guaranteed certain immunities for diplomatic missions in order that they can appropriately perform their international diplomatic functions.[3]

As a result of many attacks on internationally protected persons and in particular diplomatic missions, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents was signed in 1973 and came into force in 1977. The Convention constitutes one of the most significant conventions in the system of international criminal law regulated under the auspices of the United Nations on the prevention and punishment of international crimes. The most relevant provisions of the Convention concern

[1] Crimes against internationally protected persons and crimes of taking hostages are basically similar. For a careful analysis, discussion and references see Malekian, *International Criminal Law*, vol. II, pp. 28 et seq.

[2] See the Preamble of the Convention.

[3] For discussions and references see Malekian, *International Criminal Law*, vol. II, p. 35.

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the criminalization of certain acts against protected persons as constituting international crimes. Accordingly, protected persons are; i) a head of state, including any member of a collegial body performing the functions of a head of state, a head of government or a minister for foreign affairs, whenever any such person is in a foreign state, as well as members of his family who accompany him; ii) any representative or official of a state or any official or other agent of an international organization of an intergovernmental character including their family. The 1973 Convention criminalizes the following acts whenever they are committed against the relevant internationally protected person(s). These are:

1. The intentional commission of:
   (a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
   (b) A violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
   (c) A threat to commit any such attack;
   (d) An attempt to commit any such attack; and
   (e) An act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law.
2. Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature.
3. Paragraph 1 and 2 of this article in no way derogate from the obligations of States Parties under international law to take all appropriate measures to prevent other attacks on the person, freedom or dignity of an internationally protected person.[4]

The following section demonstrates that the provisions of the 1973 Convention on the criminalization of certain acts as constituting international crimes in the system of international criminal law have long been recognised in Islamic international criminal law. Even though the words

[4] Article 2. It must be emphasised that the criminalization of certain acts in the Convention 'could not in any way prejudice the exercise of the legitimate right to self-determination and independence, in accordance with the purposes and the principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and *apartheid*.' See the Preamble to the Convention.

and the substance of the Convention may be considered rather a new codification of the relevant crimes, such crimes could have been regulated long ago within international law if the law had not been slow and had had the vision of seeing other systems. This does not mean, however, the recognition or enforcement of those systems, but, taking solely the advantage of the benefit of having different legal systems of the world for the maintenance of peace and justice.

2. Criminalization in Islamic International Criminal Law

2.1. *Immunity*

A protected person in traditional Islamic international criminal law may be defined as a person who has been delegated certain duties and rights from an authorized person(s) under a state to deliver documents, consult or negotiate certain important matters such as political, military, economic, religious, cultural and social issues with another state which were of prominent importance for the international relations of both parties. A protected person is normally called a messenger and his dignity and duties must, fully, be respected by any other party.[5] Thus, one important legal characterization of an internationally protected person (or agent) is the inviolability of his position relative to a receiving party.

In the practice of the Prophet it was a recognised fact that the position of those who came to negotiate or deliver messages was inviolable.[6] 'Mahomet a consacré cette inviolabilité. Jamais les ambassadeurs envoyés auprès de Mahomet ou de ses successeurs n'ont été molestés.'[7] In certain situations when a protected person had seriously insulted the Prophet, the Prophet did not violate the protected person's immunity and respected his position during the mission.[8] The Prophet was also especially kind to the envoys of foreign countries and it was his recognised habit to give them gifts and other presents. He always recommended that his companions should treat the envoys in the same manner.[9]

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[5] Today, a messenger is called a diplomat or an internationally protected person.

[6] W. Montgomery Watt, *Muhammad at Medina* (1956), p. 58.

[7] Rechid, 'L'Islam et le Droit des Gens', p. 421.

[8] Id., p. 422.

[9] M. Cherif Bassiouni, 'Protection of Diplomats under Islamic Law', 74 *American Journal of International Law* (1980), pp. 609–633, at 612 and 613.

2.2. *The Scope of Protection*

While Islamic international criminal law does not speak of the immunity of the personnel in international organizations such as the United Nations, obviously protection and immunity is also applicable to such personnel during the period under which they carry out their official duties.[10] As a whole, protection was a principle which pre-existed Islamic law.[11] This is because under the provisions of Islamic law, protection, immunity and privileges are granted to all those whose function is, in one way or another, the negotiation of certain topics, to consult on certain matters, to initiate certain rights and duties and any other legitimate matter for which a person has been instructed by a recognised intergovernmental entity to discuss under the temporary jurisdiction of another party.[12] This even includes envoys on journeys from groups or states which have not been accessed or do not have the characterization of the prevailing definition of the term 'international personality' as defined under the system of international law. This is because under the Islamic concept of law 'international personality' is not provided for by the recognition of other states or organizations, rather the concept of recognition is *self-structured* by the divine law. The reason is that each individual, by himself, is a unit and in a more far—reaching aspect an integral part of one universal unit. Thus protections, immunities and privileges can also be granted to envoys of populations or groups who do not necessarily fulfil the conditions of recognition in the system of international law.[13]

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[10] Ilias Bantekas, 'The Disunity of Islamic Criminal Law and the Modern Rule of *Ijtihad*', 9 *International Criminal Law Review* (2009), 653.

[11] Id.

[12] *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 95.

[13] A serious problem concerning the type of protection provided under the system of international criminal law is that the provisions of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents do not protect the envoys of the groups or populations whose international personality(s) have been limited by an alien power. Although we do not deny that the 1973 Convention protects the struggle of people for self-determination and according to its preamble its provisions do not restrict such struggles, its provisions because of the conditions for obtaining international personality under the system of international law for states and entities do not recognize acts against the envoys of groups as criminal. However, this is not so within Islamic international criminal law.

2.3. *Criminalization*

The Islamic system of international criminal law has a considerable number of traditions and provisions recognizing certain acts against protected persons as constituting crimes and such acts are therefore against the fundamental principles of Islam.[14] This is because the framework of Islamic law provides *aman* i.e. immunity to all those who have an internationally protected position.[15] The principle of immunity was developed for several reasons, *inter alia*, the international relations between states could not be developed without the necessary respect for those who come to give messages from other countries. Secondly, Islam exercises special respect for those who are invited or have been sent by a state for negotiations. They therefore enjoy certain immunity under the jurisdiction of the host country. It is upon these basic juridical and theological principles that Islamic international criminal law provides special respect for diplomats, the violation of which may constitute crimes against protected persons.[16] The following passage is illustrative of this important matter. Accordingly:

> Envoys, along with those who are in their company, enjoy full personal immunity: they must never be killed, nor be in any way molested or maltreated. Even if the envoy, or any of his company, is a criminal of the state to which he is sent, he may not be treated otherwise than as an envoy. The envoys of the impostor Musailimah provide good law to whom the Prophet had said: Had you not been an envoy, I would have ordered you to be beheaded.
>
> Envoys are accorded full freedom of prayer and religious rites. The Prophet allowed the delegation of the Christians of Najran to celebrate their service in the very Mosque of the Prophet. Muslim historians mention as a curiosity that these Christians turned their faces towards the East and prayed.
>
> Envoys may only, in extraordinary cases, be detained or imprisoned. So, the Prophet detained the plenipotentiaries of Mecca until the Muslim ambassador detained in Mecca returned safely to Hudaibiya where the Prophet was camping.
>
> The property of the envoys is exempt from import duties in Muslim territory if reciprocated … if the foreign states exempt Muslim envoys from customs duties and other taxes, the envoys of such states will enjoy the same privileges in Muslim territory.[17]

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[14] See also chapter twenty.
[15] Bassiouni, *Protection of Diplomats under Islamic Law*, pp. 613–614.
[16] Malekian, *International Criminal Law*, vol. II, p. 33.
[17] Hamidullah, *The Muslim Conduct of State*, pp. 139–140.

It is indeed obvious that certain persons were recognised within Islamic international criminal law as internationally protected persons, approximately fourteen centuries ago.[18] The protection not only extends to heads of states, ambassadors and their families, but also to those, who for one reason or another, accompanied the protected persons. This could include all those who carried out administrative duties and their family members. All these persons came under special immunity and violations of their privileges were criminalized under Islamic international criminal law. Significantly, diplomatic privileges did not need to be requested by the diplomats, they applied automatically with the start of the mission.

In Islamic international criminal law to attempt, have complicity in and/or participate in the violation of the privileges of protected persons may constitute a crime against an internationally protected person(s). Obviously, if a violation has occurred, reparation and restoration must be made, where possible, to the state of the protected persons. This includes damages to the property of the protected persons and also their companies. Furthermore, it must be added that the international conventions protecting diplomats and recognizing the commission of certain acts as crimes against internationally protected persons are signed and ratified by states, the legislations of which have, in one way or another, benefited from Islamic law.

[18] See, generally, Bassiouni, *Protection of Diplomats under Islamic Law*, pp. 609–633.

CHAPTER NINETEEN

TAKING OF HOSTAGES

1. International Criminal Law

In the old system of international law the taking of hostages during or after a war was a legitimate right of the conflicting parties.[1] The purpose of the taking of hostages was mainly to force the other party or parties to fulfil their obligations. The taking of hostages was especially practised after the end of a war. The practice was abolished during the nineteenth century. This did not however mean that states did not resort to the taking of hostages in order to impose their military, political or economic interests on other states.[2]

Despite the fact that there is an international convention criminalizing the taking of hostages, the practice has been continued not only through individual's and organization's actions but also under the order of those states which are also the permanent members of the United Nations. The former Union Soviet Socialist Republic and the United States took hostages against one another's policy, who were only released after certain political agreements were reached. The International Convention Against the Taking of Hostage was adopted in 1979. The Convention prohibits the taking of hostages and recognises it as an international crime.[3]

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[1] Crimes of taking hostages and crimes against internationally protected persons are basically similar.

[2] For detail analysis of this international crime see Malekian, *International Criminal Law*, vol. II pp. 1–27.

[3] The International Convention Against Hostage Taking reads that:

Article 1: 1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or judicial person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commit the offence of taking of hostages "hostage-taking" within the meaning of this Convention.

2. Any person who:

(*a*) Attempts to commit an act of hostage-taking, or

(*b*) Participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purpose of this Convention.

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However, there is no special reference to this international crime in the Statute of the ICC.

2. Islamic International Criminal Law

Under the traditional system of Islamic international criminal law, like the system of international law, hostages might be taken if the taking of hostages is stated in an agreement for the purpose of implementing its provisions. Parties to an agreement stated that they could kill hostages if such provisions were disregarded by another party. In practice, the provisions of such agreements were repeatedly violated by the parties. Moreover, 'Bonne foi pour perfidie vaut mieux que perfidie pour perfidie.'[4] According to the Prophet, "Restitue le dépôt à qui s'est fié à toi et ne trahis point qui te trahit."[5] In general, the practical application of the law sometimes took priority over its definite application.

2.1. *Principle of Inviolability*

Killing hostages was recognised as against the principal philosophy of Islamic law and the formulation of any provision in a treaty concerning the killing of hostages when the provisions of the treaty were violated, was therefore due to the maltreatment and threatening of Muslims by other parties. Furthermore, the imposition of such a provision for the killing of hostages was practically invalid due to Islamic international criminal law. The beginning of hostilities between the parties to an agreement was a strong reason for Muslims to immediately and safely return all hostages to their homeland in order to fully respect family unity. For confirmation of this, 'Les hostilités ouvertes, on met les otages en liberté mais s'ils sont

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Article 2: Each State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences.

Article 3: 1. The State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure.

2. If any object which the offender has obtained as a result of the taking of hostages comes into the custody of a state Party, that State Party shall return it as soon as possible to the hostage or the third party referred to in article 1, as the case may be, or to the appropriate authorities thereof.

[4] Rechid, 'L'Islam et le Droit des Gens', p. 433.

[5] Id.

des hommes faits, il est obligatoire de les faire parvenir jusqu'à leurs lieux de sûreté; si ce sont des femmes ou des enfants, il est d'obligation de les ramener jusque dans leurs familles.'[6]

According to a significant principle of Islamic international criminal law, even though Muslim hostages could have been killed and were killed by unbelievers or non-Muslims, Muslims should not kill hostages because of the very important function of the principle of inviolability and philosophical spirit of pure Islamic law. Thus, killing hostages was not recognised by the provisions of Islamic international criminal law and was therefore illegitimate.[7]

2.2. *Principle of Integrity*

Although Islamic international criminal law places a heavy weight on the principles of proportionality and reciprocity, the implementation of these principles may not, in certain circumstances, be permitted which may involve a threat to the life of hostages.[8] The conclusion is that Islamic international criminal law prohibits the killing of hostages for the purpose of revenge or retaliation and this principle is well consolidated in the second source of Islamic law i.e. *Sunnah*.[9] Furthermore, this principle was not even suspended in the time of armed conflict, and hostilities between two nations. Disregarding the provisions of a treaty did not either excuse the killing of hostages. For this reason, "if hostages are exchanged, and the rebels murder the loyal hostages, the rebel hostages may not be punished even when that had been agreed upon, for the guilt is not theirs personally but of their government."[10] Essentially, Islamic international criminal law does not permit the imposition of provisions which may go against the fundamental principles of humanity and violate the personal integrity of hostages. In other words, the philosophy of the principle of natural law took priority, in certain circumstances, to the principle of *de lege lata*. For this reason, "killing enemy hostages, even if those of the Muslim state have been murdered by the enemy, and

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[6] Id.

[7] Id.

[8] One of the cases of taking of hostages is the occupation of the American Embassy in Teheran by Iranian students in 1979. They were later released after political negotiations between the American and Iranian authorities. See Malekian, *International Criminal Law*, vol. II, pp. 31–32.

[9] See chapter nine.

[10] Hamidullah, *The Muslim Conduct of State*, p. 174.

even if there is express agreement that hostages may be beheaded in retaliation"[11] is forbidden and considered one of the gravest breaches of the principles of Islamic international criminal law.

[11] Lost.

CHAPTER TWENTY

DRUG OFFENCES

1. Criminalization in International Criminal Law

There are ample documents in the system of international criminal law that prohibit illegal trade in narcotic drugs. These documents come under the principles of conventional international criminal law.[1] Most of these conventions have permitted this trade for medical purposes only and for other purposes which are emphasised in the conventions. It is on this basis that there are indeed a large number of rules and provisions prohibiting, preventing and criminalizing the cultivation, production,

[1] Some of these conventions are: 1. International Opium Convention, Hague, 23 January 1912. 8 League of Nations Treaty Series, 187; 6 A.J.I.L. (1912), p. 177; 2. Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of Prepared Opium, Geneva, 11 February, 1925. 51 L.N.T.S, 337; 3. International Opium Convention, Geneva, 19 February 1925. 81 L.N.T.S, p. 317; 23 A.J.I.L. (1929), p. 135; 4. Protocol to the International Opium Convention, Geneva, 19 February 1925. 81 L.N.T.S. 356; 23 A.J.I.L. (1923), p. 155; 5. Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, Geneva, 13 July 1931. 139 L.N.T.S, p. 301; 28 A.J.I.L. (1934), p. 21; 6. Agreement on the Suppression of Opium-Smoking, Bangkok, 27 November 1931. 177 L.N.T.S, p. 373; 7. Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, Geneva, 26 June 1936. 198 L.N.T.S, p. 299; 8. Protocol amending the Agreements, Conventions and Protocols on Narcotic Drugs concluded at the Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925, and 13 July 1931, in Bangkok on 27 November 1931 and at Geneva on 26 June 1936. 12 U.N.T.S, p. 179; 9. Protocol Bringing under International Control Drugs Outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as Amended by the Protocol signed at Lake Success, New York on 11 December 1946, signed in Paris, on 19 November 1948. 44 U.N.T.S, p. 277; 10. Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, New York, 23 June 1953. 456 U.N.T.S. 56; 11. Convention on the Territorial Sea and Contiguous Zone, Geneva, 29 April 1958. 516 U.N.T.S. 205; 12. Single Convention on Narcotic Drugs, New York, 30 March 1961. 520 U.N.T.S. 151; 13. Convention on Psychotropic Substances, Vienna, 21 February 1971. 10 I.L.M. (1971), p. 261; 14. Protocol Amending the Single Convention on Narcotic Drugs, 1961, Geneva, 25 March 1972. 976 U.N.T.S; 11 I.L.M. (1972), p. 804; 15. Convention on the Law of the Sea, Montego Bay, 10 December 1982. 1 I.L.M. (1982), p. 1261; 16. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. E/CONF. 82/15 and Corr. 1 and 2.

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manufacture, possession, exportation, importation, distribution and numerous other acts relating to trade in narcotic drugs without a valid licence. Breaches of these rules and provisions constitute a very serious international crime.

The purpose of all these regulations has not only been to prevent illicit trade in narcotic drugs but also to bring the perpetrators of international crimes under an appropriate jurisdiction for prosecution and punishment.[2] As a general rule each party to these conventions is bound to adopt

[2] For example Article 26 on Penal Provisions of the Single Convention on Narcotic Drugs 1961, reads that:

1. Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.
2. Subject to the constitutional limitations of a Party, its legal system and domestic law,
   (a) (i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;
   (ii) Intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;
   (iii) Foreign convictions for such offences shall be taken into account for the purposes of establishing recidivism; and
   (iv) Serious offences, heretofore referred to, committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender was found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given.
   (b) It is desirable that the offences referred to in paragraph 1 and paragraph 2 *(a) (ii)* be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the Parties, and as between any of the Parties which do not make extradition conditional on the existence of a treaty or on reciprocity, be recognised as extradition crimes; provided that extradition shall be granted in conformity with the law of the Party to which application is made, and that the Party shall have the right to refuse to effect the arrest or grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.
3. The provisions of this article shall be subject to the provisions of the criminal law of the Party concerned on questions of jurisdiction.

certain rules and obligations which may be necessary under its domestic system to criminalize the given conduct and especially to provide serious penalties for the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery in whatever way, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drugs and any other psychotropic substances.[3]

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4. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

[3] For example Article 22 on Penal Provisions of the Convention on Psychotropic Substances, 1971, reads that:

1. (a) Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.
   (b) Notwithstanding the preceding sub-paragraph, when abusers of psychotropic substances have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to punishment, that such abusers undergo measures of treatment, eduction, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 20.
2. Subject to the constitutional limitations of a Party, its legal system and domestic law,
   (a) (i) if a series of related actions constituting offences under paragraph 1 has been committed in different countries, each of them shall be treated as a distinct offence,
   (ii) intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion with the offences refer to in this article, shall be punishable offences as provided in paragraph 1;
   (iii) foreign convictions for such offences shall be taken into account for the purpose of establishing recidivism; and
   (iv) serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given.
   (b) It is desirable that the offences referred to in paragraph 1 and paragraph 2 *(a) (ii)* be included as extradition crimes in any extradition treaty which has been or may hereafter to concluded between any of the Parties, and, as between any of the Parties which do not make extradition conditional on the existence of a treaty or on reciprocity, be recognised as extradition crimes; provided that extradition shall be granted in conformity with the law of the Party to which application is made, and that the Party shall

2. Prohibitions in Islamic International Criminal Law

Islamic international criminal law does not provide, as does the system of international criminal law, provisions governing the prohibition of narcotic offences, but basically prohibits the use of narcotic drugs according to common Islamic purposes. The fact is that "drugs have the same effect on the human mind as alcohol, and they therefore produce the same public harm that led to the prohibition of the former."[4] The prohibition of narcotic drugs in Islamic law is based on the theory that social interests must be protected by the law and therefore any action which contradicts social development or creates civil or domestic problems between individuals, groups and the state is juridically wrong and must be punished according to the law. Furthermore, the prohibition of narcotic drugs within Islamic law also rests on the theory that since narcotic drugs are harmful to the human body and may handicap physical growth and ability, any involvement in it must be recognised as criminal. Islamic law has in one sense the function of a medical treatment of the body and for this reason it may even prohibit other substances in narcotic drugs which may be discovered in the future, on the condition that such substances are harmful to the human body. Permission for the use of narcotic drugs may be given under particular circumstances which are vital for the treatment of certain illnesses.

Narcotic offences under Islamic criminal law are penalized under the term *hudud* meaning fixed penalties. On a wider plane it means 'prevention, hindrance, restraint, prohibition, and hence a restrictive ordinance or statute of Allah, respecting things lawful and unlawful.'[5] In addition to this, *hudud* offences are against the fundamental principles of

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have the right to refuse to effect the arrest or grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.

3. Any psychotropic substance or other substance, as well as any equipment used in or intended for the commission of any of the offences referred to in paragraphs 1 and 2 shall be liable to seizure and confiscation.
4. The provisions of this article shall be subject to the provisions of the domestic law of the Party concerned on questions of jurisdiction.
5. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

[4] Don Peretz, Richard U. Moench and Safia K. Mohsen, *Islam: Legacy of the Past, Challenge of the Future* (1984), p. 109.

[5] Muhammad Iqbal Siddiqi, *The Penal Law of Islam* (1979), p. 50. Quoted in Matthew

Islamic law and are considered acts against divine law and are therefore prosecutable and punishable by the state jurisdiction under which the given criminal conduct is committed.

According to Islamic criminal law it is the intentional involvement in narcotic offences such as the selling or possession of narcotic drugs which causes the application of criminal provisions and not unintentional elements.[6] Thus, although Islamic criminal law has criminalized the possessions of narcotic drugs, it is against its equal standard of justice to punish those who have not intentionally engaged in the commission of such criminal conduct. In this way, the Islamic criminal system attempts to safeguard the interests of the accused over whom Islamic criminal jurisdiction is exercised.[7]

The prohibition of narcotic drugs in Islamic law has not only a national characterization, but also, an international characterization. This is because, according to the theory of Islamic law, acts by individuals or their state within their own territories should not harm other nations in the international community as a whole. This is on the grounds that all men must be treated equally before the law of God. Analogies in narcotic offences under Islamic international criminal law may therefore be made to similar prohibitions stated in the system of conventional international criminal law. These include aspects such as production, manufacture, extraction, preparation, offering for sale, distribution, sale, delivery in whatever way, dispatch, transport, importation and exportation of any narcotic drugs. This inclusion is with the reservation that the system of international criminal law has regulated certain provisions for all these activities in conventional international criminal law, while the same conclusions in Islamic international criminal law are deduced from its purposes, functions and sources which forbid, prohibit and make any intentional involvement in narcotic drugs a prosecutable and punishable

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Lippman, Sean McConville, and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction* (1988), p. 38.

[6] However, one cannot disagree with the fact that the Islamic Republic of Iran has, strongly, violated the system of international criminal justice and Islamic criminal law concerning the prosecution and punishment of those who are engaged in narcotic offences. It has, mostly, applied capital punishment violating the most fundamental principles of universal human rights and Islamic human rights law.

[7] It is useful to note here that Islamic criminal law does not punish those who are addicted to drugs while they attempt to stop their addiction. There will be inflicted *hudud* penalties, if after they have been cured of their dependency they become addicted again. Lippman, McConville and Yerushalmi, *Islamic Criminal Law and Procedure*, p. 48. This philosophy of punishment should be modified to the modern theory of treatment.

crime. Clear examples of this practice can be examined in the legislations of many states in which Islamic law has been an influence, such as the legislation and practice of Iran.[8] An involvement with any type of illegal narcotic drugs can be specified under the principle of *taboo*.

The procedure for jurisdiction and punishment may differ in Islamic law from other legal systems. This does not preclude the comparative analysis of both systems of international criminal law. As an acceptable general principle of the system of international criminal law, so long as there are not yet regulations permitting the permanent International Criminal Court (ICC) to exercise jurisdiction over the perpetrators of all international crimes for the purpose of effective prosecution of criminals, the implementation and enforcement of the system remains the privilege of various selected legal systems.

[8] In fact, many of those who are engaged in narcotic drug trade in Iran have been punished by the application of capital punishment. This method of punishment has been internationally objected by a number of international institutions but without any effective result. The United Nations has also condemned the practice and encouraged the internal authorities for the abolition of capital punishment and the implementation of the principles of international human rights law.

CHAPTER TWENTY-ONE

TRAFFICKING IN PERSONS AND PORNOGRAPHY

1. Criminalization in International Criminal Law

While the system of international criminal law has greatly developed in different fields of criminal law, the system still lacks certain effective provisions for the prohibition of certain activities which are harmful to individuals in general and the social interests of the international community in particular. For example the system of international criminal law has very limited provisions for the prohibition and prevention of obscene activities and publications. The relevant instruments applicable to this international crime are no longer useful in terms of the present epoch.[1] This is because there is still no effective movement(s) for the criminalization of obscene publications in the relevant legislations of states and governments are generally reluctant to adopt legal measures to prohibit any type of obscene publications.[2] This is for three essential reasons.

[1] These instruments are: 1. Arrangement for the Suppression of the Circulation of Obscene Publications, 4 May 1910. 5 A.J.I.L. (1911), p. 167; 2. International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 12 September 1923. Hudson, II International Legislation, p. 1051; 3. Protocol to Amend the Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, concluded at Geneva on 12 September 1923, 1947. 46 U.N.T.S. 169; 4. International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, concluded at Geneva on 12 September 1923 and amended by the Protocol signed at Lake Success, New York, on 12 November 1947. 46 U.N.T.S. 201; 5. Protocol amending the Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris on 4 May 1910, 1949. 30 U.N.T.S. 3; 6. Agreement for the Suppression of the Circulation of Obscene Publications of 4 May 1910, amended by the Protocol of 4 May 1949, 1949, 47 U.N.T.S. 159, and 7. Convention on the Rights of the Child, 20 November 1989. Resolution 44/25, Adopted without a vote, Report: A/44/736 and Corr. 1, U.N. Press Release, Department of Public Information, Press Release G.A/7977, 22 January 1990, Resolutions and Decisions Adopted by the General Assembly During the First Part of Its forty-fourth Session from 19 September to 29 December 1989. The 1910 Arrangement and the 1923 Convention regulate the most important provisions applicable to this international crime. Other instruments have only modified or adapted the provisions of the arrangement and the convention to the time.

[2] The most effective international legislation for the criminalization of the publication of obscene materials is entered into the provisions of Article 1 of the International

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Firstly, governments do not see the publication of obscene materials as a threat to their national or international policies and *secondly*, publications of obscene material have become a great source of income for the economies of various countries. *Thirdly*, such a prohibition may not be well-received by the majority of the population of a state and create controversy and other practical problems such as smuggling and increasing the border-line of criminality under the jurisdiction of a state.

Publications of obscene materials become more dangerous to the social structure of the national and international community when one considers that for the accomplishment of these publications many individuals and often families are used, whether by their own consent or through acts of force and slavery. This is especially notable in the countries which have no effective control over their populations and where prostitution and pornography have become an important aspect of their economies. Indeed, the pornography and prostitution of children has become one of the great problems facing various national authorities and the international community has not been successful in eliminating this form of abuse. A notorious example is Thailand and the involvement of some of its younger generations in these activities.

Convention for the Suppression of the Circulation of and Traffic in, Obscene Publications, concluded at Geneva on 12 September 1923 and Amended by the Protocol signed at Lake Success, New York on 12 November 1947. Article 1 reads that:

> The High Contracting Parties agree to take all measures to discover, prosecute and punish any person engaged in committing any of the following offences, and accordingly agree that:
>
> It shall be a punishable offence:
>
> (1) For purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects;
> (2) For the purposes above mentioned to import, convey or export or cause to be imported, conveyed or exported any of the said obscene matters or things, or in any manner whatsoever to put them into circulation;
> (3) To carry on or take part in a business, whether public or private, concerned with any of the said obscene matters or things, or to deal in the said matters or things in any manner whatsoever, or to distribute them or to exhibit them publicly or to make a business of lending them;
> (4) To advertise or make known by any means whatsoever, in view of assisting in the said punishable circulation or traffic, that a Person is engaged in any of the above punishable acts, or to advertise or to make known how or from whom the said obscene matters or things can be procured either directly or indirectly.

However, one cannot disagree with the fact that different measures for the prevention have been used by states. They have taken legislative measures for the prevention and prohibition of certain activities and the provisions of the 1910 Convention relating to the prohibition of the publication of obscene materials were updated by the establishment of the United Nations.[3] Nonetheless, the provisions of these legislations are not sufficient in practice and in many regards the criminalization of the given conduct is not effective in the elimination of obscene activities and publications. One can easily obtain obscene publications including various types of pornographic videos in most countries of the world. This has particularly been increased with the development of technique and internet access.

Since the publication, importation and exportation of obscene materials are legally permitted there are no effective international movements for their prohibition. Although some states have provided for punishment in certain extreme cases, the penalties are very light and do no carry out any effective weight in relation to the consequences of such criminal conduct.[4] A severe punishment would not either be useful for

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[3] For example the provisions of the Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris on 4 May 1910, as Amended by the Protocol, signed at Lake Success, New York on 4 May 1949 are not seriously accepted in the domestic legislations of states. Article 1 of the Agreement is, in particular, important for the criminalization of the given conduct under the domestic systems of states. It reads that:

> Each one of the Contracting Powers undertakes to establish or designate an authority charged with the duty of
>
> 1. Centralizing all information which may facilitate the tracing and suppression of acts constituting infringements of their municipal law as to obscene writings, drawings, pictures or articles, and the constitutive elements of which bear an international character.
> 2. Supplying all information tending to check the importation of publications or articles referred to in the foregoing paragraph and also to ensure or expedite their seizure all within the scope of municipal legislation.
> 3. Communicating the laws that have already been or may subsequently be enacted in their respective States in regard to the object of the present arrangement.
>
> The Contracting Governments shall mutually make known to one another, through the Secretary-General of the United Nations, the authority established or designated in accordance with the present article.

[4] For example, under the relevant provisions of the Swedish legislation, even Swedish courts, until recently had the right to sell pornographic videos using children. This occurred up to the end of May 1993. It should be noted however that such videos

the prevention of the crime. Any individual can obtain different types of obscene publications including videos and phonographs and the possession of these is not criminalized, except for those obscene publications which relate to children. Yet, there is a very serious difficulty concerning the age of children and the discovery of the age of children in the pornographic videos is not easy, especially when their producers are unknown. In other words, there is a legal contradiction between the publication of material and the development of trafficking in person. The latter is an international crime that has rapidly been developed in the international arena and has created one of the most serious problems for the world. Women and children of very young ages are the victims of this increasing international crime.

2. Prohibitions in Islamic International Criminal Law

Contrary to the basic weaknesses in the system of international criminal law, Islamic international criminal law criminalizes the publication of obscene materials and any involvement by a person or persons in acts of prostitution and/or pornography are prosecutable and punishable. Islamic law perceives the effect of published obscene materials from its fundamental social standards and believes that obscene materials are not only against family rights but also against the spiritual interests of human society. Islamic law tackles the issue of the publication of obscene materials on the basis of social structure and the harm which it may cause the social characterization of women and men—as the basic element of family unity. It is due to this theory that Islamic law criminalizes the given conduct and makes its commission a punishable crime. This theory of Islamic law is also applicable in the Islamic system of international criminal law.

The element of Islamic international criminal law which is against the publication of obscene materials and prostitution is based on protecting the dignity and integrity of the human body. This is because

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used as evidence were sold under justifiable freedom of information acts, taking into consideration that the provisions of the relevant legislation were against the international obligations of the Swedish state as stated in the 1988 Convention on the Rights of Child. Many persons purchased children pornographic videos from a court, in particular From Stockholm Court, which was involved in the seizure of these obscene materials produced by Swedish citizens in Thailand. The Swedish legislation has however been modified and there are serious provisions concerning the prohibition of pornography of children.

the publication of obscene materials, in Islamic international criminal law, is against the legal and social personality of men and causes insecurity in the family structure. This international crime can therefore be treated under the provisions of Islamic international human rights, protecting females and families from any type of violation including criminal ones. Islamic law examines almost all aspects of a violation in relation to the integrity of family values and its effect on the development, re-development and promotion of family dignity. It is on this basis that Islamic law emphasises the internationalization of its principles and the criminalization of any act which violates the principles of family law in general and the ethical values of international social structure in particular.

One of the chief differences between Islamic international criminal law and the system of international criminal law with respect to the publication of obscene materials is that the given conduct is criminalized by the provisions of Islamic international criminal law while the system of international criminal law opens the door for the non-application of its provisions by permitting its publications. Nevertheless, one has to state that both systems have similar problems concerning the probation of obscene materials. The Islamic system has prohibited its publication and possession, but, all these materials can easily be found within the territories of all Islamic nations. This means that Islamic international criminal law is not effective in the development, prevention and prohibition of the crime either.[5]

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[5] For the effective criminalization of the publication of obscene materials I have suggested that 'Trafficking in obscene publications greatly damages the cultural, educational and ideological development of people in general and the young in particular. It is therefore of fundamental importance that states pay due attention to this international crime which is helping to destroy their cultural morality. It is particularly important to legislate against the open circulation of pornographic videos, which are not only harmful to national morality but are also harmful to the integrity of children, members of both sexes and the family itself. Consequently, it is recommended that the following measures be taken by states:

1. An international legal instrument dealing with all forms of trafficking in obscene publications must be adopted by the international legal community for the purpose of protection of national and international order.
2. States shall, in accordance with an international convention, agree that obscene publications constitute an international crime. They shall also undertake not to employ this category of international crime as a political tool.
3. In order to effectively prevent the publication of obscene materials, states shall undertake legal responsibility for all publications within their territorial jurisdiction.

3. Trafficking in Persons

Trafficking in person constitutes a new area of the system of international criminal law that has received particular attention by the international legal and political community as a whole. But, this does not necessarily mean that the crime is also new, trafficking in persons has been occurring for a long period of time during the history of mankind civilisation, however in different forms, such as slavery, prostitution and mostly trade on women and young girls. In recent times, the United Nations has, indeed, been forced to fight against this heinous crime which breaks most of the principles of international human rights law. Thus, many international criminal conventions have been formulated and ratified by states. These are such as the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others;[6] the 2000 United Nations Convention against Transnational Organized Crime;[7] the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;[8] Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime; Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations

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4. States shall take necessary domestic legal measures in order to enforce the relevant laws for the prohibition of obscene publications, or shall formulate the requisite legislative measures for such purposes.
5. A lucid definition of what constitutes obscene materials must be agreed upon.
6. Regional and international cooperation of various kinds must be effected in order to bring about the elimination of traffic in obscene publications.
7. International and national provisions must not only recognize international trafficking in obscene publications as a crime, but also as a prosecutable and punishable crime.
8. National and international criminal responsibility must be applied to all those who have engaged in or participated in the trafficking of obscene publications.' Malekian, International Criminal Law, vol. II, pp. 416–417.

[6] Some other earlier conventions are the 1904 International Agreement for the Suppression of the White Slave Traffic, the 1910 International Convention for the Suppression of the White Slave Traffic, the 1921 International Convention for the Suppression of the Traffic in Women and Children and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age.

[7] General Assembly resolution 55/25 of 15 November 2000.

[8] G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (vol. I) (2001).

Convention against Transnational Organized Crime and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw. The purposes of all these conventions are prevention, prohibition, elimination, extradition, cooperation, prosecution, jurisdiction and punishment. The intention is to protect and support the victims of these international crimes and also to give particular economic assistance to the victims. According to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the term "Trafficking in persons" is defined as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[9]

Similarly, the system of Islamic international criminal law has given especial attention to the prevention of trafficking in persons, in particular, slavery, prostitution and the sexual use of women and children. This can be seen within the provisions of the Arab Charter on Human Rights. The Charter aims to protect all kind of trafficking in persons including sexual exploitation of children. It reads that:

1. All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances.
2. Forced labor, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited.[10]

Similarly, the Arab Charter on Human Rights prohibits trafficking in the organs of human beings. It states that:

> No one shall be subjected to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian and professional rules are followed and medical procedures are observed to ensure his

[9] Article 3 (a).
[10] Article 10 of the Charter.

> personal safety pursuant to the relevant domestic laws in force in each State party. Trafficking in human organs is prohibited in all circumstances.[11]

Both systems of international criminal law have intended to define the term "trafficking in person", but, from different sources. Whilst sources of international criminal law widely differ from the sources of Islamic international criminal law, they have, nevertheless, comparable definitions and purposes. In other words, they aim at the prevention of trafficking in persons, particularly women and children and especially their sexual exploitation. In addition, the inspiration of Islamic law concerning the protection of human beings confirms the provisions of the United Nations Convention and its Protocols. Furthermore, the ratification of the aforementioned documents by Islamic states applies to their legal tendency for the criminalisation of trafficking in persons in an international level.

[11] Article 9 of the Charter.

CHAPTER TWENTY-TWO

CRIMES AGAINST NATURAL ENVIRONMENTS

1. Nature

Islamic law broadly preserves the natural environment. It gives special respect to the natural environment, which not only includes natural phenomena such as water, gardens, agricultural fields and forests but also living creatures in the seas and land animals. The preservation and protection of natural environments under Islamic law must be regarded as one of the most significant values to be found in this law, especially when there was no protection for the natural environment at the time. The protection and preservation of the natural environment in Islamic international criminal law is essentially no different from the protection of the natural environment under international criminal law as recognised and criminalized under various international conventions.[1]

Under Islamic law, the natural environment is basically protected by divine law for the purpose of preserving human life. It is for this reason that certain activities which harm or damage the natural environment are considered evil and strictly prohibited under Islamic law. As we have already mentioned elsewhere, according to Islamic international criminal law the devastation and destruction of forests, agricultural fields and the unnecessary killing of animals is prohibited during war and armed attacks. They must not therefore be waged in certain areas which may be dangerous for natural objects.

Similarly, Islamic law prohibits Muslims, at all times, from devastating the natural environment or any act which is against nature. One of the essential reasons for this is that under the law of *Qur'ān* anything that God created in the human environment has a special purpose and therefore its principal natural characterization should not be disregarded or disabled by any means. This purpose is precisely what is now being developed under the system of international criminal law for the purpose of protecting and preserving the international natural environment. This

[1] See Malekian, *International Criminal Law*, vol. II, pp. 309–346.

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development can especially be examined within the works of the United Nations in the 2009 Copenhagen Climate Conference constituting the largest gathering of world leaders in the history of the organization. The purpose has been to achieve certain regulations for the protection of the natural environment and prevention of more harm to the framework of the international climate. All the participating states at the Conference were of the view that the planet is in serious peril, but in the end, they could not find a concrete measure on how to protect the natural environment and hinder serious global disaster generating from climate change.

2. Protection of Living Creatures

Special protection under Islamic law is given to living creatures and this protection should be regarded as one of the most significant characterizations of Islamic law as revealed approximately fourteen hundred years ago. According to the second source of Islamic law use of animals must fit their nature.[2] The protection of animals in Islamic law also includes birds. According to *hadith* constituting a part of second source *Sunnah*, all birds should be protected and their living situation should not be disordered by human beings.[3] The protection of birds in Islamic law is similar to the protection of birds in the system of international law, with the difference that the former protects birds on the grounds of their natural rights and the latter mostly according to positive or conventional law. The value of the former is that it relies on both legal and moral aspects of the law and the latter on the practical application of the legal system when in contradiction with the interests of individual states. But, this does not necessarily mean that Islamic nations protect the natural environment

[2] Alfred Guillaume, *The Traditions of Islam: An Introduction to the Study of the Hadith Literature* (1924), p. 106. According to one *hadith* of the Prophet, 'Do not use the backs of your beasts as pulpits, for God has only made them subject to you in order that they may bring you to a town you could only otherwise reach by fatigue of body.' This *hadith* can also be completed by another *hadith* stating 'Do not clip the forelocks of your horses, not their manes, not their tails; for the tail is their fly-whisk; the mane is their covering; and the forelock has good fortune bound within it.' Guillaume, *The Traditions of Islam*, p. 107.

[3] According to one *hadith* when the Prophet saw a bird which was separated from its two young he stated, 'Who has injured this bird by taking its young? Return them to her.' Id.

more than other states in the world. On the contrary, the provisions of the natural environment have seriously been violated by most states of the world.

3. A Double Criminalization

Under Islamic international criminal law harm, injury, wrong or crime can be committed against any creature. This is regardless of the nature of such a creature, whether human, animal or otherwise.[4] All 'creatures' are considered an integral part of the inhabitants of our global life. Accordingly, it is recognised as "a double crime: a crime against one's immediate victim, and also a crime against God, since the criminal conduct in question constitutes a violation of the Divine prescriptions. It is thus that, when there is an injustice or crime against another creature, one has not only to try to repair the damage, by restituting to the victim of one's violation the right which had been taken away from him, but he had also to beg pardon of God."[5] This viewpoint implies the gravity of the crime and also the fact that all creatures are an important part of our natural environment and should not be harmed.

Thus, not only activities against animals and the natural environment are criminalized under Islamic international criminal law but it also recognises the compulsory duty of every person to protect and preserve natural environments.[6] Therefore 'Men should profit from what God has created, yet in an equitable and reasonable measure, avoiding all dissipation and waste.'[7] Islamic international criminal law also provides punishment against those who do not carry out their duties and obligations towards the natural environment. It is thus the responsibility of the human beings to keep the natural environment alive and not destroy its function. Consequently, the law with the prohibition of certain acts against natural environment has several purposes. These are *inter alia*:

– to protect environment for man and man for the protection of environment,

[4] It was upon this philosophy of criminal law that the Prophet 'gave a warning, that on Doomsday, a certain person would be thrown in Hell because he had tied up a cat with a rope, giving it neither to eat nor to drink, thus causing the death of the poor animal.' *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 79.

[5] Id., p. 79.

[6] It is, for instance, prohibited to hew down trees unnecessarily. Id., p. 80.

[7] Id., p. 80.

- to protect nature by law and morality,
- to preserve the environment's needs with criminalization,
- to emphasise that acts against the natural environment cannot go without punishment,
- to universalize the protection of the natural environment by its *siyar* which implies Islamic international law relating to peace and wartime,
- to make it clear that the natural environment is even protected in wartime and a war between two or several states cannot be a reason for its devastation,
- to emphasise that the use of weapons or strategies which destroy the natural environment is not permitted during war or peacetimes,
- to give attention to the prohibition of the use of nuclear weapons,
- the criminalization of the protection of the natural environment is also to save its destruction from illegal acts of companies or states.

CHAPTER TWENTY-THREE

CRIMES AGAINST FOODSTUFFS

In Islam the destruction of food is basically considered a sin and its protection is the great responsibility of human beings. All foodstuffs should consequently be preserved and should not therefore be devastated. This general rule in Islamic law is contrary to the system of international law and the general practices of modern states. This is because there is not any special rule in international law prohibiting the destruction of foodstuffs and therefore a huge amount of foodstuffs is destroyed *e.g.* in Europe every year. This is in order to keep the prices of foodstuffs high and maintain international standards. The *Qur'ān* condemns the devastation of food by man who 'when he becomes a ruler, he runs about on earth greedily and his great effort everywhere is to make mischief and disorder in it and destroy the crops and the cattle of mankind.'[1] The illegal nature of devastation is thus assimilated to the obliteration of all human beings' foodstuffs including all types of flora, plants, vegetation and animals.

Islamic law is originally against any type of monopolization of food and although it encourages commercial law in various economic aspects to protect individual and groups interests, it recognises a great sin in destroying food for business purposes. According to *hadith*, 'He who monopolizes food … may God smite with elephantiasis and grinding poverty.'[2] This *hadith* should also be read in conjunction with another similar one. It reads that 'An importer is blessed, but a monopolist is accursed.'[3] This statement is also strengthened by another *hadith* containing, 'He who monopolizes a commodity is a sinner.'[4] And a sin under *shari'ah* constitutes an offence against the divine jurisprudence.

Islamic law therefore recognises any devastation of foodstuffs for the purpose of monopolizing prices as a great sin and therefore a violation of its provisions. This principle of Islamic law becomes stronger and more effective when foodstuffs are destroyed regardless of the starvation of

[1] The *Qur'ān*, 2:205.
[2] Guillaume, *The Traditions of Islam*, p. 102.
[3] Id.
[4] Id.

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certain people(s). Thus, the destruction of foodstuffs under the orders of certain European states and others would be definitely recognised as crimes once treated under Islamic international criminal law.[5] One of the most important reasons for this is that Islamic law not only protects all mankind from all types of violations, but also strongly supports the right to food for all men, regardless of racial, ideological, political or religious differences. For this reason, Islamic law has very broad principles regarding the division of wealth and protection of all human beings from gradual starvation. Due to these legal and moral values in Islam a neighbour is responsible for other neighbours who are suffering and starving. This principle of Islam is internationally valid and Muslim nations should not destroy foodstuffs in order to monopolize prices and especially when there are already nations which have starving populations. Thus, aid and assistance with foodstuffs to the poor should be regarded as an integral part of the moral duty of any Muslim and as an essential part of the legal taxation.

[5] A clear example is the destruction of food during the administration of the Prime Minister Margaret Thatcher which could be tackled under the principle of discretion.

CHAPTER TWENTY-FOUR

CRIMINALIZATION OF ALCOHOL CONSUMPTION

1. International Criminal Law

Whilst the early system of international criminal law has not directly dealt with the questions of the prohibition of alcohol, there have been certain rules concerning its criminalization under national criminal systems. Historically, certain rules have been regulated to criminalize its importation in certain areas or certain measures have been imposed in order to minimize its distribution. The process of prohibition, criminalization and restrictive possession of alcohol has, for instance, been very long in the United States. A chief justice of one of the courts of the United States has asserted that "And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing, in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting, it altogether, if it thinks proper."[1] This applied to the prohibition of the sale and manufacture of alcohol. However, the growing development in the twentieth century has changed the position and all these prohibitions have been effectively abolished. A similar conclusion may be presented about the regulations of some other states such as the prohibition in the Russian Empire and Soviet Union during 1914–1925.

The new development in the system of international law may be examined under the Convention on the Rights of Child which aims to express the negative effect of the consumption of alcohol by parents and to impose certain measures on the contracting parties to forbid access to alcohol for children under the age of 16.[2] For this reason, the Committee on the Rights of the Child recommends that:

[1] 46 U.S. (5 How.) 577 (1847). Cited in www.druglibrary.org/schaffer/LIBRARY/studies/vlr/vlr1.htm.

[2] The Committee on the Rights of the Child is "concerned about the harmful effects of alcohol and substance consumption by parents on the physical, emotional and psychological development and well-being of children in the State party. While noting that the Alcohol Act prohibits the selling of alcohol to children aged 16 years or below, the

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> … the State party take initiatives to combat drug and alcohol abuse by children, including thorough public education awareness campaigns and ensure that children who abuse alcohol and/or use drugs and other harmful substances have access to effective structures and procedures for treatment, counseling, recovery and reintegration. The Committee further recommends that parents are educated, through, *inter alia*, awareness-raising campaigns, on the harmful effects of parents' use of alcohol and controlled substances on the development and well-being of children. The Committee urges the State party to adopt the necessary legislation to prohibit the sale, use and trafficking of controlled substances by children, and to ensure the effective implementation of all legislation prohibiting alcohol and substance use by children.

The criminalization of the sale of alcohol to those under a certain age is also recommended by the legislations of many European states such as Sweden, Denmark, Norway and Finland. All these imply the fact that the use of alcohol under a certain age is not recommended and there are rules encouraging its disadvantages for family unity.

2. Islamic International Criminal Law

The criminalization of alcoholic drinks is one of the most well-known characterizations of Islamic law. The *Qur'ān* does however refer to the usefulness of wine, but for the sake of an individual, group or nation drinking alcohol has been prohibited in order to strengthen one's resolution and control, as well as protecting family unities from destruction. The *Qur'ān* therefore states the prohibition of drinking wine along with its utility and proclaims that 'They ask you concerning wine and gambling. Say: In both of them is great sin or great harm and some advantages for men but their disadvantage is greater than their advantage.'[3] Another verse reads that 'O you who have believed! do not offer your prayer when you are intoxicated until you know well what you utter …'[4] This means that intoxication is the statute that creates an unstable situation for the person who has drunk alcohol or other similar substances or even used drugs.

Committee expresses concern that the Act carries no penalty in the case of violation, and that legislation prohibiting the use of alcohol by minors is generally ineffectively implemented." CRC/C/15/Add.261, 21 December 2005, para. 83.

[3] The *Qur'ān*, 2:219.

[4] The *Qur'ān*, 4:43.

In another verse the *Qur'ān* categorizes idolatry and alcoholic drinks as being on the same level. It states that 'O you who have believed! intoxicants and gambling, set up stones (to worship, to sacrifice) and the divining arrows are an abomination, and are filthy deeds of the evil, insurgent, ignorant and satanic men, therefore refrain from such evil deeds so that you may be successful.'[5] According to the same source, 'The evil man or Satan only desires to sow enmity and hatred among you, with intoxicants and gambling, and hinder you from the remembrance of God, and from prayer; will you not then abstain?'[6]

Without doubt, the verses above refer to the criminalization of two different conducts, both of which are against the social structure of human society. These are alcohol and gambling. The system of international criminal law does not however deal directly with these two different types of criminalisation. It is nevertheless a rule within the Convention on the Rights of Child, that children of a young age should be protected from the hazardous effects of alcohol and other harmful social phenomenon.

[5] The *Qur'ān, 5:90.*
[6] The *Qur'ān, 5:91.*

CHAPTER TWENTY-FIVE

PIRACY

1. Piracy in International Criminal Law

Piracy is one of the most notorious international crimes recognised since the early conception of the regulation of the law of the sea.[1] Under the system of international criminal law it took a long period of time before states could prohibit piracy and not support privateers for their own political purposes. One of the most controversial conflicts concerning the subject of piracy was the question of creating the right to visit and search vessels.

The term 'piracy' is employed in the system of international criminal law to indicate the unlawful nature of acts of plunder *animus furandi*.[2] One important characteristic of the international crime of piracy is that it is recognised as a crime against mankind and a pirate is considered as *hostes generis humani*.[3] For this reason any state which captures pirates has a recognised international right to bring them under its criminal jurisdiction for prosecution and punishment. This means that pirates can be prosecuted in accordance with the principle of universality under the system of international criminal law. In general, some of the elements for the recognition of the crime of piracy under the customary and conventional international criminal law are intention, violation, plunder and the commission of the crime on the high seas.[4]

Piracy has not only been characterized as an international crime under customary international criminal law but there are also a number of international conventions which recognize piracy as a prosecutable and punishable international crime. Some of these conventions have mutual and others multilateral characters. Two of the most important of these conventions are the 1958 and 1982 United Nations Conventions on the

[1] Malekian, *International Criminal Law*, vol. I, p. 489.
[2] Id., p. 490.
[3] Id., p. 500.
[4] For further clarifications, definitions and a comprehensive analysis of the international crime of piracy see id., pp. 489-seg.

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Law of the Sea. The latter convention modifies the former and is rather a modern comprehensive approach to the law of the sea compared with the former.

In recent years, the commission of the crime of piracy has, largely, been developed because of war and the economic conditions of the population of some of the very poor nations. Some of the Europeans states such as France,[5] Russia,[6] Denmark,[7] the United Kingdom,[8] and even the United States[9] have been involved in the prevention or prosecution of pirates. There is also a tendency between the European Union and the United States to empower a Court of Kenya to deal with most piracy cases regardless of whether they concern its interests.[10]

2. Land Piracy in Islamic International Criminal Law

The concept of piracy in the system of Islamic international criminal law is rather different from the concept of piracy in the system of international criminal law. This is because in the latter the term 'piracy' is employed in order to denote the commission of certain criminal activities on the open or the high seas. This is regardless of the fact that there are certain terminologies in the system of international criminal law such as brigandage, banditti, buccaneers, partisans and robbers which are assimilated or employed as synonyms for the term 'piracy'.[11] In Islamic international criminal law the status of the international crime of piracy is employed in connection with the term 'international highwaymen' or 'land piracy.'[12] The original term 'piracy' is seldom employed. According to one writer 'The characteristics which the desert shares with the sea induced us to call the desert brigandage 'land piracy.''[13]

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[5] A Paris court has brought charges against six Somali Pirates. news.bbc.co.uk/2/hi/7355598.stm-.

[6] www.cnn.com/2009/WORLD/.../somalia.pirates.../index.html.

[7] The Danish authorities released ten Somali pirates, as it was impossible for them to be brought before a Danish criminal court and also impossible to hand them over to the Somali government where they were in danger of being killed or tortured. Id.

[8] www.kyivpost.com/news/nation/detail/56321/.

[9] www.nefafoundation.org/miscellaneous/.../US_v_ Muse_dojprindictment.pdf.

[10] www.usatoday.com/news/world/2009-04-23-pirates_N.htm.

[11] Malekian, *International Criminal Responsibility of States*, p. 49.

[12] Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 15.

[13] Id.

In contrast to the system of international criminal law, which for a long period of time has had the problem of prohibiting and preventing the crime of piracy by a code of law, Islamic international criminal law has prohibited this international crime since the time of its revelation.[14]

It is essential to remember that the provisions of the *Qur'ān* concerning the punishment of those who commit the crime of piracy were characterized close to fourteen hundred years ago and therefore their value should not be misinterpreted or diminished because of the modern codification of the law into the system of international criminal law. Moreover, these provisions and old methods of punishments are greatly adaptable to the modern codification of the law of piracy in the system of international criminal law.[15] In principle both systems condemn the unlawful character of plunder by certain individuals in international relations and therefore it is a prosecutable and punishable crime. More significantly, both systems support the universality of jurisdiction over pirates of all types (whether on land or at sea) and recognize it as being the international duty and right of any state to punish the perpetrators of such international crimes.

The Islamic system of international criminal law especially recognised certain severe punishments to be inflicted upon criminals. Some of these crimes and their punishments were i) plundering which ended with murder and was punished through beheading followed by crucifixion, ii) beheading as inflicted for a murder, iii) amputation of hands or feet might be carried out if only plunder had been committed and iv) discretionary punishments might be imposed on those who intended committing a crime but had not yet done so, such as imprisonment and confinement to a border district.[16] According to modern Islamic international criminal

[14] The relevant law can be found in a valuable and significant verse of the *Qur'ān*, 5:33. Islamic lawyers are unanimous that the provisions of the verse obviously deal with the question of international highwaymen and pirates. It runs that: 'The punishment of those who wage war against God and His Apostle and strive to make mischief in the land is only this, that they should be slain or crucified, or their hands and feet should be cut off from opposite sides, or they should be exiled from the land; this shall be as a disgrace for them in this world, and in the Hereafter they shall have a grievous chastisement. (The *Qur'ān*, 5:33.) Except those who repented and turned to the right Path but before they fell into your power, in that case, you know that God is Oft-forgiving, Most Merciful.' (The *Qur'ān*, 5:34.) The philosophy of heavy punishment in the verse should be compared with the theory of punishment in ancient times. These punishments are obviously not permitted in the contemporary practice of states and their applications do not make any sense either.

[15] See the above footnote.

[16] Hamidullah, *The Muslim Conduct of State*, p. 178.

law the prosecution and punishment of highwaymen and/or pirates must be carried out irrespective of their rank or position and this should not violate the method of punishment in international criminal law.

The severity of the above punishments must, however, be understood from the fact that fourteen hundred years ago there was no law governing maritime navigation or the security of traders between two countries by land or upon the seas and furthermore, the capacity of communication between states was in its absolute infancy. Consequently, from the perspective of existing knowledge, conditions, capacities and abilities of states at the time, punishment was seen as a necessary element in preventing the commission of crimes. Furthermore, punishment in the early practice of Islamic international criminal law was seen as a method of preventing other persons from committing the relevant international crime. Unluckily, this philosophy is still one of the essential reasons for the infliction of punishment in most modern societies at this time. It should also be noted that the above punishments may entirely be forgiven if the pirates or the highwaymen voluntarily submit themselves to the relevant state officials before they are able to arrest them for the commission of their crimes.[17] This means that the purpose of punishment was not necessarily to discipline criminals, but, to prevent other persons explicitly and implicitly from becoming involved in behaviour which was theologically, morally and juridically wrong.

[17] Id., p. 179.

CHAPTER TWENTY-SIX

LIMITATIONS OF HOSTILITIES IN THE CONDUCT OF STATES

1. Declaration of War

The Islamic system of international criminal law has considered the declaration of war as constituting one of the most important elements within the institution of armed conflicts. For this reason Islamic law commands conflicting parties not to engage in an armed conflict before declaring their intentions to the enemy state. The Islamic international criminal law does not, however, place particular emphasis on the declaration of war in certain situations and these are when i) a war is waged for the purpose of self-defence or is a defensive war, ii) a war with an enemy with whom there has been constant armed conflict and no treaty of peace has been made, iii) a war against an absolute threat of aggression or a preventative war[1] and iv) a war of retaliation or a punitive war against a state which has violated serious provisions of its treaties' obligations.[2] In general, in the above situations there is no need to give notification or a declaration to the conflicting party(s) regarding armed conduct. However, the last alternative is subject to discussion and the idea has also been to provide an ultimatum before launching the war.

In other situations Islamic international criminal law obliges a Muslim state not to engage in war without a clear notification or declaration. This rule must be especially respected regarding states with which treaties are concluded. Declaration must also be announced to those who are non-Muslim and for this reason a declaration of war in the Islamic system of international criminal law is inevitable. Yet, a declaration of war against non-Muslim states can only be made when all the necessary peaceful channels have already been exhausted such as arbitrations, negotiation and all forms of diplomatic consultations.

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[1] The examples of this are Banu'l-Mustaliq, Khaibar, Hunain.

[2] The examples of this are attacks on Banu-Quraizah and Mecca. Hamidullah, *The Muslim Conduct of State*, pp. 181–182.

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2. Contraband of War and Trade

A declaration of war suspends most relations between the belligerent states and therefore diplomats are recalled to their home states and persons under the jurisdiction of the conflicting parties are prohibited from sending information about the activities of their home states regarding the strategies of the war. Analogous to the system of international criminal law, in Islamic international criminal law one may also find certain sanctions prohibiting commercial relations between the belligerent states and such trade is called 'contraband of war and trade.' In general, it is to be noted that the enforcement of some of the prohibitive rules broadly depends on the political policies of the conflicting parties and it seems that prohibitive sanctions concerning foodstuffs are very difficult to respect entirely. In practice, Muhammad—the Prophet of Islam—lifted certain bans and it has been told that on one occasion when hostilities were enacted between Mecca and Medina, he himself sent a quantity of dates from Medina to the Magnate, Abu-Sufyan and required animal hides in return.[3]

One must emphasize that although Islamic international criminal law places a heavy weight on the actual conditions of hostilities, it simultaneously mitigates the effect of hostilities on humanitarian grounds.[4] This is because in Islamic international criminal law, the institution of war is combined with humanitarian considerations, in other words, war cannot be made against the spirit of man, which is equal in all human beings.

[3] Hamidullah, *The Muslim Conduct of State*, p. 187.

[4] Of course, the provisions of Islamic international criminal law may not be respected by the conflicting parties and be severely violated—even by those who pass on Islamic law and culture. For example, the Islamic law of armed conflict has been violated by Iraq. This occurred during the eight years war between Iran and Iraq and during the occupation of Kuwait by Iraq in 1990. Similarly, the provisions of the system of international criminal law may not be respected by parties who consider themselves the most essential reasons for the development and consolidation of a number of international criminal law conventions. Examples of this type of double morality are numerous. A clear recent example is the selling of weapons by the Swedish authorities to the conflicting parties during the war between Iran and Iraq. A similar habit was also shown to be true of other European countries such as France, the United Kingdom and in other parts of the world by the United States and Canada. In addition, during the Second World War, many countries were involved in the delivery of weapons to German Nazism.

3. Self-Defence

Islamic international criminal law recognises self-defence as the natural and legal right of an individual, group and state. This right has been established in Islamic law since the early time of its revelation. In order for self-defence to be recognised, certain conditions are required by law. These conditions more or less coincide with the conditions found in the system of international criminal law governing the status of self-defence.[5] This is because both legal systems have limited the resort to the right of self-defence in order to prevent abuses of the use of self-defence in international relations. It must however be admitted that there is controversy in the system of international criminal law regarding the methods and degree of resort to the right of self-defence.[6]

Islamic international criminal law lays down the following basic conditions in order that resort to self-defence be recognised as proper.[7] These are the following:

i) There must be a definite sign of action which clearly constitutes a serious internationally wrongful conduct jeopardizing the security of a state.[8]
ii) It must be definitely impossible for a state which resorts to exercising the right of self-defence to obtain protection through another legal status such as opening negotiations and/or arbitrations. In the case of an individual or a group exercising the right of self-defence, there must not be any possibility of reporting the commission of wrongful conduct by the perpetrator(s) to independent legal authorities.

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[5] See Article 51 of the Charter of the United Nations.

[6] Generally see Josef Laurenz Kunz, 'Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations', 41 *A.J.I.L.* (1947), pp. 872–879; D.W. Bowett, *Self-Defence in International Law* (1958); Ian Brownlie, 'The Use of Force in Self-Defence', 37 *British Year Book of International Law* (1961), pp. 254–257; Ian Brownlie, *International Law and the Use of Force by States* (1963), pp. 251–280; Malekian, *International Criminal Responsibility of States*, pp. 118–120; Malekian, *International Criminal Law*, vol. I, pp. 65–68; Malekian, *Condemning the Use of Force in the Gulf Crisis*, pp. 24–31; See also F.S. Lin, 'Self-Defense—A Permissible Use of Force Under the U.N. Charter', 13 *De Paul Law Review* (1963), pp. 43–72.

[7] See *also* section 6 below.

[8] The Prophet 'always laid emphasis on the point that Muslims should never be the first to attack; they should on the other hand fight only for defence.' Allahdin, *Extracts from the Holy Qur'ān and Sayings of the Holy Prophet Mohammad*, p. 193.

iii) The principle of proportionality must fully be respected.[9] This principle constitutes a basic element in Islamic law of self-defence and has an important function identifying whether or not an act constitutes an act of self-defence.
iv) An attack must not be continued where a wrongful conduct has already been prevented or corrected.
v) A reprisal should not be considered an integral part of the right of self-defence. This is because the right of self-defence automatically comes into force against a crucial act of attack which is obvious and not an act which has already been committed.

These five principles of Islamic international criminal law governing the status of self-defence may be compared with the status of self-defence under customary international criminal law and the provisions of Article 51 of the United Nations Charter. In order for self-defence to be recognised as legitimate under the Charter an armed attack must occur against a member of the United Nations and secondly, 'Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'[10]

Islamic international criminal law places a heavy weight on the principle of proportionality and a state should not resort to the use of excessive force in exercising the right of self-defence.[11] In other words, the use of force must be equivalent to the force which is already used by the other party and should not therefore be aggressive. The status of this principle is however not clarified in the system of international criminal law and the principle has been interpreted differently in the practice of states.[12] Furthermore, the new gatherings of states parties to the Statute of ICC, is supposed to define the term aggression from which the scope of self-defence may be demonstrated.

[9] See *also* section 5 below.
[10] Article 51.
[11] See sub-section five.
[12] See Malekian, *Condemning the Use of Force in the Gulf Crisis*, 2nd ed. (1994), pp. 29–30.

4. Reprisals

Islamic international criminal law, in contrast to the system of international criminal law, forbids acts of reprisal in any form and for any reason. The term 'reprisal' in the system of Islamic international criminal law can be compared with the term 'reprisal' or *lex talionis* under the system of international criminal law. The concept of treatment of reprisal in Islamic law is a significant characteristic of Islamic international criminal law governing the humanitarian law of armed conflicts and because of this humanitarian purpose both acts of hostility and armed reprisal are prohibited. By and through this important principle, Islamic international criminal law promotes pacific settlements of international disputes and effectively aims to prevent killing, destruction, devastation and bloodshed.

In this connection the *Qur'ān* states that 'All prohibited things are under the Law of Retaliation; if then any one acts aggressively against you, inflict injury on him according to the injury he has inflicted on you, and fear God, and know that God is with those who refrain from doing evil deeds and are righteous ones.'[13] This statement in the *Qur'ān* must be regarded as one of the major principles in the system of legislation of Islam in order effectively to extinguish bloodshed. The verse has vividly stated that 'All prohibited things are under the Law of Retaliation.' This theory encourages the conflicting parties to conclude peace treaties and not to engage in activities which extend or prolong hostilities.

A similar principle can also be found in other verses of the *Qur'ān* which promote the stages of peace, even when a wrongful act has already occurred. According to one verse:

> And the recompense of evil is punishment like it, but he who forgives and reforms the offenders or makes reconciliation, his reward is with God, surely God does not love the unjust tyrants.[14]
>
> But indeed those who with the help of others after being oppressed take their revenge, these are they against whom there is no way to blame.[15]

[13] The *Qur'ān*, 2:194. In another verse, the *Qur'ān* reads that 'Whoever does the evil deeds, he is only recompensed with the like of it, and whoever does good, whether male or female and he is a believer these enter the Garden, in which they are provided sustenance without measure.' 40:40.

[14] The *Qur'ān*, 42:40.

[15] The *Qur'ān*, 42:41.

> The way to blame is only against those who oppress people transgressively and revolt in the earth unjustly, for them is a grievous chastisement.[16]

A modern interpretation of the above principles means that a state should not involve itself for any reason in acts of terrorism, the taking of hostages or the temporary detention of internationally protected persons on the grounds of reprisal. States should endeavour to find peaceful solutions for the conflicts and this should be a general policy of all states claiming to implement, in one way or another, Islamic norms.

5. The Principle of Proportionality

The principle of proportionality constitutes a valuable principle of Islamic law and must always be respected by Muslims in their social conduct. The principle also has an important function in the system of Islamic international criminal law and is treated broadly by the followers of the Prophet of Islam. For instance, Imam Ail Ben Abi Talb, who is considered the first of twelve leaders of Islam (by *Shi'a*) after the death of the Prophet, has given special respect to the principle of proportionality in the actual relations of Muslims. For instance, 'when Ali the successor to the prophet of Islam was stabbed in the back with a dagger by one of his enemies while praying, he gave advice to his followers that one should forgive one's attacker. If one cannot, one should not use any weapon other than that used against oneself and one should not strike one's attacker more times than one has been struck by him. If he does not die as a result, he should be released as soon as possible. Thus, even in cases of revenge, there were certain restrictions in the use of weapons.'[17]

The principle of proportionality must be respected during times of war.[18] According to Islamic international criminal law, a war should not be made unlimited and the conflicting parties must take into account certain rules and provisions governing an armed conflict.[19] The principle of proportionality is thus considered an important element of the law of armed conflicts. This is of prominent importance in cases of armed

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[16] The *Qur'ān*, 42:42.

[17] Malekian, *International Criminal Law*, vol. I, pp. 151–152.

[18] According to one opinion the principle of proportionality 'requires that no more force has to be used than is necessary for the purpose. There must be proportionality between the means chosen and the end in view.' J.N. Singh, *Use of Force Under International Law* (1984), p. 22.

[19] See chapter twelve.

attack constituting individual or collective self-defence by a state against another state. In this regard the *Qur'ān*—the main source of Islamic international criminal law—states 'if then any one acts aggressively against you, inflict injury on him according to the injury he has inflicted on you, and fear God, and know that God is with those who refrain from doing evil deeds and are righteous ones.'[20] This statement means that Islamic international criminal law places a very significant degree of respect on the principle of proportionality at all times and especially for the maintenance of international humanitarian law of armed conflicts.[21]

6. Self-Determination

The principle of self-determination under Islamic international criminal law constitutes one of the most helpful principles for the development of international equality between all nations struggling for their inalienable right of independence. According to the first source of Islam, "In the Law of Equality there is security of life to you, o men of understanding; that you may guard yourselves against evil."[22]The principle has, especially, been supported by states exercising the provisions of Islamic law.[23] These states have also voted for resolutions of the General Assembly adopted for the political, juridical, religious, economic or territorial independence of groups or nations having been, in one way or another, colonized, monopolized or occupied by the military power of a third state. The

[20] The *Qur'ān*, 2:194. In another verse, the *Qur'ān* reads that 'Whoever does the evil deeds, he is only recompensed with the like of it, and whoever does good, whether male or female and he is a believer these enter the Garden, in which they are provided sustenance without measure.' 40:40.

[21] The position of the principle of proportionality is not however clear in the system of international criminal law. 'Although the criterion of the principle is notoriously difficult to apply, the measures for the restoration of the territorial integrity and political independence of a nation must of course be in conformity with the principles of justice and positive international law documented in the 1949 Geneva Conventions and 1977 Protocols governing the international humanitarian law of armed conflicts.' Malekian, *Condemning the Use of Force in the Gulf Crisis*, 2nd ed., p. 30.

[22] The *Qur'ān*, 2:179.

[23] According to one writer, 'Arab and Islamic countries insist that each country has the right to self-determination and on the principle of non-alignment. But in fact they offer military bases to Western countries. These are used by Western countries for their own interests.' Sami A. Aldeeb Abu-Sahlieh, 'Muslims Human Rights: Challenges and Perspectives', in Wolfgang Schmale (ed.), *Human Rights and Cultural Diversity: Europe. Arabic-Islamic World. Africa. China* (1993), pp. 239–268, p. 253.

principle has therefore been entered into the structure of the Declaration of Human Rights in Islam. For this purpose, it provides that:

1. All peoples have the right of self-determination and control over their natural wealth and resources, and the right to freely choose their political system and to freely pursue their economic, social and cultural development.
2. All peoples have the right to national sovereignty and territorial integrity.
3. All forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples; all such practices must be condemned and efforts must be deployed for their elimination.
4. All peoples have the right to resist foreign occupation.[24]

From a comparative aspect the principle of self-determination has not only been supported under the system of international criminal law, but has also been encouraged and supported under the spirit of the United Nations Charter. One of the chief purposes of the United Nations Organization is 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.'[25] This means that the principle of self-determination supported by Islamic international criminal law is inconformity with the system of international criminal law.

One of the basic reasons for the development of the principle of self-determination in Islamic international criminal law can be seen in the Charter of the Organization of the Islamic Conference established in 1972.[26] Participating states demonstrated a strong tendency towards

[24] Article 2.

[25] Article 1 (2) of the Charter. Although the principle of self-determination which is supported in the Charter is juridically very important in the development and promotion of the principle of equality of all nations, its scope of application is strongly limited by other articles of the Charter yielding the most juridical and political power of the Organization to certain politically powerful states in the Security Council.

[26] The Organization of the Islamic Conference, Jeddah, Saudi Arabia, the text of the Charter as amended; see also UNTS 914, 111–116. Members of the Organization of the Islamic Conference are Afghanistan, Algeria, Bahrain, Bangladesh, Benin, Brunei, Cameroon, Chad, Comoros, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Malaysia,

re-establishing of the rights of oppressed peoples. According to this Charter the objectives and principles of the Conference are:

(*A*) Objectives
The objectives of the Islamic Conference shall be:

1. to promote Islamic solidarity among member States;
2. to consolidate co-operation among member States in the economic, social, cultural, scientific and other vital fields of activities, and to carry out consultations among member States in international organizations;
3. to endeavour to eliminate racial segregation, discrimination and to eradicate colonialism in all its forms;
4. to take the necessary measures to support international peace and security founded on justice;
5. to co-ordinate efforts for the safeguard of the Holy Places and support the struggle of the people of Palestine, and to help them to regain their rights and liberate their land;
6. to strengthen the struggle of all Moslem peoples with a view to safeguarding their dignity, independence, and national rights;
7. to create a suitable atmosphere for the promotion of co-operation and understanding among member States and other countries.

(*B*) Principles
The member States decide and undertake that, in order to realize the objectives mentioned in the previous paragraph, they shall be inspired and guided by the following principles:

1. total equality between member States;
2. respect of the right of self-determination, and non-interference in the domestic affairs of member States;
3. respect of the sovereignty, independence and territorial integrity of each member States;
4. settlement of any conflict that may arise by peaceful means such as negotiation, mediation, reconciliation or arbitration;

Maldives, Mali, Mauritania, Morocco, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Syrian Arab Republic, Tunisia, Turkey, Uganda, United Arab Emirates, Upper Volta (Burkina-Faso), Yemen—Arab Republic, Yemen—People's Democratic Republic.

5. abstention from the threat or use of force against the territorial integrity, national unity or political independence of any member State.[27]

One of the important aims of the principle of self-determination and its support under the newly developed Islamic international criminal law is to build on the protection of the rights of peoples who are the victims of various violations. One of these peoples is the Palestinians.[28] They

[27] Article 2.

[28] See, for instance, The United Nations Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Populations of the Occupied Territories; Report of the National Lawyers Guild 1977 Middle East Delegation, Treatment of Palestinians in Israeli-Occupied West Bank and Gaza (1978); 1988 Report of the National Lawyers Guild, International Human Rights Law and Israel's Efforts to Suppress the Palestinian Uprising (1989). Benvenisti Meron, *The West Bank Data Base Project 1987 Report* (1987); Emma Playfair, *Administrative Detention in the Occupied West Bank, Al Haq/Law in the Service of Man* (1986); Al-Haq/Law in the Service of Man, Briefing Papers on Twenty Years of Israeli Occupation of the West Bank and Gaza (1987); Al Haq/Law in the Service of Man, Punishing a Nation: Human rights Violations During the Palestinian Uprising, December 1987–December 1988 (1988); Lawyers Committee for Human Rights, an Examination of the Detention of Human Rights Workers and Lawyers from the West Bank and Gaza and Conditions of Detention at Ketziot (1988); Physicians for Human Rights, the Casualties of Conflict: Medical Care and Human Rights in the West Bank and Gaza Strip (1988). See also the B'Tselem which is an independent Jerusalem-based organization founded in 1989 by Israeli lawyers and others to report violations of human rights in occupied territories. See, for instance, B'Tselem/the Israeli Information Center for Human Rights in the Occupied Territories, Annual Report 1989: Violations of Human Rights in the Occupied Territories (1989) and B'Tselem/the Israeli Information Center for Human Rights in the Occupied Territories, the Military Judicial System in the West Bank (1989); B'Tselem/the Israeli Information Center for Human Rights in the Occupied Territories, the Use of Firearms by the Security Forces in the Occupied Territories (1990); B'Tselem/the Israeli Information Center for Human Rights in the Occupied Territories, the System of Taxation in the West Bank and the Gaza strip: As an Instrument for the Enforcement of Authority During the Uprising (1990); Amnesty International, Israel and the Occupied Territories—Excessive Force: Beatings to Maintain Law and Order (1988); Amnesty International, Israel and the Occupied Territories—The Misuse of Tear Gas by Israeli Army Personnel in the Israeli Occupied Territories (1988); Amnesty International, Israel and the Occupied Territories—Administrative Detention During the Palestinian Intifada (1989); Resolution 44/48, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, U.N. Press Release, Department of Public Information, Press Release G.A/7977, 22 January 1990, Resolutions and Decisions Adopted by the General Assembly During the First Part of Its forty-fourth Session from 19 September to 29 December 1989; Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967', 84 *American Journal of International Law* (1990); Richard Falk, 'The Relevance of International Law to Palestinian Rights in the West Bank and Gaza', 32 *Harvard International Law Journal* (1991); Joost Hiltermann, *Israel's Deportation Policy in the Occupied West Bank and*

struggle in order to achieve their right to independence.[29] The protection of the rights of Palestinians to political and territorial independence has constantly been supported under the General Assembly resolutions, however, without any practical effect.[30] There have been some relevant negotiations for the political and territorial independence of Palestinians.

Gaza, Al Haq/law in the Service of Man (1986); manchesterstopwar.org/.../556-btselem-50-of-gaza-deaths-were-civilians.html, visited 01-03-2010.

[29] "Palestine was historically an Arabic land, an Arab nation and above all ideologically and politically dependent on the Islamic system. Later, Palestine came under the control of the Turkish Ottoman Empire. In 1917–1918 Palestine was occupied by the British and in 1920 the Palestine Mandate was given by the League of Nations to the British. According to the provisions of the Mandate, Britain was supposed to give *administrative advice* until Palestine was able to stand alone. However, in 1897 the idea of creating a Jewish state was presented through the World Zionist Organisation by T. Herzl. In 1917 the British Foreign Secretary, A.J. Balfour stated that Britain would support a Jewish national home in Palestine providing that "nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine." (Sally Morphet, 'The Palestinians and Their Right of Self-Determination', in R.J. Vincent (ed.), *Foreign Policy and Human Rights* (1986), pp. 85–103, at pp. 85–86.) However, Palestinian Arabs objected to Zionism in 1920 and in the following years, especially when the British Peel Commission suggested the partition plan for Palestine in 1937. After World War II a suggestion was passed to the United Nations, which finally resulted in a resolution in 1947. According to this resolution by the General Assembly of the United Nations, Palestine was to be divided into eight parts. Three to constitute an Arab state, three a Jewish state, a seventh, Jaffa, an Arab enclave in Jewish territory and the eighth part Jerusalem, which is a *corpus separatum* controlled by an international regime. Israel declared its independence in 1948. The partition resolution and the independence of Israel created a difficult situation which has still not been resolved today. Palestinians are now demanding self-determination. This was one of the essential reasons for the establishment of a Palestinian National Council and subsequently the Palestine Liberation Organization. This organizations struggles for the re-establishment of Palestinian Rights." Malekian, *International Criminal Law*, vol. II, pp. 90–91. The State of Palestine has now been established, but, with limited recognition. This is due to the fact that the permanent members of the United Nations do not politically and legally carry out their duties and responsibilities towards the members or non-members as is promised under the provisions of the Charter. Unfortunately, the State of Palestine is categorized under "Other entities having received a standing invitation to participate as observers in the sessions and the work of the General Assembly and are maintaining permanent offices at Headquarters."

[30] Although Muslim populations have supported the General Assembly resolutions concerning the principle of self-determination, they have not been the favour of the partition plan which was recommended by the General Assembly of the United Nations in the early years of its establishment. They were in a state of solidarity from the early days of political conflicts in Palestine with the Palestinian peoples in order to eliminate political conspiracy and intrigues and also to reject the Balfour Declaration and the League of Nations mandate over Palestine. Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-Operation among its Member States*, p. 80.

An agreement for the independence of some parts of Palestine was concluded between Israel and the PLO in September 1993,[31] and the first form of Palestinian self-rule was signed in May 4, 1994. Since that time, the Palestinian nations have suffered many wars and many of them have been killed under the heavy military attacks of Israeli forces such as in the Gaza Strip in 2008 and 2009.

Although respect for the principle of self-determination of peoples has constantly been supported in the United Nations,[32] this principle has not been respected in the actual practice of states.[33] The United Nations Security Council has, for instance, adopted a number of resolutions governing the political and territorial independence of the Muslims in Bosnia-Herzegovina in 1993 and 1994, the Organization was not, however, successful in the implementation and enforcement of the resolutions in the beginning.[34] This was also a fact even after the NATO air strike ultimatum to Serbs in April 1994. However, the situation finally changed and the war in the former Yugoslavia ended with the creation of a number of new states. The United Nations also created the *ad hoc* International Criminal Tribunal for the prosecution and punishment of criminals in the former Yugoslavia (ICTY).[35]

7. Humanitarian Help

The system of Islamic international criminal law has recognised the institution of humanitarian help when necessary in order to give particular assistance to a nation which has become the object of criminal operations by another regime(s). The scope of this humanitarian help may however vary largely from case to case and also depends on the conditions of those to whom such humanitarian help is assumed to aid. Two verses of the

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[31] Malekian, *The Monopolization of International Criminal Law in the United Nations, A Jurisprudential Approach*, p. 166.

[32] For example, Article 1 (2) of the Charter of the United Nations states that the purposes of the Organization are … 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people, and to take other appropriate measures to strengthen universal peace.'

[33] Abu-Sahlieh, *Muslims Human Rights: Challenges and Perspectives*, p. 253.

[34] See the following letters by Farhad Malekian: 'An Inquiry into the Severe Violations of International Criminal Law in Bosnia-Herzegovina', (A letter to the Members of the Security Council of the United Nations and the General Secretary of the Organization, 27/May/1993), 12 pp.; A letter to the Members of the Security Council of the United Nations and the General Secretary of the Organization, July 7, 1993, 5 pp.

[35] See also part three on international criminal court.

Qur'ān basically deal with the reasons for and scope of humanitarian aid (and asylum) which should be granted to a nation which has asked for it. According to one verse:

> Those who believed and took flight and made hard exertion in God's Way with their wealth and their persons, and those who gave asylum and aid—these are guardians, friends and protectors of one another; and those who believed but did not flee, you owe no duty of protection to them until they take flight; and if they seek aid from you in the matter of religion, then it is your duty to help them, except against a people between you and whom there is a treaty of mutual alliance, and God watches what you do.[36]

There are therefore two important conditions under which the institution of humanitarian help may be granted to a nation in order to save it from certain criminally inflicted conducts. These conditions should not, necessarily, be treated in conjunction with one another. Each one of them has an independent characterization.

The *first* condition being that a nation has asked for humanitarian help based on a 'matter of religion'. This means that it is the moral and legal duty of a nation to help other nations of the same religion.[37]

The *second* condition is that humanitarian help cannot be granted as long as there is a treaty between the regime of a nation requesting help and the regime of a nation requested to help which contains contrary provisions.[38]

Thus, as we have mentioned elsewhere, Islamic international criminal law places a heavy weight on respecting the obligations of a treaty between two nations and therefore such obligations should not be violated between contracting parties.[39] This conclusion should not however be interpreted as meaning that the provisions of a treaty must be respected when a particular regime or government has illegally come into power, has frustrated international community on the grounds of its criminal activities or practices political tyranny over its own or other nations through killing, armed attack, genocide and torture.

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[36] The *Qur'ān*, 8:72.

[37] In accordance with modern circumstances, a far reaching interpretation of the verse is that a nation can give humanitarian help to a requesting nation if both nations hold common concepts, beliefs or are parties to a treaty, the provisions of which treat all contracting parties by the same degree. Members of an international organization may give humanitarian help to one another under the conditions of its charter or constitution if there are provisions for that purpose.

[38] The *Qur'ān*, 8:72.

[39] See chapter nine.

Humanitarian help can be requested for the release from danger or freedom from criminal conditions and this is irrespective of whether the authorized government under which a Muslim nation is suffering is Muslim. The *Qur'ān* reads that 'And those who, when they are oppressed revolt against the oppressors, and ask other powers for help to defend themselves.'[40] This humanitarian assistance can even be given to any other nation which has basically other cultures and beliefs. Furthermore, treaty obligations may lose their legal validity when the situation is one of inevitable necessity or extreme emergency. In other words, obligations of a treaty must be respected, 'Except one who is driven by necessity, neither craving nor transgressing, it is no sin for him.'

Humanitarian help must especially be given to all minors, children and females who are, for one reason or another, suffering from unjustified, immoral or unnecessary use of force by others. Accordingly,

> And what reasons have you and why should you not fight in the cause of God and for the weak among the men and the women and the children who pray: 'Our Lord! rescue us from this town, whose people are tyrants, and raise for us from thee defender, guardian and raise for use from Thee a protector, helper.'[41]

The above provisions must be seen in the light of their revelation, at a time when no international organization or entity existed which could give humanitarian help to those who were attacked and plundered immorally and illegally by other nations. Islamic law by its very notion of universality and significant humanitarian purposes aims to function as a universal organization for the prevention of war. It is for this reason that Islamic law provides full humanitarian support for the poor, victims and the oppressed. Its provisions do not encourage war but equality of arms which requires each conflicting party to be given a reasonable opportunity to defend its rights under the conditions that do not situate the weak party at a considerable disadvantage in comparison with its opponent. Therefore, the provisions provide legal grounds for those who are already under attack to seek humanitarian help from other nations. A clear example here is the Gaza Strip case which needs the help of the

[40] The *Qur'ān*, 42:39.

[41] The *Qur'ān*, 4:75. 'Those who have believed battle for the cause of God, and those who disbelieved battle for the cause of devil, therefore battle against the friends of the devil leader, surely the cunning schemes, evil plots, and the stratagems of devil are weak.' The *Qur'ān*, 4:76.

international legal and political community as a whole. Another example is the genocide of the population of Darfur in Sudan which requires immediate humanitarian assistance.

More or less, similar provisions to those in Islamic international criminal law can be found in the system of international criminal law. The latter generally prohibits states from intervening in the political affairs of other states and the Charter of the United Nations indicates this also.[42] Accordingly, the provisions of both these legal systems legitimate humanitarian help. The relevant provisions of Islamic international criminal law and the system of international criminal law regarding the giving of assistance to those who are the victims of international crimes can, especially, be examined in the light of the conclusions of the International Court of Justice regarding the Case Concerning Application of the Convention on the Prevention and punishment of the Crime of Genocide in Bosnia-Herzegovina.[43]

[42] 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.' Article 2 (7).

[43] It reads that: "4. That under the current circumstances, the Government of Bosnia and Herzegovina has the right to seek and receive support from other States in order to defend itself and its people, including by means of immediately obtaining military weapons, equipment, and supplies. 5. That under the current circumstances, the Government of Bosnia and Herzegovina has the right to request the immediate assistance of any State to come to its defence, including by means of immediately providing weapons, military equipment and supplies, and armed forces (soldiers, sailors, air people, etc.) 6. That under the current circumstances, any State has the right to come to the immediate defence of Bosnia and Herzegovina—at its request—including by means of immediately providing weapons, military equipment and supplies, and armed forces (soldiers, sailors, and air people, etc.); …" See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (8 April, 1993, Order), p. 7.

CHAPTER TWENTY-SEVEN

INSTITUTION OF PROTECTIONS

1. Overview

By the term 'institution of protections' we mean all forms of protection which may be sought, granted or given under the Islamic jurisprudence to those soliciting protection or to those to whom it is granted without any form of soliciting also. These protections under Islamic law are not only broad, but have also certain significance in the development of Islamic human rights and the Islamic humanitarian law of armed conflicts. These protections include children, asylum, refuge, hospitalities for foreigners as well as internationally protected persons, aliens, shipwreck victims, and quarter. We have not however dealt with the scope and perspective of all these institutions and protections here, since each one of them has its own broad philosophical, theological and juridical characterization and cannot therefore be completely studied in one volume. Some of these legal protections are studied below.

2. Children

Rules governing the prohibition of child soldiers constitute today an integral part of international humanitarian law of armed conflict. However, these rules have not practically been recognised until the adoption of the two Protocols of the four Geneva Conventions in 1977. Article 77 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts deals with this significant matter and prohibits all types of involvement of children in armed conflicts in the territories of the conflicting parties. It states clearly that children should not be employed in armed conflicts before attaining the age fifteen. The article reads that:

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall

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provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.
4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

Provisions similar to those above are formulated into the provisions of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts which is known as Protocol II. Article 4 (3) (c) of the Protocol specifies this important matter. According to it, children shall be given the sufficient care and aid they require. Particularly, children who have not attained the age of fifteen should not be recruited into armed forces or groups. They should not either be granted any possibility to take part in hostilities. Still, the Protocol has tried to foresee the situation in which a child may be the victim of decisions which engage it in an armed conflict. It has therefore provided that "(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured."[1]

[1] The article has even states that "(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom

The provisions in the above have been strengthened with other international conventions which have directly or indirectly dealt with the rights of children or concerned the questions of armed conflicts. These are such as the 1989 Convention on the Rights of the Child, the Statutes of the ICTY, the ICTR, the Sierra Leone Court, and the Statute of the permanent International Criminal Court (ICC). All these statutes prohibit the conflicting parties from recruiting children in armed conflicts.

A search into the provisions of Islamic international criminal law also reveals the fact that the recruitment of children in armed conflict is not permitted and constitutes a crime against the natural existence of man. According to Islamic law, the teenage year is the age during which a child may be equivalent in its reasoning to an adult. The practice of the Islamic states and their contribution to the ratification of relevant international treaties are two illustrative examples that denote that it is prohibited to recruit children under the fifteen year old to participate in whatever armed conflict. This means that the recruitment of children by any Islamic state should be treated as an act against the foundation of Islamic and international criminal law as a whole. This interpretation should also cover voluntary recruitment. This is because the child who has not attained the age of 15 has not logically compiled the authentic wisdom and needs therefore to realize his or her position. Furthermore, any contribution of the child under 15 years old in armed activities creates the concept of responsibility of the parents, superiors and the state in question.

The reason behind this concept of responsibility is rather clear. The authorities have obligations for the maintenance of *pacta sunt servanda*. They are not permitted to recruit persons who are not yet legally, practically or conceptually mature. Here, the purpose of Islamic law and the system of international criminal law is to prevent physical and mental suffering of a person who is still recognised as not being adult.

Despite the fact that there are a considerable number of rules and provisions prohibiting the participation of children in armed conflicts, many Islamic states have violated these rules. The same conclusion may be reached concerning many other states which engage in armed activities. The fact is that political decisions are the most essential reasons for the violations of the law of armed conflicts and therefore the right for

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are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being."

children under 15 or 18 years old has some minimal probative value. There is often unfair prejudice against the function of the law and a strong theological concept to encourage children to engage in war in the path of God and for the promulgation of his justice and satisfaction. This is what should be called the misuse of the theory of the law by those who are interpreting it for their own personal interests.

3. Refugees

Rules governing the status of refugees constitute an important institution in the system of Islamic international criminal law. The *Qur'ān* reads that 'And if anyone of the polytheists seeks asylum, grant him asylum, till he has heard the message of God, then escort him to his place of security …'[2] The provisions of this verse apply to several matters. Among these are *a*) seeking asylum is an accepted concept; *b*) granting asylum to asylum seekers is an obligation of the host state; and *c*) assistance, cooperation, providing hospitality as well as guarding the asylum seeker is an integral part of the institute of asylum. This institution has been recognised since the creation of Islamic law and been considered an important principle for the promotion of the concept of Islamic human rights and the Muslim humanitarian law of armed conflicts. The main source of Islamic international criminal law provides a number of verses dealing directly with both the concept and questions concerning the condition of refugee. Some of the relevant verses from the *Qur'ān* are:

> The wealth left by enemy is for the poor who fled, those who were expelled from their homes and from their property, who seek the grace of God and His pleasure, and supporting God and His apostle they are indeed the sincere and truthful ones.[3]
>
> And those who before them took refuge into the homes and the faith impressed their hearts, they love and show their affection to those who have fled to them, and entertain no desire in their hearts for those things which are given to the latter, and give them preference over themselves even though poverty may afflict them on account of their entertaining, and whoever is preserved from the niggardliness of his soul, so they are the successful ones.[4]

[2] The *Qur'ān*, 9:6. See also section 4 below.
[3] The *Qur'ān*, 59:8.
[4] The *Qur'ān*, 59:9.

Under Islamic law there is no difference between persons who are refugees or those who take asylum under the territorial jurisdiction of an Islamic state. Refugees from all classes of religion, race, language, colour, ideological or political view or ethnic origin are welcome and treated fairly and equally in accordance with the system of Islamic international law. Historically, 'The victims of racial, religious, political and other persecutions have always found refuge and shelter in the land of Islam.'[5] Comparatively, this is precisely what is formulated under the 1951 United Nations Conventions Relating to the Statute of Refugee. The Convention provides that the status of refugee being accorded to persons who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[6]

The Islamic international criminal law forbids Islamic states from the expulsion of refugees. In fact, it was the first system which established the principle of non-refoulement as an established duty of the state of asylum in order to guarantee the rights of refugee to all individuals from all classes. It went even further and in certain situations prohibited the extradition of criminals which had taken refuge in an Islamic state.[7] The reasons of non-refoulement were *inter alia* the followings:

1. … the principle of non-refoulement is recognised as a principle of customary law. It is established in Islam that 'what is customarily recognised is tantamount to that provided for by provision', that 'what is established by custom is tantamount to that established by text', that 'custom is a reference for judgment', i.e. it can be appealed to as a reference …
2. This principle has been applied since the early beginnings of the Islamic State to Prophet Mohammad who endorsed it, thus making it applicable to any refugee …
3. Refoulement of a refugee to a place where there are fears of his being subjected to persecution or torture conflicts with the reputed

[5] *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 135.
[6] Article 1 of the Convention.
[7] S. Mahmassani, 'The Principles of International Law in the Light of the Islamic Doctrine', 117 *RCADI* (1966), p. 256.

Islamic principle of 'inadmissibility of breaching aman (safe conduct)' or that of 'inadmissibility of reneging on a covenant of protection for those who are safe or are seeking protection (protégés)' . . .

4. Returning a refugee to a state, where his life may be at risk or his basic rights violated is deemed as treachery, which is forbidden according to the law of Islam. This applies equally, no matter whether a refugee is a Muslim or a "convert". In the latter case, such person enjoys all the rights of a Muslim, including protection of his life and personal safety, regardless of the fact that the refugee is a non-Muslim seeking protection or a non-Muslim living in Muslim territory (zimmi), because, having been granted aman or a covenant of protection, he is to enjoy the same sanctity as any Muslim.[8]

The Islamic institution of refugee gives special consideration to those persons who have been considered slaves and a slave who has escaped and come under the territorial jurisdiction of Islamic states should be immediately considered as free. Slaves can also be freed from their social position if they seek refuge in a Muslim army camp active in a war which is not in a home state. This is because a Muslim camp in the territory of a conflicting party is regarded as a temporary Muslim territory.[9] Furthermore, according to Islamic law the state of resident for aliens has a duty to protect their rights and it is also incumbent upon such states, where Muslims have encampments in enemy territory, to help resident aliens and assist them if they are taken prisoners by the state(s) at war with the relevant Muslim state.[10] Islamic human rights, in contrast to the Western institution of human rights governing the rules of refuge (the rules of which are conditional), commands the state of asylum to provide the necessary aid from the public wealth of the state for such refugees.[11]

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[8] Ahmed Abu Al-Wafa, *The Right to Asylum Between Islamic Shari'ah and International Refugee Law: A Comparative Study* (2009). 53–55.

[9] Hamidullah, *The Muslim Conduct of State*, p. 128.

[10] Id.

[11] In one instance due to some records, the Islamic system *has* even given asylum to persons who seriously violated its regulations and committed crimes against the common values of Islamic society. This occurred in the early twentieth century when certain Russian envoys raped some Persian women and because of the anger of the public took asylum in one of the religious tombs situated close to Teheran, the capital of Persia. They had closed themselves into the vaults of the tomb in order to receive amnesty (a tradition to receive mercy or amnesty). Their crimes were not, however, forgiven and they were not juridically given amnesty but they were safely returned to their country. This example displays the high level of humanitarian support under the system of Islamic international

It may also be useful to note that in the system of international law, to seek refuge is not a right and must be determined in accordance with the legal and political factors of each state. In contrast to this, to seek refuge under the Islamic system of law is considered the *right* of any person who, for one reason or another, comes under Islamic jurisdiction. Under Islamic international criminal law, it is not a necessary condition for a refugee to provide the reason of his/her asylum to the authorities of the host state, as long as, he/she does not feel the need to do so. This is because the institution of refugee in Islamic law develops its statute on rights belonging to refugees and not on granting rights. This is precisely contrary to the system of international law which speaks about the granting of rights to refugees and not their inevitable rights. According to the UN High Commissioner for Refugees António Guterres:

> As expressed by many scholars, the migration of Muslims to Abyssinia (Habasha) and the flight of the Prophet, (PBUH), to Medina, to avoid persecution and oppression by the people of Qureish, were acts of mercy. Yet these set an important precedent for the relationship between the asylum-seeker and the asylum provider, whereby the rights of the former are linked to the duties of the latter. More than any other historical source, the Holy Qurʾān along with the Sunnah and Hadith of the Prophet of Islam are a foundation of contemporary refugee law. Even though many of those values were a part of Arab tradition and culture even before Islam, this fact is not always acknowledged today, even in the Arab world. The international community should value this 14-century-old tradition of generosity and hospitality and recognize its contributions to modern law.[12]

The imperative function of the law of refugee under Islamic international criminal law and its significant light within the framework of international human rights law can especially be examined in an important verse of the *Qurʾān*. The verse vividly overlaps with the terminologies of human rights law such as emigration, shelter and refuge as well as refugee. It reads that "Those who believed and emigrated, and strove in the cause of God and those who sheltered them and gave them refuge, and supported them, are the truly believers. They have deserved forgiveness and an honourable recompense."[13] The verse provides several very fundamental messages regarding the value of the human rights law in Islam.

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criminal law. It also proves the high level of respect which can be given to the institution of asylum under the Islamic system as well as municipal legislation.

[12] Forword in Ahmed Abu Al-Wafa, *The Right to Asylum Between Islamic Shari'ah and International Refugee Law: A Comparative Study* (2009).

[13] The *Qurʾān*, 8:74.

It clearly demonstrates that helping and assistance to refugees is basically appreciated within its principles and sheltering a refugee has a universal value under immigration rules.

4. Extradition

The principle of extradition is also dealt with in the system of Islamic international criminal law. The principle of extradition in Islamic system, like the system of international criminal law, has different aspects governing the extradition of those who are requested to be returned to their country of origin. The institution of extradition in the Islamic system of international criminal law limits the scope of protections which may be granted to certain persons who have sought refuge or taken asylum. This is because according to Islamic international criminal law when there is an agreement concerning extradition, its provisions must fully be respected. For example, there were agreements from the time of Muhammad, the Prophet of Islam, which clarify the scope of extradition in the practice of Islamic law. Sometimes the provisions of an agreement could only represent the interests of one of the conflicting parties. Nevertheless, the provisions of such an agreement could still be fulfilled. One early example is the agreement of Hudaibiyah concluded between Muhammad and the city-state of Mecca in 6 Hegery. According to this pact, 'Whoever from among the Quraishites went to Muhammad without permission of his superior … Muhammad shall extradite him to them; yet whoever from among the partisans of Muhammad went to the Quraishites, they will not extradite him.'[14] Although, extradition may be carried out due to the provisions of a treaty, in certain particular circumstances, threat to the life of a person, notoriously known violations of human rights' principles within the territory of the requesting state, and religious discriminations may prevent the extradition. As a result, "Everyone has the right to seek political asylum in another country in order to escape persecution. This right may not be invoked by persons facing prosecution for an offence under ordinary law. Political refugees may not be extradited."[15]

Islamic international criminal law also recognises the extradition of those who are subjects of a Muslim state and have committed highway robbery under the jurisdiction of another state but have escaped to

[14] Hamidullah, *The Moslim Conduct of State*, p. 132.
[15] Article 28.

the jurisdiction of a Muslim state. Such persons should not be tried under Islamic jurisdiction and should be extradited to the relevant state for prosecution and punishment. This rule is valid even though their criminal conduct has, basically, been committed against Muslim subjects. Extradition is however granted according to the terms of any relevant extradition treaty.[16]

5. Quarter

Quarter constitutes one of the largest institutions of protection under Islamic law and therefore we shall only consider its certain aspects. Quarter in the system of Islamic international criminal law means the act of giving life to a defeated enemy. This means that quarter is normally granted to enemy persons and therefore when one speaks of giving quarter in Islamic international criminal law one means specifically persons who are enemies and have, for one reason or another, come under Islamic jurisdiction during an armed conflict.[17] This is regardless of the social position or religious status of such a person. The source of quarter in the Islamic system of international criminal law arises from its basic constitution i.e. the *Qur'ān*. The relevant verse in the *Qur'ān* reads, 'And if anyone of the polytheists seeks asylum, grant him asylum, till he has heard the message of God, then escort him to his place of security …'[18] The above verse contains the basic provisions of Islamic international criminal law governing the statute of quarter and also

[16] Id., p. 178.

[17] It was a recognised practice in the tradition of the Prophet to give amnesty to those who had violated their peace treaty with Muslims. For example when the pagans of Mecca violated their peace treaty the Prophet occupied Mecca in a bloodless diplomacy and ordered the defeated population to assemble. He reminded them of their treaty violations, their ill-deeds towards Muslims, the devastation of their properties and especially their prolonged hostilities against Muslims during a twenty year period. He asked them, 'What do you expect of me?' They lowered their heads with shame. The Prophet therefore proclaimed, 'May God pardon you; go in peace; there shall be no responsibility on you today; you are free.' This statement by the Prophet created a profound psychological transformation. After this amnesty by the Prophet of Islam, the Meccan leader accessed to the Prophet and declared his acceptance of Islam. The Prophet appointed him as governor of Mecca. The Prophet retired to Medina without leaving a single soldier in Mecca and consequently the whole population of the city, due to this great generosity on the part of the Prophet and arising from the Islamic principles, became Muslims within a few hours. *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 12.

[18] The *Qur'ān*, 9:6. This verse has been also translated as 'And if anyone of the

implies that quarter is only given to those who do not hold faith with the divine law, in other words those considered non-Muslims.

There are two different forms of quarter in Islamic international criminal law. One is requested by the relevant person(s) from the official authorities of the state and the other is considered by the same authorities without any need for prior request. In both cases, it is the relevant state department which decides whether to grant quarter. This can be conditional or temporary. According to conditional quarter, a person who receives the status has to fulfil certain conditions such as certain payment. A temporary quarter means a limited period of time granted for a person to fulfil a definite requirement.[19]

Quarter granted by an individual Muslim is regarded valid if it is not contradicted with the power of the superior or commander of the Muslim army. Moreover, both forms of quarter may also be granted by the lowest Muslims, combatants, persons incapable of fighting, the sick, blind, slaves, women and man and still be binding upon the whole Muslim state. The right of granting quarter is exclusively given to Muslims but quarter granted by a non-Muslim who is fighting for a Muslim army may also be regarded valid if such a person is authorized by a competent Muslim.[20]

There are several differences between quarter, refugee and asylum regulations. The *first* basic difference is that the former must be solicited by the relevant persons while the latter two do not need to be solicited as long as a person comes under the jurisdiction of an Islamic state in order to seek refuge or asylum. The reason for this is that a person who is given quarter is an enemy who has been surrounded, captured, arrested or detained for reasons of war, while a refugee does not necessarily need to come from a place of war and can be any person who has, for one reason or another, taken asylum in an Islamic state.

The *second* difference is that a refugee does not necessarily need to be a non-Muslim person and therefore may be a Muslim who has come from the jurisdiction of one Islamic state to another.

The *third* difference is that refugees are, in most cases, protected persons and according to their own will usually ask for asylum in Islamic

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Associators seek thy protection (O Muhammad), then protect him so that he may bear the Word of God and afterwards convey him to his place of safety.' See also section 2 above.

[19] Hamidullah, *The Muslim Conduct of State*, pp. 200–202.

[20] Id., pp. 201–202.

regions. In contrast to this, persons given quarter have no right of choice and are considered belligerents.

The *fourth* difference is that to seek refuge is usually considered a spiritual right of protection in the Islamic system of international criminal law, while quarter is a form of protection which must be decided in accordance with the circumstances in each instance.[21]

According to the *fifth* difference to seek asylum or refuge is the right of a person while quarter is not. In other words, granting quarter is not a duty of Muslim authorities, but, accepting, dealing and giving refugee status is a compulsory responsibility of the state authorities.

[21] Taking these differences into consideration, one must always remember that all these statutes may finally be considered relative to political and economic factors and may therefore be ignored by the relevant authorities within Islamic systems.

CHAPTER TWENTY-EIGHT

HUMANITARIAN PROTECTIONS OF PRISONERS OF WAR

1. Prisoners of War in International Criminal Law

There have, until recently, been very few regulations governing the treatment of prisoners of war under the system of international criminal law. Attempts at such regulations have been very weak and have not been binding internationally. Most of the earlier rules in international criminal law dealing with armed conflicts are without any especially effective regulations relating to the status of prisoners of war. These rules were formulated during the second half of the nineteenth century and did not give prisoners of war any special legal protection.[1]

The events of the First and the Second World Wars and especially the mass killings of Jewish prisoners in the Second World War were strong proof of a lack of regulations under the international legal system. A single agreement was however in force. This was the 1929 Convention concerning the Treatment of Prisoners of War and was applicable between the major Western states. This Convention was also the development of the Hague Regulations of 1899 and 1907 governing the law of war or armed conflicts, but none of these agreements could provide the necessary support for the consolidation of the position of prisoners of war. This was for several reasons; *Firstly*, these agreements had mostly regional rather than international effects. *Secondly*, the legal scope of applicability of the 1899 and 1907 regulations was very narrow and indeed impractical from a political aspect. *Thirdly*, at the time of the drafting of the Regulations and the 1929 Convention many states of the world were under colonial domination and were not therefore free to express their own legal consent. Thus, these agreements were formulated in accordance with the will of colonial and powerful states and their allies. *Fourthly*, the legal framework of the system of international criminal law was not recognised as it is recognised today and therefore the characterization of the law of armed conflicts was, more or less, a matter of formality, not of

[1] Malekian, *International Criminal Law*, vol. I, p. 100 seq.

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implementation and enforcement. The International Military Tribunals in Nuremberg and Tokyo implemented the system of international criminal law to some extent but only according to the will and interests of the victorious states.

The third Geneva Convention Relative to the Treatment of Prisoners of War, 1949, has, however, converted the unstable and irregular situation of prisoners of war and a large number of states including Islamic nations are parties to this Convention, which basically aims at harmonizing and humanizing the status of prisoners of war. The Convention contains a number of humanitarian provisions in order to eliminate acts which may, in one way or another, cause various forms of harm to prisoners of war. Accordingly, parties have undertaken to take the necessary measures for the implementation of the provisions of the Convention. In particular the 1949 Convention, among many other provisions governing the protection of prisoners of war states that its provisions must be respected fully by the conflicting parties and any unlawful acts against a prisoner by the detaining power causing his death or endangering the health of the prisoner are not only prohibited, but can also be regarded as a serious violation of the provisions of the Convention. The Convention also protects prisoners from any act against their dignity, exercise of religious duties, right to food or any other necessity, medical treatment, personal honour, insults and public curiosity.

Today, the provisions of the convention have the effect of customary international criminal law, which means that they must be respected by all means by the conflicting parties in an armed conflict. The provisions of the convention are binding upon all those who are involved in armed conflicts regardless of whether or not they are parties to the convention. Respect for the provisions of the convention is so important that it should not be denied by any state. This is why we call it *jus cogens* principle. The convention is also strengthened by the provisions of the 1977 Geneva Protocol I, Relating to the Protection of Victims of International Armed Conflicts and the 1977 Geneva Protocol II, Relating to the Protection of Victims of Non-International Armed Conflicts, both of which are Additional to the Geneva Conventions of 12 August 1949. Despite this, the provisions of the 1949 Convention Relative to the Treatment of Prisoners of War and the additional Protocols have been violated in most national and international armed conflicts such as Vietnam, Cambodia, Mai Lay and Yugoslavia. They were more seriously violated in the United States and the United Kingdom war in Iraq. The military authorities of both permanent members of the United Nations committed serious

and grave violations of the international humanitarian law of armed conflicts in Iraq without any international response for their prosecution and punishment. Clear examples of these crimes were in Abu Ghraib Prison against the prisoners. Their physical and psychological integrities were necked, raped, humiliated, tortured, degraded, insulted, abused, offended and seriously harmed and injured by the legal authorities under the direct or indirect supervisions of the superiors.

2. Prisoners of War in Islamic International Criminal Law

2.1. *Definition*

In Islamic international criminal law prisoners of war are those who have, in one way or another, been captured during a state of hostility in actual armed conflicts between the conflicting parties and are consequently considered enemy combatants.[2]

In the early practice of Islamic international criminal law, prisoners of war could be enslaved due to the prevailing practice of the Middle Ages and in accordance with the incorrect interpretation of one of the verses of *Qur'ān* to save individuals from further killing.[3] The verse reads that 'So when you encounter the unbelievers in a battle, smite at their necks until when you have slaughtered them and consequently have overcome them, then you imprison them, and afterwards either set them free as a favour or taking some ransom until they lay down their arms, this is a just Law of God for war mongers; and if God had pleased, He would have taken revenge from them Himself, but (He lets you fight) that He may try some of you by the others; and those who are slain in the Way of God, so He never let their deeds to go in vain.'[4] For this reason one cannot deny that Islamic international criminal law did not permit prisoners of war to be reduced to the status of slavery because of the circumstances of the ancient time and misunderstanding of the law.

In certain situations the practice was however different, as prisoners were divided among those who had conducted the war. Prisoners of war

[2] According to one writer, 'The prisoners of war are the enemy combatants who, in a legitimate war declared by a Muslim sovereign, were made prisoners by Muslims.' Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 148.

[3] The *Qur'ān*, 47:4.

[4] The *Qur'ān*, 47:4.

could therefore be enslaved in situations considered proportionate to the hostile activities of the enemy state. In connection with the above verse and the position of the prisoners of war it is rightly asserted that the Islamic state had "the choice only between two alternatives; either to set free the prisoners of war gratuitously or to claim ransom. The verse unequivocally does not entitle the Muslims to enslave their prisoners of war since it does not contemplate such right. Moreover, it—*a contrario*—forbids enslavement."[5] It should be further stated that "the permission of enslaving the prisoners of war is given as a measure of retaliation and not as a right *ab initio*. Therefore, the Muslims are not entitled to enslave their prisoners of war whenever they like but only when their enemy enslaves the Muslim prisoners of war. In other words Islamic law of war does not contain enslavement as one of its tenets but as a sanction that could be inflicted on a basis of *reciprocity*."[6] It must therefore be emphasised that the *Qur'ān* does not support enslavement of prisoners of war and although it was sometimes practised during the early days of Islamic law (close to fourteen hundred years ago) the practice has gradually been abolished.

The Prophet of Islam prevented this practice as much as was possible and actively encouraged its abolition.[7] This means that the relevant verse of the *Qur'ān* was practised by the Prophet and the second source of Islamic international criminal law i.e. *Sunnah* was strongly interpreted as a means of promoting its abolition. Thus, it is certainly incorrect to state that in Islamic law enslavement of prisoners was an absolute right of the military commanders or superiors and that there was no tendency towards its abolition. This is irrespective of the fact that there are a number of cases documenting the enslavement of prisoners of war in the early practice of the Muslim states. In any event, enslavement did not constitute a right but an amnesty to mitigate further killings and family unity suffering. Because of the development of international relations and according to the modern interpretation of Islamic law, enslavement is considered a grave violation of the Islamic international humanitarian law of armed conflicts.[8]

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[5] Emphasis added. Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 190.

[6] Id., pp. 190–191.

[7] See chapter fourteen.

[8] That is why international conventions prohibiting slavery are signed by states with Muslim populations. For data see Bassiouni, *The Islamic Criminal Justice System*, pp. 48–53.

2.2. *Protections*

Islamic international criminal law lays down a number of humanitarian principles in order to protect those who have been captured as prisoners during a regional or an international armed conflict. These principles may be regarded as the earliest and most consolidated principles of international humanitarian law of armed conflicts which have been achieved in the history of civilisation. They provide certain basic guarantees for prisoners which have only recently been codified in the modern legislations of the system of international criminal law.[9]

According to Islamic international criminal law the following principles must be fulfilled with respect to prisoners who have been captured during an armed conflict.[10] These are:

1. Prisoners should not be held responsible for the cause of hostilities between the conflicting parties.
2. Prisoners who have acted in accordance with the law of war during an armed conflict should not be held responsible for whatsoever damages caused to the conflicting parties.
3. Food and any other necessities such as clothes must be provided for all prisoners and they should not be charged to that effect.
4. A conflicting party who holds prisoners should provide appropriate shelter for their protection.
5. The dignity and integrity of prisoners should not be disregarded.
6. Any cause of human suffering must be avoided. This includes torture and the humiliation of prisoners.
7. Superiors must be equally respected.
8. The cultural attitudes of prisoners must fully be respected.
9. Females' position should especially be respected.
10. No person should be raped.
11. Females, minors, disable persons and families must be given special respect because of their particular status.
12. Family unity should be respected.

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[9] Some important traditions may be useful to mention here. i) A prisoner could generally be released upon a ransom; ii) A non-Arab origin prisoner could be released only for half of that ransom in (i); iii) A prisoner could be released on the grounds of teaching knowledge to others; iv) Poverty of a prisoner could be a basic reason for one's immediate unconditional release; v) Transportation of prisoners should be carried out on the best possible facilities. Hamidullah, *The Battlefields of the Prophet Muhammad*, p. 17.

[10] Hamidullah, *The Muslim Conduct of State*, pp. 205–208.

13. Mothers should not be separated from their children.
14. Close relatives should not be separated from one another.
15. In all procedures prisoners should be treated fairly by the conflicting parties.
16. Communications by letter or other forms of this type should be handed over to the relevant enemy authorities.
17. Prisoners who suffer from special discomfiture or a special condition should as far as possible, be given help to that effect.
18. Sick and wounded must, where possible, be given medical services.
19. Compulsory work should not be imposed on prisoners.
20. Prisoners should not be forced to fight against their own will.
21. Capital punishment should not be carried out on prisoners of war.[11]
22. Any forms of retaliation or revenge on prisoners are prohibited.
23. Prisoners who have escaped to their own country and are again captured during an armed conflict should not be punished for a previous escape(s).
24. Prisoners who violate discipline may be punished accordingly.
25. A prisoner of war who is accused of having committed activities beyond the rights, rules and regulations of belligerency may be brought before a tribunal for the purpose of prosecution and if his guilt is proved without any reasonable doubt, he may be punished.
26. The above provisions are a duty of the conflicting parties and therefore parties should not expect prisoners to be grateful for the fulfilment of such a duty.

Islamic law also recognises certain duties for Islamic states to negotiate, as soon as possible, for the release of Muslim soldiers captured by enemy states. According to the main source of Islamic law, certain incomes from a Muslim state must be specified and administrated for that purpose.[12] Similarly, ransom is permitted by the *Qur'ān* for the release of prisoners of war and simultaneously recommends the generous release of prisoners of war when hostilities have ceased.[13] Whenever possible, prisoners of war should also be exchanged between conflicting parties.

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[11] An exception to this principle is to be found in extreme situations of military necessity for the interests of a conflicting party. It has however been demonstrated that the companions of the Prophet were unanimous that the death penalty should not be carried out on prisoners of war. Id., pp. 208–209.

[12] The *Qur'ān*, 9:60.

[13] The *Qur'ān*, 47:4. See the previous sub-section.

With all these provisions, Islamic international criminal law diminishes the risk of killing prisoners of war through acts of revenge, hostility or reprisals and harmonizes the activities of conflicting parties in order to achieve peaceful settlements of national, regional and international disputes.

CHAPTER TWENTY-NINE

ISLAMIC CRIMINAL JURISDICTION WITHIN THE ICC

1. The Establishment of International Criminal Courts

One of the most serious problems within the system of international criminal law has been the problem of its implementation. The problem has not been just, how to enforce the law, but how to bring the perpetrators of international crimes under criminal jurisdiction for prosecution and punishment. Attempts to bring the accused persons under criminal jurisdiction have, however, long been discussed in the international legal and political community. Two of the most recognised positive contributions to the problem of implementation of international criminal law are the Nuremberg and Tokyo Tribunals. The Statute of the Nuremberg Tribunal relied on the London Agreement of 1945 and the Tokyo Tribunal on the Proclamation of 1946.[1] The purpose of both tribunals was to bring the perpetrators of crimes against humanity, war crimes and crimes against peace before their jurisdiction for the purpose of the application of the concept of international criminal responsibility and punishment. Although the tribunals worked for this purpose, they were not fully successful in the application of criminal responsibility based on the fact that most of the perpetrators could, in one way or another, escape effective prosecution.

The above categories of crimes were not, however, respected after the Second World War and were committed by many states and mostly by those states which were drafters of the Charter of the Nuremberg Tribunal. Among these states are the United States and the Soviet Socialist Republic. The prolonged Vietnam War and the killing of a large number of civilians under the power of the United States government is one of the clearest examples. The Vietnam War, in particular, has been branded with the commission of genocide, crimes against humanity and crimes against peace. No international criminal tribunal was established for

[1] The Nuremberg Tribunal was the big powers tribunal and the Tokyo was entirely under the military authority of the United States.

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those crimes. One can only mention the non-governmental international criminal tribunal which was established by Bertrand Russell in London, Stockholm and Copenhagen which had no power of enforceability of the law. The tribunal is known as the Bertrand Russell Tribunal.

The enforcement of the system of international criminal law was not, however, possible even after the end of the Cold War, mainly between the United States and the Soviet Socialist Republic. This non-enforceability of the principles of international criminal law could be seen all over the world through torturing, raping, killing, murdering, disappearing, genociding and various types of humiliations of race. One of the most horrible of these events is the grave violations of the system of international criminal law against the Muslim population of Herzegovina by the Serbian armed forces which finally caused the establishment of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY). The Tribunal has an *ad hoc* character and is a body of the United Nations. A more or less similar tribunal was established in Rwanda known as the International Criminal Tribunal for Rwanda (ICTR). The principal functions of both tribunals have been to prosecute the perpetrators of war crimes, crimes against humanity, genocide or serious violations of the laws of armed conflict.

The repeatedly violations of the system of international criminal law finally caused the formulation and ratification of the Statute of the permanent International Criminal Court (ICC). The Court is based on a treaty law and functions according to the principle of complementarity. The power, functions and machinery of the Court are compared with the Islamic criminal justice system below.

2. Islamic Norms Creating the ICC

Without doubt, there are different systems of criminal justice in the world. But, this does not necessarily mean that the principal idea of the prosecution of accused persons differs broadly from one another. This is because all these criminal justice systems, if based on the equal application of the law and appropriate jurisdiction, seek to criminalize certain acts and bring the perpetrators of criminal conducts under prosecution and punishment. But since, all these criminal systems under national jurisdictions do not apply the law sincerely or, in other words, they are

prejudiced, for various reasons in the application of criminal responsibility, they are to be complemented with other courts. This is especially true, in the case of international crimes and criminal responsibility of those leaders who may, in one way or another, escape prosecution and punishment. The situation has been more tangible, in the case of crimes against humanity, war crimes, genocide and aggression.

Together, the above reasons became a strong foundation for the creation of the ICC. It is, however, important to say that the basis for the creation of the Court should not be interpreted as permission to go against other criminal jurisdictions in the world. This means that the "establishment of the Court" stated in part 1 of the Statute does not necessary contradict the basic principles of criminal justice within other legal systems. In other words, the Statute of the ICC cannot be regarded as preventing the system of Islamic criminal jurisdiction or violating its legal provisions. This is because:

- The ICC is based on treaty law. The treaty law is one of the fundamental sources of Islamic international criminal law, if it does not violate its provisions. Since a considerable number of Islamic nations or states have ratified the Statute of the ICC, its provisions do not contradict Islamic criminal norms. In other words, the Statute of the Court would not have been ratified if there were serious contradictions between these two separate legal systems.
- Similar to Islamic international criminal law, the Court aims to bring the perpetrators of international crimes before its jurisdiction. This means the fulfilment of Islamic provisions for the prosecution of criminals, but, in an international standard and by international prosecutors and judges.
- Islamic international criminal law is based on *Shari'a* or the Islamic code. The ICC is based on its own Code or the Statute. The difference is that the Statute of ICC would not have been regarded as a legal Statute if it had differentiated from the principal intentions of Islamic criminal law. In other words, the Statute is the development and modernization of different criminal legal systems including Islamic law.
- The ICC is almost bound over all nations of the world. Islamic criminal justice has not been effective over all nations of the world but it presents its motives and interests for the prosecution of criminals by accepting the Statute of the Court as its sub or high division body. While the ICC has its own international legal personality

and its wholly independent entity, its power and legislation are based on civil law and common law systems and have therefore, surely, benefited from the Islamic legal system too.
- The Court should in no way violate its norms and principles stated in its Statute. This means certain positions must always be respected by the Court such as the prevention of impunity and equal treatment of all those who have, for one reason or another, come under its jurisdiction. The Court is therefore obliged to apply international criminal responsibility to all those who violate the provisions of the Statute and commit crimes against humanity, war crimes and genocide.[2] These are also the purpose of Islamic criminal jurisdiction.

3. Classification of Crimes in Islamic Law

As with many other criminal systems, Islamic law also has different categories of crimes due to its basic rules. The reason for this is to minimize the concept of the commission of crimes and also simultaneously to underline different categories of crimes that may be useful in the recognition of criminality and the attribution of punishment. The categorization may also be useful for the clarification of the method of jurisdiction, prosecution and punishment. This means that Islamic law bases its criminal rules on certain legal disciplines that should be respected for the purpose of an appropriate understanding of its norms. Generally speaking, there are three different categories of crimes under Islamic law. These are *hudūd* crimes, *qisas* crimes and *tazir* crimes. Each one of these crimes has its own statute and should be read and interpreted in conjunction with its given historical situation.

3.1. Ḥudūd

Ḥudūd crimes are those offences that are regarded as being offences against God. Hudūd is therefore the first category of crimes under Islamic law. They are defined in the provisions of the *Qur'ān*, the commission of which is regarded by most Islamic jurists, as being against the Islamic principles of justice. This is because *hudūd* crimes are offences against the

[2] Farhad Malekian, 'The Homogeneity of International Criminal Court with Islamic Jurisprudence', 9 *International Criminal Law Review* (2009) 599.

community or state and go against the social integrity of human beings as a whole. Different crimes falling under hudūd offences are such as various types of bribery coming under the category of theft, brigandage, adultery, *zinā* implying sexual intercourse outside wedlock, defamation, alcoholism, rebellion and apostasy. Due to the historical facts or socially low standard of the Arab community at the time of the revelation of Islam, the *hudūd* crimes were punished with very heavy penalties. The intention of punishment was mostly to prevent others from committing the same crime. This habit has also, regrettably, continued within many Islamic nations and the application of certain penalties has not been rare. Clear examples of the application of these types of punishment can be examined within the criminal law of the Islamic Republic of Iran. However, a general modern interpretation of Islamic law implies the fact that those heavy penalties should not any longer be applied. This is based on the fact that the Islamic Declaration of Human Rights prohibits the application of heavy penalties to *hudūd* crimes and makes it clear that Islamic provisions should be read in conjunction to change of time and the present circumstances. In other words, any interpretation of Islamic law for the purpose of the application of *hudūd* penalties must be seen as contrary to the acceptable criminal procedures of most nations of the world and therefore invalid. In fact, it is a general principle of law that heavy penalties such as amputation, cruxification and capital punishment have been abolished and their application violates the principles of the human rights' justice.

3.2. Qiṣāṣ

The criminal system of Islamic law is also based on another category of crimes which are not considered offences against God but are against individuals. This is called *qiṣāṣ* or the second category of crimes under Islamic law. The *qiṣāṣ* crimes have gradually been recognised under the changing juridical and political reasons within the social structure of society. The main source of Islamic law also refers to these crimes. It lists such crimes as voluntary and involuntary homicide, crimes against mankind, crimes against individuals, and murder. The *qiṣāṣ* crimes have, however, different types of policy for the application of penalties. This is based on the fact that most penalties are excusable by offering *diyya* or blood money. However the amount of blood money depends on the gravity of the criminal conduct and its consequences. Thus, *qiṣāṣ* crimes may be punished by retaliation. However, with the term "retaliation"

we do not mean here that Islamic law permits members of a family whose relative has been murdered to take necessary measures for the murder of the accused person. This would be lawless and therefore violates the Islamic ethic of legality. An accused person has to be brought before a criminal court for the purpose of appropriate prosecution and punishment.

3.3. Taʾzīr

Taʾzīr offences constitute the third category of crimes under Islamic law. They are crimes that are considered against the public or individual's interests and should therefore be prevented by law and regulations. A *taʾzīr* offence relies mostly on the nature of the criminal act. Accordingly, it is the substance of criminal conduct which makes an act prosecutable and punishable. This means that the criminalization of *taʾzīr* does not necessarily rest on the act or the conduct itself, but, on the character of the act which is painful to the social system and may have negative consequences. The applicable penalties to *taʾzīr* offences are consequently discretionary. This also varies depending on the character or nature of the wrong-doing and the harm arising from the criminal conduct. The *taʾzīr* offences are such as corrupting public services within the land, bribery of the authorities to take certain decisions, and cheating others by different methods of falsification. Penalties applicable to *taʾzīr* crimes vary from case to case depending on the gravity of the criminal behaviour. They may, therefore, include such things as fines, various terms of imprisonment and capital punishment. However, the implementation of the latter must be seen as an abolished institution since it goes against the instruments of the human rights law including the Islamic Declaration of Human Rights. The intention of all these penalties is to prevent the offenders from engaging in criminally wrongful acts.

4. Imperative Principles of Criminal Law

There are certain general principles of criminal law that have to be respected and should not be violated by the implementation of criminal jurisdiction. This does not only *inter alia* include the ICC but also the Islamic criminal justice system. These principles are such as *de lege lata*, *nullum crimen sine lege*, *nulla poena sine lege* and *ne bis in idem*. The Arab Charter on Human Rights has also taken into effective consideration the above principles. According to it "No crime and no penalty can be

established without a prior provision of the law."[3] In all circumstances, the law most favourable to the defendant shall be applied. A close and short study of the principles may therefore be useful here.[4]

4.1. De Lege Lata

A significant principle of international criminal justice is the principle of *de lege lata*. The principle constitutes one of the keys for the recognition of the concept of crime. Neither the Statute of ICC nor the principles of Islamic criminal jurisdiction can function without the full respect of the principle. That is why Islamic international criminal law underlines what actions are considered war crimes, crimes against humanity or genocide.[5]Historically, Islamic criminal jurisdiction could not have been established if the given act had not already been recognised as sin or wrongful behaviour. Yet, the recognition was divided into different categories. These were the *hudūd* crimes, *qiṣāṣ* crimes and *ta'zīr* crimes. Each of them had own legal discipline and could be evaluated differently. They could nevertheless present the significant value of the principle of *de lege lata*. According to one writer, although there are some differences between the principles of legality in international criminal law and Islamic law, one cannot deny the fact that both legal systems are essentially based on the principle of *de lege lata*. He motivates that:

> The Islamic criminal justice system recognizes the 'principle of legality' but apply them in a different manner. The *Qur'ān* and the *Sunna* mandate the application of 'principle of legality' to criminal legislation and judicial interpretation. But the system does not with some differentiation as between three categories of crimes: Hudūd, crimes which are codified in the *Qur'ān*, require a rigid application of the 'principle of legality'. Quesas crimes, which are also stated in the *Qur'ān*, permit some analogy for the different types of physical injuries and their compensation, and *Ta'zīr* crimes, for which there are no stated prescriptions in the *Qur'ān*, include either that which positive law may establish or that which the judge can find by analogy or in reliance on general principles found in the *Shari'a*. The application of the principles of legality in Hudūd crimes is parallel to the one followed in the positivist Romanist-Civilist-Germanic systems, while in *Qusas* and *Ta'zīr* crimes, the application parallels the approach followed by the common law of crimes, the latter being even more flexible.[6]

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[3] Article 15.
[4] See also the Arab Charter on Human Rights.
[5] See the relevant chapters.
[6] M. Cherif Bassiouni, *Crimes Against Humanity in International law* (1999), 136.

Similarly, the Statute of the ICC is based on the principle of *de lege lata* which means the ICC can solely function on its provisions. Consequently, the principle of *de lege lata* in both legal systems refers to what is and is not enforceable before their jurisdictions. More specifically, the concept of *de lege lata* is used in conjunction with the concept of *de lege ferenda* and *ex post facto* law. The latter concepts also highlight the important validity of the concept of *de lege lata* or the law in force while the other concepts refer to the provisions which may be adopted for the future and the provisions which cannot be applied retroactively. The ICC and Islamic sources naturally confirm the prevailing law.

4.2. Nullum Crimen sine Lege

The provisions of the ICC and even Islamic international criminal justice encourage the prosecutors and judges to base all aspects of a case, not only on the principle of *de lege lata*, but also, the principle of *nullum crimen singe lege*. This principle is also encouraged under other criminal systems. According to the ICC Statute "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."[7] Due to the Cairo Declaration on Human Rights in Islam which is based on the principles of the main source of Islamic law, "A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence."[8] Furthermore, the Declaration provides that "It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him." This means that both legal systems put a great importance on the power of the legislator to determine and announce the criminal conducts.

The principle of *nullum crimen singe lege* indicates the inviolable integrity of individuals and therefore protects them from unjustified and unfair accusations. In other words, this means the liberties of individuals against the arbitrary and unwarranted interference of the authorities. Therefore, the ICC cannot recognize an act as a crime if such an act is not already prescribed within its Statute. In this case, when there is no regulation implying the criminality and the law is silent about certain acts, the Court and the Islamic principles do no permit violation of the principle of *nullum crimen singe lege*. Historically, under Islamic practice,

[7] Article 22 (1).
[8] Article 19 (e).

an accused person had to be free from detention when the authorities found him innocent. A verdict of innocence and freedom had thus to be issued. Similarly, the lack of law in the ICC Statute, bound the judges to issue the verdict of innocence. It should also be stated that the principles of human rights within both legal systems calls on the application of the principle of *nullum crimen singe lege*.

4.3. Nulla Poena sine Lege

Another important principle under the provisions of criminal law of most states of the world is the principle of *nulla poena sine lege*. This principle has also entered into the basic structure of Islamic criminal jurisdiction and the Statute of the ICC. The principle simply applies to the legality of punishment. It makes it clear that punishment for the criminal act should be based on rules that are already foreseen by the legislation. The phrase *nulla poena sine lege* is also similar to the phrase *nullum crimen singe lege* with the difference that one speaks about no punishment without the pre-existing law and the other no crime without the pre-existing law. The principle of *nulla poena sine lege* has therefore aimed at the criminalization of the application of retroactive law and increases the principle of objectivity of criminal procedures for the prosecution and punishment of criminals. In the system of international criminal justice, the principle of *nulla poena sine lege* also refers to the principle of *nullum crimen, nulla poena sine praevia lege poenali*. This principle is the presentation of the element of all three principles namely the principle of *de lege lata*, *nullum crimen sine lege* and *nulla poena sine lege*. The principle provides that no crime or penalty can be recognized without the previous regulations.[9]

Although, Islamic international criminal law and the system of international criminal law emphasises on the application of the principle of *nulla poena sine lege*,[10] the principle may be violated in the case of the implementation of those crimes that have not already been accepted by certain states. For instance, the Statute of the ICC is not ratified by Sudan, the United States and Israel. However, it is true that the universality principle as well as *jus cogens* norms encourage the prosecution of individuals who have committed genocide, crimes against humanity, war crimes

[9] Ali Mokhtar, 'Nullum Crimen, Nulls Poena, Sine Lege: Aspects and Prospects,' 26 *Statute Law Review*, pp. 41–55.

[10] Article 23 of the Statute of ICC.

and more obviously the crime of piracy. This means that even though, we suppose that those crimes are not criminalized under the constitution of certain states, their individuals can still be brought before the ICC because of the commission of the crimes. Similarly, Islamic law permits the prosecution of those crimes without due regard to the provisions of the legislation of certain states. This theory is based on the concept of crimes against mankind and violation of the fundamental principles of natural law.

4.4. Ne Bis in Idem

The principle of *ne bis in idem* has an important function within both legal systems. The principle prohibits the prosecution and punishment of a person for a crime for which he/she has already been prosecuted. Therefore, the principle secures the right to be free from double jeopardy within the criminal law of different states. In other words, the ICC should not prosecute a person for a conduct which formed the basis of crimes for which the relevant person has already been convicted or acquitted by the ICC.[11] Under Islamic criminal jurisdiction, no one should be prosecuted for the conduct that has already received appropriate attention by an authentic criminal jurisdiction. The Arab Charter on Human Rights has also strongly condemned the application of the principle of *ne bis in idem*. Due to it provisions "No one may be tried twice for the same offence. Anyone against whom such proceedings are brought shall have the right to challenge their legality and to demand his release."[12] Furthermore "Anyone whose innocence is established by a final judgment shall be entitled to compensation for the damage suffered."[13] Despite this, the principle of *ne bis in idem* has been violated under the criminal law of certain Islamic states. They have claimed that the principle may go against the social, cultural, economic or political interests of the state. Therefore, the tendency has been to examine each case separately and establish the appropriate application of punishment.[14] The ICC also permits the easing

[11] Article 20 (1) of the Statute of ICC.

[12] Article 19 (1).

[13] Article 19 (2). Article 23 of the same Charter recognizes that "Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

[14] Thus, this principle has, partly, been violated in practice. For instance, the criminal code of Islamic Republic of Iran has permitted re-examination of the proceedings of other courts. See the Penal Code of 1982 which not only ignores international rules, but also,

of the principle of *ne bis in idem* if it seems that the proceedings in other courts:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[15]

The main purpose of criminal justice in Islamic law and the ICC is to prevent injustices and thus it would be contrary to the purpose of justice to punish a person twice for the same criminal conduct. This means that the ICC regulations concerning the principle of *ne bis in idem* are not contrary to the general inspiration of Islamic justice which prevents the unnecessary punishment of a person.

5. The ICC Substantive Crimes and Islamic Law

The international criminal court can only function on the basis of its Statute which lists the substantive crimes according to which the ICC is empowered to establish its proceedings. Similarly, the Islamic criminal justice function is to create justice and to establish jurisdiction over those who have violated certain rules or regulations that are within its constitution or have come into existence as a result of international treaties. In other words, although both legal systems may have different attitudes and theories of criminalization, they contain, more or less, similar schedules for the implementation of the law and justice. This is because both systems want the prosecution and punishment of the perpetrators of transnational or international crimes.

The substantive crimes under the provisions of the ICC are war crimes, crimes against human, genocide and aggression.[16] All these crimes are also prosecutable and punishable under Islamic jurisdiction. This means that Islamic international criminal law has certain rules and provisions

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the Islamic rules of criminal justice. Mansour Rahmdel, 'The Ne Bis in Idem in Iranian Criminal Code', 1, no. 3 *Journal of Financial Crime* (2004), pp. 271–281.

[15] Article 20 (3) of the Statute of ICC.

[16] See Articles 5 to 8.

pointing out which acts constitute war crimes, crimes against humanity, genocide and aggression.[17] However, the crime of aggression is the only crime which does not appropriately come under the jurisdiction of the ICC, based on the fact that the ICC is not empowered to deal with the crime. This is as long as the Security Council of the United Nations has not given its permission. However, the permission to deal with the crime of aggression under Islamic law does not necessarily rest on the decisions of the legal authorities, but, on the sources of the law. This may be regarded as one of the differences between the two legal system and their implementations. In other words, the Statute of the ICC recognizes aggression as a crime; it is not however practically permitted to identify this core crime.

6. The Principle of Complementarity

When the Statute of the ICC was drafted, there were many different opinions concerning its jurisdiction. The reason for this was very simple; states of the world were reluctant to submit all criminal cases concerning international crimes to the jurisdiction of the Court. Thus, the problem was not the legal characterization of the ICC, but, how to convince the negotiating parties to agree with the Statute of the Court. The Islamic states, like many other states, had the same difficulty. Finally, this problem was, due to political circumstances surrounding the establishment of the ICC, solved in a very diplomatic manner which coincides with the philosophy of common and civil law including the Islamic philosophy of criminal justice.

According to the main purpose of the Statute, the question of prosecution and punishment remained primarily the rights, obligations and duties of states parties and the court jurisdiction was taken under the principle of complementarity. The principle provides the rights and obligations to the ICC for the prosecution and punishment of the perpetrators of international crimes when the states parties do not for one reason or another bring the violators of the provisions of the Statute under their own criminal jurisdiction. The Statute has clearly stated that the ICC "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be *complementary*

[17] For each one of these crimes see the relevant chapters.

to national criminal jurisdictions."[18] This means that the ICC has two significant aims for the application of its law *a*) under the criminal jurisdiction of different states including the Islamic nations, *b*) under its own jurisdiction.

6.1. *Primacy of Jurisdiction*

What is indeed important within the appropriate Islamic criminal jurisdiction is that justice should be done regarding the rights of international society including the victims. Thus, it makes no difference if the ICC applies the provisions of international criminal law in the Court. In reality this means that the interests of all legal systems including the Islamic one are fulfilled. The basic philosophy is that the Islamic criminal jurisdiction respects all treaty provisions which are concluded on equal footings and do not violate its basic sources. In other words, the provisions of the Statute regarding the "Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State,"[19] do not contradict with Islamic criminal justice. This theory is valid, as long as, the ICC does not violate its own law or the principles of the international human rights law by discriminating between criminals and criminals.

It must be remember that the exercise of the jurisdiction of the Court over Islamic nations, like other nations, is subject to several conditions. These include: *a*) that the state does not initiate any criminal jurisdiction; *b*) that the state refuses to prosecute certain persons; *c*) that the criminal jurisdiction initiated by the state was very narrow and did not keep its objectivity regarding the case. All these provisions are in conformity with Islamic criminal jurisdiction. This is because the Islamic philosophy of criminal law rejects the application of the principle of impunity and its development.

6.2. *Prevention of Impunity*

The most primitive idea of Islamic criminal jurisdiction is the abolition of the principle of impunity. The idea is also one of the key elements for the creation of the Court. The reason is very simple. None of these criminal systems wishes to release criminals without appropriate punishment. The theory is to create justice and apply it in such a way that it should

[18] Article 1 of the Statute. Italic added.
[19] Article 4 (2).

not harm the society, accused, victim and witness. Thus, if the Court challenges the application of the law in an Islamic nation, this should not be interpreted as a violation of Islamic criminal jurisdiction. This is because, as an established element of justice, the principle of non-impunity is considered today to be one of the most recognised principles of international customary law and this custom has been applied within the Islamic philosophy of criminal law for a long time. Islamic sources neither permit impunity for crimes against humanity, war crimes and genocide nor accept its non-abolition. It was also upon the principle of non-impunity that many of the verses of the *Qu'ran* were completed. Thus, if the Court exercises its jurisdiction with respect to a crime referred to in its Statute, this does not create any contradiction to Islamic law.

Accordingly, the Court may exercise its jurisdiction on Islamic nations or any other nations if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

A clear example here is the case concerning the president of Sudan who is accused of the violation of the Statute of the ICC. Although, Sudan is not a party to the Statute of the International Criminal Court, certain individuals may, due to the provisions of the Statute, be brought before its jurisdiction if the Security Council makes such a request.[20] However, the position may be criticised because of the application of the law behind the Security Council power. This is especially controversial under the Islamic

[20] On 27 April 2007, the judges in Pre-Trial Chamber I decided that "Regarding the territorial and personal parameters, the Chamber notes that Sudan is not a State Party to the Statute. However, article 12 (2) does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the Charter, pursuant to article 13(b) of the Statute. Thus, the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not Party to the Statute." The president of Sudan has not yet been brought before the jurisdiction of the Court.

criminal justice and its international criminal law when the Court and the Security Council discriminates between criminals and criminals and does not apply the law to the presidents of the permanent members of the United Nations such as Tony Blair and Gorge Bush.

7. Admissibility

The ICC is empowered to exercise jurisdiction over genocide, crimes against humanity and war crimes. Islamic criminal jurisdiction is also empowered to exercise jurisdiction over those categories of crimes. But, this does not necessarily mean that when the crimes have been committed the ICC or Islamic criminal jurisdiction can immediately initiate a case before their jurisdictions. The Court has to wait and see whether the state party in the territory of which the crimes are committed, is willing to start its criminal proceedings over the case. This means that the jurisdiction of the Court is not altogether universal, but, subject to certain conditions. Similarly, an Islamic criminal jurisdiction cannot, automatically, be exercised over criminals based on the fact that the accused persons may be extradited due to the provisions of a treaty or certain other reasons, such as diplomatic negotiations, religious dependency and any other international agreement. Even where the ICC has jurisdiction over a case, it will not necessarily act for this purpose. The principle of "complementarity" underlines that certain cases may be inadmissible within the jurisdiction of the Court, even though, the Court has, according to its Statute, jurisdiction.

Similarly, where an Islamic criminal Court, has jurisdiction over a case, it should not act immediately. Historically and due to the sources of Islamic international criminal law, the principle of the equality of religion and jurisdiction emphasizes that a case may be inadmissible if the accused is willing to be prosecuted under his/her own jurisdiction because of religious reasons. Yet, he/she may require that the Islamic criminal jurisdiction should exercise the rules and regulations that are normally exercised under his/her own religion. "The chief reason for applying this principle is to implement, as fairly as possible, the spirit of justice and not ignore the rights and customs of other jurisdictions, in order to increase respect and avoid contradiction."[21] This means that

[21] Malekian, 'The Homogeneity of International Criminal Court with Islamic Jurisprudence', p. 605.

the fundamental rules governing Islamic criminal jurisdiction regarding admissibility and the rules of the ICC regarding admissibility are not far from one another's intention for the prosecution of the accused persons and therefore the ICC does not conflict with Islamic law.

Due to the principle of application of equal justice and the principle of proportionality, in both systems of criminal justice, a case will be inadmissible if it has already been prosecuted by a state. This is valid, as long as the prosecution is authentic and has not missed its goals. The case will also be inadmissible under the jurisdiction of both systems if it is not of sufficient gravity to be prosecuted. All this means that the jurisdictions of both systems have similar aims, even though, their sources are different. In other words, the jurisdiction of the ICC should not be seen against Islamic criminal justice but as a necessary corollary for the strength of its ideology of non-impunity.[22]

8. Hybrid Jurisdiction

A serious question in the drafting of international criminal tribunals or courts has been the question of legality of their structure. This has opened controversial discussions between the negotiators. The reason for this has been very complicated. The negotiators were participating in the drafting of the statutes which did not present one system of law, but, several systems simultaneously. In practice, this meant to apply criminal legislations to different legislations. Naturally, the exercise of such a jurisdiction was not only difficult, but also, very impractical. It could contradict with the legislations of most states of the world, based on the fact that

[22] For instance, the following provisions within Article 17 of the Statute are, in general, in conformity with the jurisdiction of Islamic nature. Accordingly, "In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

they have different understandings of crimes and principles of criminal jurisdiction including its procedure and proceedings. Furthermore, the gravity of punishment varied from state to state depending on the stage and level of democratization of ruling powers. All these would create a negative impression of the new international criminal court and would prevent states from trusting its jurisdiction. That is why the negotiators agreed to solve all these problems by making a compromise which would, more or less, satisfy all the legal systems including the Islamic criminal jurisdiction. The suggestion was finally to get the most significant principles of most legal systems into practical understanding, the utility of which could help the exercise of international criminal jurisdiction.

The framework of the Court was therefore based on hybrid jurisdiction. This meant almost a mixed criminal jurisdiction based on the criminal legal systems of the participating states in the negotiation of the Court. Hybrid jurisdiction is a unique jurisdiction which gives sufficient respects to the criminal principles of different legal systems. It uses the most valuable intentions and purposes of criminal justice without involving in theoretical issues. It offers simultaneously a criminal system which is neither against the generally accepted Islamic principles of criminal justice nor the imposition of Islamic criminal legal system. Examples of such principles of Islamic criminal jurisdiction are essentially the principles of *de lege lata, nullum crimen sine lege*, *nulla poena sine lege* as well as *ne bis in idem*. In general:

> Islamic law permits a hybrid jurisdiction if it is carried out on an equal footing and based on the provisions of a signed and ratified treaty, which is expressed by the given consent of Islamic nations.[23] The term 'hybrid jurisdiction' refers here to a jurisdiction, the regulations of which are, after careful examination and negotiation of the rules of two or more states, formulated into a unique *sui generis* treaty that enjoys the statute of *pacta sunt servanda*.[24] Although the legal nature of the ICC may not be regarded as hybrid, it is nevertheless a combination of domestic and international criminal rules and comprises judges and prosecutors who have long experience with national criminal jurisdiction. That is why the Nuremberg, ICTY, ICTR and ICC are called "hybrid criminal bodies"[25] which have the character of a mixed internationalisation of law.[26] Islamic

[23] Sudan rejected an Arab proposal to establish a hybrid court for Darfur crimes; see www.sudantribune.com/spip.php?article30742 (26k).

[24] The Qur'ān reads: "And fulfil the covenant of God when you have made a covenant, break not your oaths after you have confirmed them". *Qur'ān* 16:91.

[25] www.pict-pcti.org/courts/hybrid.html (24k).

[26] However, we do not deny that the term 'hybrid' is most often employed in the case

law does not suggest that, for the implementation of an international criminal jurisdiction, all judges or prosecutors should be Muslims.[27] As long as the Court maintains its objectivity regarding the application and implementation of its Statute, its provisions may not violate the provisions of Islamic law.[28] Also, the tradition of Islamic law suggests that justice should not serve for its own sake nor should it preserve habitual justice. Real justice exists when its principles are applied equally to those parties accused of committing international crimes.[29] This is also important for all types of jurisdictions: including *ad hoc*, hybrid or an international one.[30]

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of Sierra Leona, East Timor, Kosovo and Cambodia courts. The judges and prosecutors of these courts are selected from the relevant state in question and the suggestions by the United Nations.

[27] 58) In the light of the principle freedom of religion, there has been a strong objection to the assumption that non-Muslims can be prosecuted and punished in accordance with Muslim law. See extending jurisdiction on 'close proximity': "It is an implied way of imposing Shari'ah law on the non-Muslim communities in Malaysia." In: http://www.Jihadwatch.org/dhimmiwatch/archives/020562.php (visited on 2009-02-11); see also "Modern, moderate Malaysia: Proposal to expand prosecutions to cover 'close proximity' between Muslims, non-Muslims of opposite gender", in: http://www.jihadwatch.org/dhimmiwatch/archives/020 555.php (visited on 2009-02-11).

[28] Malekian, 'The Homogeneity of International Criminal Court with Islamic Jurisprudence'.

[29] A clear example is the show tribunal concerning the prosecution of Saddam Hussein. See Farhad Malekian, 'Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal', 38 (3) *Cornell International Law Journal* (2005) 673–723. Examine also Jeremy Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein', 48 *Harvard International Law Journal* (2007) 257; Jordan Engelhardt, 'The Pre-eminent State: National Dominance in the Effort to Try Saddam Hussein', *Cornell Journal of International Law* (2009) 776.

[30] Malekian, 'The Homogeneity of International Criminal Court with Islamic Jurisprudence', pp. 605–606.

CHAPTER THIRTY

THE MECHANISMS OF THE TRIAL

1. The Legal/Moral Qualification of the Court

Islamic international criminal law speaks of several principles which are fundamental for the cultivation of justice and prevention of evils. These include as the principle of legality, *nullum crimen sine lege, nulla poena sine lege, ne bis in idem* and *ex post facto* law. For the application of law, Islamic criminal justice also exercises a considerable number of cautions in the time of its implementation. Among these are the quality of the judges, prosecutors and the house of the trial in which the seat of the court takes place. According to it, the locality in which the proceedings of the jurisdiction of a court are carried out must be free of any illegal nature and should have not been occupied by force. All these refer to the spiritual qualification of the house of the court and its imperative function for the finding of truth. Essentially, the law seeks to discover the truth and the finding of the truth cannot be initiated in a house which is itself build on illegal, unlawful, immoral and evil behaviours. But, this does not necessarily mean that the court has to have its seat in the same locality permanently. The Court may be held in any place, as long as, certain conditions are respected. For instance, the court may, not only be established in public locations, but may also have its jurisdiction in other places such as a house of charity, mosques and also churches. In other words, an appropriate seat for the court plays a very valuable function for judgment, even though it has a physiological function and not necessarily a juridical effect.

Apparently, a consideration of the theoretical foundations of the concept of the qualification of the house of the court in Islamic justice system overlaps with the concept of the house of the court in the system of international criminal law. Due to the provisions of the Statute of the ICC, the seat of the Court is at The Hague in the Netherlands.[1] The Court may even

[1] Article 3 (1).

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sit elsewhere, whenever it considers it desirable.[2] All these imply the fact that the Court has an international legal personality which creates a range of rights and duties for the Court in order to exercise its jurisdiction over the perpetrators of international crimes.[3] Furthermore, the proceedings of the Court do not contradict with Islamic criminal justice based on the fact that Islamic states/nations have signed and ratified the Statute of the Court. This implies the fact that the legal and moral quality of the Court is acceptable to them.

The legal quality means here that the legal structure of the Court is equivalent to Islamic requirements for criminal justice including rules, provisions, norms and principles. It secures fundamental guarantees for individuals by expressing the definitions of crimes and their application under the authority of the Court. The legal quality of the Court therefore makes it clear that the law can only be applied to those who have committed the crimes, but not those who have committed the same crimes, but before the creation of the Court. This means that the Court has no legal authority over crimes which have been committed before its establishment or before coming into force. The judges of the Court do not have the power of criminalizing acts which were not foreseen in the written text. Therefore, under the procedures of the trial, the coordination of the Court jurisdiction with the principles of the Statute is regarded as being one of the main duties of its judges.

The moral quality of the Court refers to the functions of the Court which are not necessarily enforceable due to the legal provisions of the Court, but are recommended not to be ignored under the procedures of the Court. For instance, the Court should not be located in premises which are notoriously bad or occupied by force. This principle is not formulated in the Statute of the Court, but is derived from the general principle of justice and from the theory of fairness. The Court is not thus bound to this principle, but, its disrespect does not create the equivalent good for the court. The principle is supported by the philosophy of Islamic law in order not to embarrass the quality and object of criminal jurisdiction.

[2] Article 3 (4).
[3] Article 4.

2. Qualifications of Judges

Under Islamic law, justice has to be carried out with right and just persons. The judge has a duty to observe certain rules, norms and provisions and not to violate rules regarding testimony of witness or evidence. According to the main source of the law "We have appointed you as a vicegerent in the earth; therefore judge between mankind with justice, and do not follow desires lest they should lead you astray from the way of God."[4] The respect of those rules is in particular important in the case of serious offences such as crimes against humanity, war crimes and genocide. These mean that a judge must in addition to the required qualifications to be a judge, also have sufficient knowledge of criminal justice. Therefore, there are certain conditions without which a person cannot be accepted to sit in the chair of justice. Some of the below requirements may, more or less, be found under the system of international criminal justice that have significant values for the implementation of fair and equal justice in Islamic criminal jurisprudence. These are *inter alia*:

i) One of the requirements is the moral qualification. Both legal systems put considerable weight on the moral character of a judge. Accordingly, a judge must have a high moral standard such as an ethical reputation, well recognised, an honourable record, and respectable personality. He should not have been engaged in bribes or gifts. These qualifications do not necessarily mean that a slave or a poor person cannot be a judge. None of these positions decrease the qualifications of a person to be a judge.
ii) A judge should have a recognised wisdom.
iii) A judge should have a recognised intelligence.
iv) A judge should have an awareness of Islamic religion. This does not mean necessarily that a judge of the ICC must be a Muslim, but, he/she should respect all religious cultures of the world. The respect of different cultures constitutes also one of the basic principles of the Declaration of Human Rights.
v) A judge must be impartial regarding the case. This means that he/she must not have any interest in the case and he/she must keep his/her objectivity through out the case.
ii) A judge must possess all the qualifications that are required to be a judge in a court.

[4] The *Qur'ān*, 38:26.

viii) Islamic criminal justice insists on the relevant knowledge of a judge. He/she must have sufficient capacity to understand criminal law, proceedings and judgments.

ix) According to the Statute of the ICC, a judge must be competent on international law, human rights law, humanitarian law, and have a professional legal capacity. Whilst Islamic international criminal law does not necessarily list the above qualifications, it is obviously a case that those qualifications are an integral part of Islamic jurisprudence.

x) He/she should have not been involved in lending money.

xi) The judge should protect the public or international welfare.

xii) It is good if a judge is a specialist in the protection of the rights of abandoned children, orphans and children as a whole. The interpretation of this segment to the contemporary standard means a judge should protect the rights of child victims of crimes during war or peacetime. A good knowledge concerning the provisions of the conventions on the rights of children may not be necessary, but, may obviously be of great advantage.

xiii) Under Islamic jurisprudence, there was no appeal court in the contemporary meaning. But, a defendant may appeal to the ruler after the implementation of the sentence. If it is proved that the punishment of the defendant was unlawful and the findings of the judge were not accurate, the judge could be subjected to the equivalent punishment and removed from his/her position. A false appeal by the defendant was also subject to punishment. Although, all these regulations cannot be found under the Statute of the ICC and are not necessary either, it is obviously the case that the rules of the Appeals Chamber are not against Islamic jurisprudence and its establishment is quite fair and just. This is also owing to the fact that the Islamic nations established appeal courts long ago. The conclusion is that neither the Islamic jurisprudence, nor the ICC system, wants an innocent person to be convicted.

3. Prosecutors

According to Islamic criminal justice, there was no difference between the function of a prosecutor and the function of a judge. Both these legal positions had similar functions and were carried out by the same person. This means that the judge was also responsible for all other matters

concerning the administration of justice and gathering of information including the location of the judgment. A prosecutor/judge therefore had a very difficult task regarding the application of impartial judgment. The difficulty of this task and the gathering of the necessary information have however altered the administration of justice and the law speaks about two different legal bodies. Accordingly, the prosecutor may therefore initiate investigation concerning the commission of a crime and see whether there are sufficient reasons to initiate an investigation. There are however several conditions for recognizing a person as being qualified as a prosecutor. These are:

i) A prosecutor must he of high morals or have a fully respectable character.
ii) He/she should have a recognised wisdom.
iii) He/she should have a recognised intelligence.
iv) A prosecutor should keep his (her objectivity regarding the development of the case.
v) A prosecutor should have awareness of Islamic religion. This does not mean necessarily that a prosecutor of the ICC must be Muslim, but should respect all religious cultures of the world. The respect of different cultures constitutes one of the basic principles of Declaration of Human Rights.
vi) The prosecutor must have full knowledge of criminal cases.
vii) He/she should be chosen due to the provisions of the law.

4. Evidence

One of the chief principles of Islamic justice is that the burden of proof is one of the duties of the prosecutor. This means that Islamic justice puts a heavy weight on the principle of *accused is presumed innocent unless the contrary is proved*. Yet according to Islamic law, the conviction of the accused must also be without any reasonable doubt. Accordingly, one cannot be convicted for the acts that are not proved under criminal jurisdiction. Comparatively, the Statute of the ICC recognizes similar principles to the above. Due to the provisions of the Statute, the presumption of innocence constitutes as an element. Equally, it provides that it is the onus of the prosecutor to prove the guilt of the accused under the criminal justice system.[5]

[5] Article 66 of the Statute.

In addition, a pure Islamic criminal justice does not put any weight on evidence which is obtained by spying on the accused. This means that "evidence discovered in the course of an unauthorized search will generally not support the issuance of a warrant and is inadmissible at trial."[6] This applies to the fact that evidence must be obtained by legal terms and not illegal terms through violating the legal privacy of the accused. Therefore, evidence obtained by bugging the accused person's room or spying through a window cannot be recognised as legal evidence.[7] The main source of the law reads that "Avoid much suspicion, for verily suspicion in some cases is a sin, and do not spy."[8]

All these denote the fact that the criminality of the accused must be proven upon evidence and therefore no one is guilty of the commission of a crime as long as authentic evidence has not been presented and examined under an authorized criminal jurisdiction. The sources of Islamic law also denote the above facts and principles. Accordingly, those testimonies which are false and accuse a man or woman of the commission of a crime are not tolerable and the accusers are punishable due to the provisions of the law.[9] This means that evidence has an important function in the history of Islamic jurisprudence and it should be authentic and not false. The same philosophy is also encouraged under the principles of the ICC. The following sections examine the role of evidence under the procedure of justice.

4.1. *Nature*

The nature of evidence has had an effective function in the procedure of Islamic jurisprudence. But what does and does not constitute evidence is subject to some debate. This is because the *Qur'ān* has in one case referred to evidence as constituting the testimony of witnesses. This means that in criminal cases, the basis of proof may rely solely on the testimony of witnesses. However, the above interpretation may not be correct and is indeed subject to criticism. Evidently, the main source does not limit the borderline of evidence. This is because the restriction of evidence solely to the testimony of witnesses diminishes the value of justice and justice will not be achieved. More significantly, the nature of the evidence

[6] Matthew Lippman, Sean McConville, and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure* (1988), p. 66.

[7] Id.

[8] The *Qur'ān*, 24:12.

[9] The *Qur'ān*, 24:4.

cannot exclusively rest on the testimony of witnesses. The reason is that the proof of criminality would be very difficult when there is no witness but only other materials proving or disproving the guilt. The nature and substance of evidence therefore varies from case to case depending on the circumstances of each case. The nature of the evidence may be the following: *i*) A woman, *b*) A man, *c*) that which proves the guilt or innocence of the accused. The credibility and weight of the evidence must be assessed and it should determine that guilt has been established beyond any reasonable doubt.

Yet, there are some rules concerning the nature of evidence and the testimony of witnesses. In other words, there have been some regulations concerning the testimony of men and testimony of women. Both have been used, but, sometimes in different degrees and at different levels. Therefore, the nature of evidence and its validity has sometime suffered from the question of gender.

4.2. *Confession through Consent*

Consent appears to be one of the most significant principles and subjects of criminal justice in Islamic jurisprudence and the ICC as a whole. Both legal systems emphasise on the value of evidence which is expressed by free consent. In other words, a confession which is extracted by use of threat, force, torture, and any other unjustified means cannot have any legally binding effect in the criminal procedure and applies to the irrational nature of justice.

Yet, in the light of new evidence, a confession may loss its evidentiary value if it is proved that the confession which was given by the accused was due to a particular personal coercion and not of free mind. Again, a confession which is given by a person who has lost his memory or is mentally ill cannot be presented as evidence in the proceedings of justice. Any doubt in the value of the confession may be a reason for its invalidity.

Under Islamic law confession constitutes a cornerstone in the proceedings of justice and finding a truth. Thus, one of the most necessary and reliable forms of evidence under the provisions of Islamic criminal jurisprudence has been the confession of the accused. This is particularly valuable in the case of serious crimes. The theoretical "reasoning behind this principle is to render and promote justice by means of confession in order to avoid mistakes or consider unfair and inflamed evidence. However, an accused may not be condemned based solely on his confession of guilt; there must exist appropriate and legitimate evidence of

confession."[10] In addition, a confession does not involve the criminal responsibility of any other person who, aids abets, assists in, or attempts the commission of a crime. The confession only implies the acceptance of responsibility on the part of the accused. Any other person, who has, in one way or another, participated in the commission of the crime, must confess by his/her own free will.

It is also significant to mention that new evidence could be a reason to revise judgment under Islamic law. The Statute of the ICC has also foreseen the situation in which the conviction of a person has, for one reason or another, been wrongly delivered by the Court because of incorrect or insufficient evidence. According to the Statute, the revision of judgment or sentence may be possible by the Appeals Chamber if it founds that:

> (a) New evidence has been discovered that: (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

Apparently, both legal systems have aimed at the protection of the accused and the validity of the authentic evidence. A confession which is taken by resorting to force and unlawful measures is not valid and null. One cannot disagree with the fact that each system may put emphasis on the different values of evidence, but, this cannot prevent the maintenance of appropriate judgment under the provisions of the ICC or the historical evaluation of the Islamic jurisprudence. In other words, the provisions of the ICC regarding this matter do not conflict with Islamic criminal justice and are rather identical.

4.3. *Testimony of Witnesses*

As a general rule, all persons can give testimony before the jurisdiction of a court. Under Islamic law, a witness must be sane and should have reached the age of fifteen. A testimony may be given by women, men, old or young. A blind person may also be a witness. But the value of the testi-

[10] Malekian, p. 617.

mony of witnesses may vary from case to case and at the discretion of the judges. There is not any particular restriction to this element in Islamic law. But, testimony must be correct and not misleading. In other words, all witnesses are morally and legally responsible for their testimony. The moral responsibility is mostly based on the strength of beliefs and the legal responsibility on the principle of asserting truth in the court of justice and not violating the integrity of jurisdiction. Although, the ICC does not speak of the moral responsibility of witnesses, it is axiomatic that moral responsibility is also integrated into the legal responsibility before the Court, even though, a witness is an unbeliever. Obviously the Court does not judge on Islamic principles, but, on the standard of international human rights principles. This means that the Court does not necessarily put any weight on the theological part, but on the ethical understanding of rendering a fair judgment.

Under Islamic criminal justice, witnesses must pass the following qualifications:

A) The witness must not be mentally ill. This includes the time when he/she observed the incident and when he/she testifies in the court.
B) The witness must, in one way or another, be capable of expressing his/her view in a language. If he/she cannot speak, he/she should write it and if he/she is not capable of writing, he/she should demonstrate it by signs or symbols.
C) The testimony given by a minor is subject to circumstances and the tendency of other evidences.
D) A competent witness must not have any problem with his/her memory when facing the incident and when giving testimony.
E) The testimony of a blind person may be accepted by a court if he/she is capable of hearing.
F) The testimony of a witness must be based on his/her view. If he/she gives testimony to what he/she has heard from another person, the validity of the testimony may rapidly decrease.
G) The witness must not be notorious for scattering false news. The validity of such testimony may decrease.
H) There is no condition that the witness should be Muslim.[11]
I) A judge who rules a case, cannot be a witness in the same case.

[11] The *Qur'ān*, 5:106.

4.4. *Testimony of Judge*

According to common and civil law systems, the conviction of the accused must be established by documents or the testimony of witnesses or both. Yet, this conviction should also be carried out publicly and in a courtroom. The reason for this policy of jurisdiction and administration is to hinder a judgment based on the personal knowledge of a judge. It is even possible that a judge disqualifies himself/herself from approaching the case based on the fact that he/she has extra knowledge concerning the proof or disproof of criminality. This means that the civil and common law system may reject the entire procedure concerning a case because of the circumstances of the case. In other word, the testimony of a judge is not acceptable when he/she is involved in the judgment of a case. The Statute of the ICC also refers to the above matters.[12]

The Islamic jurisprudence has, however, taken rather different measures and policies concerning the above theme. There are three different opinions. According to one opinion a judge is permitted to rule even though he has prior knowledge concerning the case. This view is based on the interpretation of the following verse: "O ye who believe! Stand out firmly for justice and be witnesses for Allah, even though it be against yourselves, or against your parents, or your kindred. Whether he, against whom witness is borne, be rich or poor, Allah is a better protector to them than you are. Therefore follow not your low desires that you may be able to act equitably. And if you distort your witness or refuse to give it, verily, Allah is ever well-acquainted with all what you do."[13] Due to another view, the judge is strongly prohibited to rule a case based on prior knowledge which governs *hudūd* offences. These are crimes against the foundation of mankind such as theft or murder. This means, in other criminal matters the judge may benefit from his prior knowledge. The second view is, in fact, another interpretation of the above verse.

But the most prevailing view is the view which prohibits the judge from ruling on the basis of prior knowledge. However, he/she may testify in the court, but not judge. The third view does not separate the provisions of the above verse, but, it interprets it in the light of public interest and, particularly, rightful justice. This is because "stand out firmly for justice" and give "witness" does not necessarily mean to loss objectivity and harm public trust in the machinery of justice. Furthermore, the phrase "if you

[12] See Article 41 concerning excusing and disqualification of judges.
[13] The *Qur'ān* 4:135.

distort your witness or refuse to give it" means simply do not hide and contribute to justice with a good heart and good ambition. In other words, the whole verse in the above encourages the positive contribution of all individuals to the body of justice and condemns hiding the truth.

4.5. *Testimony of Women*

One of the greatest problems of Islamic criminal jurisprudence has been the principle of inequality of sex.[14] This means that men have been given a very high position within the criminal jurisdiction and women did not enjoy the same position as men. The problem was, thus, not of the substance of humans but in the manner of the interpretation of the *Qur'ān*. As a whole this source did not mean to create injustice but because of the historical background of Arab nations and their poor civilisation, the law was presented in a manner to teach, stage by stage, the Arab nations the real value of mankind by the Prophet who belonged to the same race. The task was not, therefore, easy. It was likewise in changing the attitude of the population to the respect of equality of gender i.e. women and men. Furthermore, the laws of other nations at that time did not give respect to the equality between men and women. Unfortunately, women had an inferior position to men almost within all civilized and uncivilized societies.

Casting stones at women, female infanticide, cutting sexual organs or preventing their social conducts have, more or less, all been practised by most nations of the world. Thus, the question was not concerning the rules of the law within the provisions of the *Qur'ān*, but, the way in which a woman was treated within different social relations in the majority of nations in the world. A woman was mostly seen for sexual relations and accepting her as having an opinion in the court of justice was indeed a very difficult question.[15]

Consequently, it was in this context that the Islamic system could survive within the Arab World until a gradual change to the deep rooted culture concerning the position of women took place, and a correct

[14] For an international aspect see generally David Wingeate Pike (ed.), *Crimes Against Women* (2010).

[15] This is true even today, in most recognised democratic countries. Even here in Sweden, it was only, twenty five years ago that the first woman was accepted as a professor of law, in a faculty which has had, at least, five hundred years of historical development. This was not based on an equal footing. It was worked out after many mental, social and underground academic exchanges. Thus, the position of women in the Islamic Court of justice, of almost fifteen hundred years ago, should not be regarded as a surprising issue.

definition and scope to their testimonies was given. Thus, it must be expressed that any practice regarding the testimony of two women as equivalent to the testimony of one man is against the present development of Islamic law and should be regarded as a violation of the instruments of the international human rights law including the Cairo Declaration on Human Rights in Islam. Furthermore, due to the second source of Islamic law "Whatever wrongs took place in the days of ignorance are abolished by Islam [...] and whatever wrongs take place in Islam may be abolished by repentance (*istighfār*)."[16] This statement clearly points to many facts. *Firstly*, severe punishments have been abolished in Islamic law because of the modern development of international criminal human rights law. *Secondly*, the testimony of a woman and a man are equal and should not be interpreted differently. The Arab Charter on Human Rights has also referred to the equality of women and men. The Charter has even provided a positive discrimination in favour of women. It reads that:

> Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.[17]

The spirit of the statement in the above, the Cairo Declaration on Human Rights in Islam and the Arab Charter imply the fact that the provisions of the Statute of the ICC concerning the equality of the testimony of women and men is completely correct and should not, in any way, be misunderstood by the Islamic nations or states.[18] Equality of race and gender is the first principle of justice and this has to be respected by all nations of the world, not only during war and peacetimes, but also, under the proceedings of national, regional and international criminal jurisdictions.

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[16] Taha Jaber Al-Alwani, 'The Testimony of Women in Islamic Law', www.alhewar.com/Taha Testimony.htm (28k; visited on 24/02/09).

[17] Article 3 (3).

[18] See also Farhad Malekian, 'The Laws Governing Crimes against Women Constituting Obligatio Erga Omnes', in David Wingeate Pike (ed.), *Crimes Against Women* (2010).

4.6. *Other Evidence*

The nature of evidence is not just the human being. Therefore, the term "testimony of witnesses" stated in the *Qur'ān* is an exemplification of criminal justice tools and not the exhaustion of other remedies. Consequently, the nature of evidence is not restrictive in the words of *Qur'ān*. The term "evidence" is therefore used with several propositions and offers different reasons for the proof of various matters. It says that "Our apostles came with clear evidences."[19]In another position, the term "evidence" is used as a confirmation of certain matters. It reads that "those who reject the truth, among the People of the Book and among the Polytheists, could not have broken up themselves from their ways till the clear evidence came to them."[20] Similarly, the term "evidence" exploited as the manifestation of great proof. For instance, it is stated that "nor were those people of the Book divided except after the clear evidence came to them."[21] All these mean that the content of evidence should be clear by itself and should not require crystallization by other means. In general, the presentation of evidence must not be delayed. In such case, the value of evidence may be reduced due to its content and nature.

Accordingly, all matters which may prove in one way or another, the border line of the criminal case and strengthen the proof that the accused is guilty or not may be valuable and is supported by the general theory of Islamic jurisprudence. However, the evidence must be conclusive and be, in one way or another, in conformity with other evidence depending on the discretion of the judgment. Nevertheless, it is evident that the evidence must not lose its conclusiveness before or even after the execution of judgment. Comparatively, within the law of the ICC, the Court can refer to any authentic material which can be useful for the proof of guilt or the contrary. In fact, the Rules of Procedure and Evidence open the door for a broader interpretation of the provisions of the ICC. Similar to Islamic jurisprudence, the presentation of evidence is not limited to certain already presented evidence. The discovery of new evidence may also be a reason for the change of circumstances and presentation of new facts before the Court.

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[19] The *Qur'ān*, 5:32.
[20] The *Qur'ān*, 98:1.
[21] The *Qur'ān*, 98:4.

4.7. *Reliability of Evidence*

Traditionally, evidence given a high degree of reliability under Islamic jurisprudence was eyewitness testimony, confessions and religious oaths. The question of reliability of evidence was, therefore, one of the most serious questions of justice and justice could not be done, if it was proved that evidence presented during the proceedings of jurisdiction were false, irrational or were not authentic as a whole. That is why the Islamic criminal jurisprudence presses that those who present evidence which is false and create contradiction within the criminal justice system are morally and legally responsible for the falsification of evidence. Thus, those who bring allegations which cause harm to the accused and to the body of criminal justice and Islamic law should be punished due to the provisions of law. For instance, in support of women's rights and their integrity under criminal justice system, it reads that "And those who launch a charge against chaste women who protect their modesty while failing to bring four eye-witnesses to support their allegations, (punish them ...) and you shall never accept their testimony or evidence: for such men are wicked transgressors."[22] It is axiomatic that the verse has, clearly, condemned bringing witnesses, presenting movable or immovable evidence and claiming evidence which is without proper basis. According to its provisions, wrong and evil evidence is immoral and therefore iniquitous. Similarly, it is a great sin to destroy evidence which may be useful in order to prove guilt or the contrary. Therefore, all these actions are considered offences against the machinery of justice and require punishments.

The above provisions of Islamic law may, more or less, be found in the inner structure of the ICC. For instance, the prosecutor of the ICC may with the permission of Pre-Trial Chamber "to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available."[23] It is, in fact, the duty of the prosecutor "to prevent destruction of evidence".[24] Furthermore, according to the Statute of the ICC, the following are offences against the administration of justice: i) providing false testimony, ii) not telling the truth, ii) presenting forged or false evidence, iv) corruptly influencing any witness in the Court, v) interfering or hampering with

[22] The *Qur'ān*, 24:4.
[23] Article 18 (5).
[24] Article 18 (1).

the attendance or testimony of any witness, vi) retaliating against a witness for giving testimony, vii) interference with the collection of evidence.[25]All these imply the fact that evidence must be reliable in both legal systems and should not contradict with the purpose of pure criminal justice jurisdiction.

[25] Article 70.

CHAPTER THIRTY-ONE

RIGHTS OF THE ACCUSED

1. Anatomy of Rights

The Islamic criminal justice system provides equal principles of criminal jurisdiction for all individuals irrespective of their social status. These include questions of arbitrary arrest, remand in custody, detention, equality before a public hearing, the principle of not guilty until proven otherwise before an impartial criminal jurisdiction, and equality in all procedures of prosecution and punishment.[1] The 2004 Arab

[1] According to one writer, "Islam has also laid down the principle that no citizen can be imprisoned unless his guilt has been proved in an open court. To arrest a man only on the basis of suspicion and to throw him into a prison without proper court proceedings and without providing him with a reasonable opportunity to produce his defense is not permissible in Islam. It is related in the *Hadith* that once the Prophet was delivering a lecture in the Mosque, when a man rose during the lecture and said: 'O Prophet of God, for what crime have my neighbours been arrested?' The Prophet heard the question and continued his speech. The man rose once again and repeated the same question. The Prophet again did not answer and continued his speech. The man rose for a third time and repeated the same question. Then the Prophet ordered that the man's neighbours be released. The reason why the Prophet had kept quiet when the question was repeated twice earlier was that the police officer was present in the Mosque and if there were proper reasons for the arrest of the neighbours of this man, he would have got up to explain his position. Since the police officer gave no reasons for these arrests the Prophet ordered that the arrested persons should be released. The police officer was aware of Islamic law and therefore did not get up to say: 'the administration is aware of the charges against the arrested men, but they cannot be disclosed in public. If the Prophet would inquire about their guilt *in camera* I would enlighten him.' If the police officer had made such a statement, he would have been dismissed then and there. The fact that the police officer did not give any reasons for the arrests in the open court was sufficient reason for the Prophet to give immediate orders for the release of the arrested men. The injunction of the Holy *Quran* is very clear on this point. 'Whenever you judge between people, you should judge with (a sense of) justice' (4:58). And the Prophet has also been asked by God: 'I have been ordered to dispense justice between you. 'This was the reason why the Caliph Umar said: 'In Islam no one can be imprisoned except in pursuance of justice.' The words used here clearly indicate that justice means due process of law. What has been prohibited and condemned is that a man be arrested and imprisoned without proof of his guilt in an open court and without providing him an opportunity to defend himself against those charges. If the Government suspects that a particular individual has committed a crime or he is likely to commit an offense in the near future then they should give reasons of

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Charter on Human Rights has also given a particular respect to the rights of the accused during criminal procedures. According to it:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant. 2. No one shall be deprived of-his liberty, except on such grounds and in such circumstances as are determined by the law and in accordance with such procedure as is established thereby. 3. Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members. 4. Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right. 5. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule. 6. Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. 7. Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation.[2]

However, during a criminal proceeding there may be slight differences in the procedure of the jurisdiction between those who are and those who are not Muslims. The reason for this is that because of the strong faith given to the Islamic philosophy, an Islamic court may rely heavily on an oath taken from the accused, while this method is not reliable for those who are non-Muslim.[3] Nevertheless, there should not be any practical differences between Muslims and non-Muslims under the territorial jurisdictions of Muslim states.[4]

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their suspicion before a court of law and the culprit or the suspect should be allowed to produce his defense in an open court so that the court may decide whether the suspicion against him is based on sound grounds or not and if there is good reason for suspicion, then he should be informed of how long he will be in preventive detention. This decision should be taken under all circumstances in an open court, so that the public may hear the charges brought by the Government, as well as the defense made by the accused and see that the due process of law is being applied to him and he is not being victimized." A. Maududi, *Human Rights in Islam* (1977), pp. 25–26.

[2] Article 15.

[3] M. Cherif Bassiouni, 'Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System' in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (1982), p. 23.

[4] This is in fact one of the basic principles of Islamic international human rights

Islamic law provides many rights for the defence procedure. Under the Islamic criminal justice system and according to its theory of 'protected interests', both plaintiff and accused have the right to present evidence.[5] They also have the right to access counsel during pre-trial interrogation, at trial and in the case of conviction at the execution of the sentence.

2. Assembly of Rights

2.1. *Rights to Counsel*

The right to counsel emanates from the Islamic theory of 'protected interests'.[6] These include and guarantee freedom of religion for all types of religious practitioners in the practice of their beliefs; the right of self preservation and self-protection; freedom of mind including expression of thought, acquisition of education and developing and increasing knowledge; the right to have a family through marriage; and the right to obtain property including movable and immovable property and their preservation and disposition.[7] Needless to say, a person has the right to obtain legal assistance for the protection of his/her rights. The Islamic criminal justice system penalizes violations of 'protected interests'.[8] This means that the principle of preservation in the Islamic criminal jurisdiction has been given a broader definition.[9]

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governing the protection of non-Muslims and essentially promotes the principle of equality between all men. The only difference between Muslims and Non-Muslims from the point of view of Islam are philosophical and celestial theories and these should not qualify any nation over another. This significant characteristic of Islam concerning full respect for non-muslims is also stated by the *Qur'ān*. Publications of Centre Culturel Islamique (No. 1), pp. 139 and 143.

[5] Osman Abd-el-Malek al-Saleh, 'The Right of the Individual to Personal Security in Islam', in m. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System*, pp. 55–90, p. 83.

[6] Id.

[7] Id.

[8] Id.

[9] For more clarification: "The preservation of the self according to Islamic jurists implies the preservation of the right to live with dignity. It includes both the preservation of physical well-being and certain moral aspects such as the maintenance of dignity and the freedom from humiliation. It also includes the freedom to work, freedom of conscience and freedom to live where one chooses. It assumes that in a civilized society, liberty is the cornerstone of human life, which in turn ensures the security of the individual. It is clear that the principle of preservation of self is enhanced by extension of the right to counsel to those accused of crimes, as it provides the accused with the means to establish innocence and to defend himself." Id. Footnotes omitted.

In Islamic criminal justice system, the importance of the principle of preservation appears especially when its norms are examined from the perspective of Islamic international criminal law which has basically universal functions and purposes. This principle can particularly be compared with those principles of international human rights which are for the preservation of individual rights and are to be found within certain specific instruments.[10]

Strictly speaking, the above provisions are not a new innovation in the Islamic system of criminal jurisdiction. They have always existed in the main sources of Islamic law, but have not always been appropriately exercised within the political structure of Islamic states and their constitutions—which have integrated some of the Islamic legal philosophies into their provisions but have exercised them negatively for political purposes.[11]

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[10] The relevance of the principles of Islamic international criminal law governing the protection of individuals from unlawful and illegal acts by any type of administration, group, government or state can also be examined by noting a scholarly resolution on the principles of the Islamic criminal justice system of 1979. This resolution presents a number of principles of the Islamic theory and philosophy of justice with respect to the principles of international human rights instruments. According to it, "Any departure from (the below) … principles would constitute a serious and grave violation of *Shariah* Law, international human rights law, and the generally accepted principles of international law reflected in the constitutions and laws of most nations of the world.' The basic principles of the Islamic human rights applicable under the Islamic criminal jurisdiction are *inter alia*: (1) the right of freedom from arbitrary arrest, detention, torture, or physical annihilation; (2) the right to be presumed innocent until proven guilty by a fair and impartial tribunal in accordance with the Rule of Law; (3) the application of the Principle of Legality which calls for the right of the accused to be tried for crimes specified in the Qur'ān or other crimes whose clear and well-established meaning and content are determined by Shariah Law (Islamic Law) or by a criminal code in conformity therewith; (4) the right to appear before an appropriate tribunal previously established by law; (5) the right to a public trial; (6) the right not to be compelled to testify against oneself; (7) the right to present evidence and to call witnesses in one's defense; (8) the right to counsel of one's own choosing; (9) the right to decision on the merits based upon legally admissible evidence; (10) the right to have the decision in the case rendered in public; (11) the right to benefit from the spirit of Mercy and the goals of rehabilitation and resocialization in the consideration of the penalty to be imposed; and (12) the right to appeal." For the complete text of the resolution see Bassiouni, *The Islamic Criminal Justice System*, pp. 249–250.

[11] See, generally, Franz Rosenthal, *The Muslim Concept of Freedom Prior to the Nineteenth Century* (1960); Khalifa Abdul Hakim, *Fundamental Human Rights* (1952); Muhammed Khalafalla Ahmad, 'Islamic Law, Civilization and Human Rights', 12 *Egyptian Review of International Law* (1956); J.N.D. Anderson, *Islamic Law in the Modern World* (1959); Abdullah Allahdin, *Decision by Majority in Islamic Law* (1973); J.N.D. Anderson, *Law Reform in the Muslim World* (1976); N.J. Coulson, *Islamic Surveys: A History of Islamic Law* (1964); Mahmud Brevli, *Islam and the Contemporary Faiths* (1965); Abu'l

2.2. *Specific Rights*

Due to the provisions of the Statute of the ICC, the accused has certain specific rights that are considered important for the protection of the accused and prevention of any prejudice regarding his/her personal integrity.[12] Thus, the Statute clearly points out the fact that in the determination of any charge, the accused shall be entitled to a public and a fair hearing. These two principles are also an integral part of the Islamic criminal jurisdiction. According to the *Qur'ān*, justice must be fair and should not violate the principles of fairness, rightfulness and justice. For this basic reason, the ICC and the Islamic criminal justice emphasises the implementation of the following rights and rules:

- The accused must be promptly informed of the content and the nature of the charges.
- The reasons for the charges must be understood by the accused in his/her own language.
- He/she should have, free of any cost, the cooperation of a competent interpreter in order to understand all legal procedures.
- The accused should have sufficient time for the preparation of the defence with the assistance of counsel.
- The counsel should be chosen in confidence.
- If the accused does not have adequate financial support, the court should provide such possibility.
- There should not be any delay for the trial.
- The accused has the definite right to examine the authenticity of witnesses.
- He/she should have the right to present evidence.
- The accused should not be forced to confess guilt.

A'la Mawdudi, *Human Rights in Islam* (1980); Paras Diwan, *Muslim Law in Modern India* (1977); D.B. Macdonald, *Development of Muslim Theology, Jurisprudence, and Constitutional Theory* (1903); Abdullahi An-Naʿim, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (1990); Abdullahi An-Naʿim, 'A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa', in Welch Claude and Ronald Meltzer (eds.), *Human Rights and Development in Africa* (1984). See also Haroon Khan Sharwani, *Studies in Muslim Political Thought and Administration* (1959); Ibrahim Shihata, 'Islamic Law and the World Community', vol. 4, no. 1 *Harvard International Club Journal* (1962); David Bonderman, 'Modernization and Changing Perceptions of Islamic Law', 81 *Harvard Law Review* (1968), pp. 1169–1193; Sami Aldeeb Abu Sahlieh's, 'Les Droits de l'homme et l'Islam', 89 *Revue general de droit international public* (1985), pp. 625–716.

[12] See also the Arab Charter on Human Rights, appendix.

– Burden of proof should not be imposed on the accused. In other words, he should not be forced to prove or disprove the given criminal acts.

2.3. *The Initial Rights*

There are certain initial rights of the accused that must be respected according to the provisions of Islamic criminal jurisdiction.[13] These rights must also be regarded as natural rights of the accused and any violation of the rights may be recognised against the philosophy of a fair and impartial justice. Most of these rights are also an integral part of the ICC Statute. Islamic criminal jurisdiction demands that:

– The accused should be treated in accordance with human rights' standard.[14]
– The accused has the right to know the reason for his temporary imprisonment, detention or arrest.
– The accused has the right to remain silent.
– There must be a lawful indictment charging or subjecting the accused with a crime.
– Any investigation affecting his/her privacy must be based on lawful permission.
– During legal proceedings, the inviolability of the personal position (social, cultural, economic, political) of the accused must be secured.
– The accused is innocent until proven otherwise.
– The accused should not be held with individuals already proven guilty for their crimes.[15]
– The administration of justice should facilitate the understanding of juridical expressions and charges against the accused.
– The accused should not be mentally ill.

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[13] The national criminal jurisdictions of many European states have also recognized certain rights for the accused that must be respected by the internal authorities. For instance consult Kerstin Nordlöf, *Straffprocessuella Tvångsmedel: Gripande, Anhållande och Häktning* (1987); Kerstin Nordlöf, *Straffrättens Processer för Unga Lagöverträdare* (1991); Kerstin Nordlöf, *Unga Lagöverträdare i Social, Straff- och Processrätt* (2005).

[14] "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Article 20 (1) Arab Charter.

[15] The Arab Charter in Article 20(2) deals with this matter. Accordingly, "Persons in pre-trial detention shall be separated from convicted persons and shall be treated in a manner consistent with their status as un-convicted persons."

– If the accused is a non-Muslim, he should give consent to jurisdiction under Islamic law.

Similar to the conclusions in this and the above mentioned sections, the Arab Charter on Human Rights refers to the inalienable rights of the accused person and the obligations of states to respect these rights. According to the Charter:

> Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgment rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees:
>
> 1. The right to be informed promptly, in detail and in a language which he understands, of the charges against him.
> 2. The right to have adequate time and facilities for the preparation of his defence and to be allowed to communicate with his family.
> 3. The right to be tried in his presence before an ordinary court and to defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially.
> 4. The right to the free assistance of a lawyer who will defend him if he cannot defend himself or if the interests of justice so require, and the right to the free assistance of an interpreter if he cannot understand or does not speak the language used in court.
> 5. The right to examine or have his lawyer examine the prosecution witnesses and to on defence according to the conditions applied to the prosecution witnesses.
> 6. The right not to be compelled to testify against himself or to confess guilt.
> 7. The right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal.
> 8. The right to respect for his security of person and his privacy in all circumstances.[16]

2.4. *Women Rights*

Females have because of their particular physical integrity certain extraordinary rights within the provisions of Islamic criminal justice. The purpose of these rights is not to reduce the social value of women compared with man, but, to emphasise their high social integrity under the machinery of criminal jurisdiction. The right is also particularly granted to prevent any form of mistreatment and sexual abuse of their physical personality. These rights can also easily be found within the provisions of international criminal justice, but are not granted on the

[16] Article 16.

basis of Islamic law even though they represent the same aim. They are the manifestation of the rules of the majority of the states in the world. Some of the rights of women under Islamic law are *inter alia* the followings, the legal validity of which cannot either be disregarded under the system of international criminal justice or the ICC:

- Only a woman should search her body; violation of this right is against the *Shari'ah*.
- Under search and during proceedings, her body should not be affronted.
- Under search and during proceedings, she should not be sexually insulted.
- Use of any term or vocabulary which opens sexual interference is prohibited.
- Revealing the accused in a manner which may cause interference to her religious or cultural attitudes is absolutely forbidden,
- A female should be kept in custody with a female.
- A pregnant woman has the legal right to secure the mental and physical health of her baby.
- A female with a dependent child has the legal right to feed the baby in accordance with tradition, as long as the child needs feeding by another means. The right is also granted when the female is convicted.

2.5. *Rights to Certain Facilities*

The right to certain facilities encourages the criminal justice to be very cautious not to injure, deliberately or accidentally, the position of the accused under criminal jurisdiction. It also denotes the necessary implementation of the human rights law regarding all individuals without due regard to their positions. Rights to certain facilities have, basically, been protected by both legal systems and are considered an integral part of other rights of the accused. They are *inter alia*:

- The right to appropriate shelter
- The right to be kept in a place which is not too hot or cold
- The right not to be kept in buildings dangerous to his/her health
- The right to shower and keep clean
- The right to a regular cleaning of his/her room
- The right to food and drink during the day
- The right to practice personal beliefs or a religion

- Unfair and unethical interruptions against facilities in order to harm the accused are prohibited.
- Facilities should not encourage recidivism or stimulate undesirable actions.

2.6. *Rights under Procedures*

Due to the provisions of the ICC and Islamic criminal jurisprudence, the accused has certain rights under procedures that are regarded of prominent importance for the evaluation of fair and appropriate justice. These rights are an integral part of the human rights law under both legal systems i.e. Islamic criminal jurisdiction and international criminal court. Therefore, they may, in many aspects, overlap one another. These are such as:

- The accused has the right to a legal lawyer or to personally defend him/herself.
- Evidence against the accused should not be hidden from his/her lawyer.
- The attorney of the accused should have sufficient time to investigate or refute evidence.
- The accused may examine the witnesses and victims through his/her lawyer.
- The accused should not be forced to admit guilt.
- He/she may voluntarily answer questions.
- The accused should not be obliged to tell the truth.
- The accused may accept to plead guilty. He/she may later change the plea.
- Any confession given under force, threat, coercion or otherwise is invalid. This means that the principle of *jus ex injuria non oritur* (a right cannot arise from an illegitimate) has to be respected.
- A confession taken by deceit is invalid, even though, no open use of force, coercion or threat was employed.
- The accused should not be tortured.
- The accused should be tried without undue delay.
- The accused has a fundamental right to protest against indiscriminate procedures or decisions.
- The accused may appeal the decision of the court.
- The accused may reject the *ex post facto* law.
- The accused has the right to demonstrate petitions and pleas.

3. Lawful Indictment

A significant right of the accused is to know that the accusation is based on a lawful indictment. This implies the fact that there is an official prosecutor who has the legal power to initiate a criminal procedure before a court. The indictment may therefore aim to charge a person with such offences as crimes against humanity, war crimes and genocide. Yet, it is a well-established principle in Islamic criminal jurisdiction that circumstantial evidence favourable to the accused should not be ignored in the indictment with the aim of involving his/her criminality.[17] Similarly, in the system of international criminal law, the accusation has to be based on clear evidence and not fake information. Therefore, under the ICC the prosecutor may initiate investigations *proprio motu* on the basis of information on crimes under the Statute of the Court. In fact, it is the duty of the prosecutor to be sure about the seriousness of the information received.[18]

Within both legal systems, the prosecutor is also responsible for dropping partly or completely, the indictment if he/she discovers the counts for which a person has been accused, are not authentic and based on fake information. Thus, there must be a reasonable basis to proceed with an investigation. Yet, under Islamic criminal jurisdiction, it is a great sin if a prosecutor accuses a person of crimes that are not committed by him/her and the prosecutor knows about this matter. Therefore, the person formulating an indictment must be aware of the consequence of irrational, immoral or, illegal accusation by an indictment. According to the principal sources of Islamic law, fair and true justice appears to be the first principle of jurisdiction.

[17] Bassiouni, 'Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice Sytem,' p. 20.

[18] Article 15 (2) of the Statute.

CHAPTER THIRTY-TWO

BASIS OF CRIMINAL ACCOUNTABILITY

1. The System of International Criminal Law

The principle of international criminal responsibility constitutes one of the most important principles for the implementation and enforcement of the provisions of international criminal law on the perpetrators of international crimes. This principle has been developed and enlarged from a number of international criminal conventions governing the law of armed conflicts and was particularly consolidated by the establishment of the International Military Tribunals after the Second World War and the creation of the United Nations Organization. The Tribunals were mostly effective in the development of the concept of the international criminal responsibility of individuals and the prosecution and punishment of perpetrators of war crimes in connection with the Second World War. The legal effect of the law of the Tribunals can particularly be examined in the provisions of a number of international criminal documents applicable to international crimes.[1]

The principle of the international criminal responsibility of individuals is rather controversial when there is a question of superior order or the plea of superior order for individuals who wish to evade prosecution and punishment. This is one of the reasons that the perpetrators of international crimes have normally been successful in avoiding the application of criminal sanctions. However, the International Criminal

[1] To note only a few: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Protocol I Additional to the Geneva Conventions of 12 August 1949, 12 December 1977, Protocol II Additional to the Geneva Conventions of 12 August 1949, 12 December 1977, the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, the International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, the International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973 and the United Nations Convention on the Rights of Child, 20 November 1989.

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Tribunals after the Second World War strongly rejected the plea of superior order as a reason to escape prosecution and punishment. Consequently, a perpetrator of international crime cannot free himself from the application of criminal sanctions by reasoning that he has acted due to a superior order or government command. It is for this reason that individuals bear criminal responsibility for violations of the principles of international criminal law. This has been proven in the practice of international criminal tribunals and courts.

The principle of the international criminal responsibility of individuals is originally based on the assumption that individuals are the most essential characters in the commission of international crimes and therefore liable to prosecution and punishment and this is regardless of their official position and includes heads of states or governments. Thus, in the system of international criminal law by the term 'international criminal responsibility of individuals' we mean all those who have, in one way or another, participated in the commission of certain acts constituting international crimes.

The principle of criminal responsibility also extends, in certain circumstances, to the concept of criminal responsibility of organizations and states. It is on the ground of this legal extension that the 1973 Convention on Apartheid recognizes the concept of criminal responsibility of Organizations involved in criminal activities constituting apartheid. Article 19 of the work of the International Law Commission on State Responsibility has also stated the important function of the concept of the international criminal responsibility of states, the legal interpretation of which includes also individuals' criminal responsibility under the system of international criminal law.[2]

It is however important to emphasize that the principle of the international criminal responsibility of individuals, organizations and states, because of a lack of juridical and political agreements, has not been

[2] The principle of criminal responsibility in international criminal law is more controversial when attributed to states in cases of the commission of international crimes. The notion of international criminal responsibility of states has, essentially, been developed since the early 1920's alongside the concept of criminal responsibility of individuals in international criminal law. The notion has, particularly, been extended by the work of the International Law Commission on the general subject of the international responsibility of states and Article 19 on 'the International crimes and international delicts' of the Draft Articles on International Responsibility of States relates to this matter. There is, however, not yet any particular consolidation of the concept of international criminal responsibility of states in international criminal law. The position has not therefore been juridically or politically settled.

strongly employed in the system of international criminal law. Individuals' criminal responsibility has recently been enforced by the ICTY, the ICTR and the Sierra Leone Court. The courts have *ad hoc* characters and have been created by the United Nations. The ICC is also trying to a limited extent to apply the concept of the international criminal responsibility of individuals. The Court is only successful upon the weak and it seems that the jurisdiction of the Court has no legal authority over the strong. Thus, the impunity is encouraged by the indirect policy of the Court. Other factors such as the reluctance of states to yield their legal power to the jurisdiction of the Court and the disinclination of political powers in each state of the world to accept the concept of criminality of their leaders have also been effective in the non-implementation and non-enforcement of the provisions of the system of international criminal law.[3] These are some of the basic reasons why a great number of international criminals have escaped from prosecution and punishment.[4]

[3] A report from the World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights points out the following factors for the lack of establishment of an international criminal court. These are: "(a) Continuing conflict between national interests; (b) The reluctance of states to yield any part of their sovereignty; (c) Chauvinism in regarding one's own national laws as superior; (d) The dangers inherent in the establishment of yet another international bureaucracy with possibly minimum benefits to the world community; (e) The difficulty in agreeing on the subject-matter jurisdiction of an international tribunal; (f) Concerns about the selection of an international judiciary; (g) The conflict of an international system of criminal justice with national jurisdictions; (h) The remoteness of an international criminal justice system from the peoples of the world; (i) The difficulty of agreeing on a general part; (j) The difficulty of agreeing on procedural rules; (k) The role which individual states should play in the international criminal justice process; (l) The problem of invoking (initiating) the international criminal justice process; (m) The cost to the international community; (n) The lack of enforcement power of an international criminal tribunal, and above all, (o) The concern that the International Criminal Court might dispense 'victor's justice.'" World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights, in Cooperation with the United Nations, A Satellite Conference to the 1993 World Human Rights Conference, Siracusa, December 2–5, 1992, 49 pp., p. 6.

[4] The commission of serious international crimes, especially the international crimes of genocide, crimes against humanity, war crimes and torture in the former Yugoslavia against the Muslim nationals by Serbians are the most effective reasons for the establishment of a temporary international criminal tribunal (ICTY) for the prosecution and punishment of the perpetrators of international crimes.

2. Islamic International Criminal Law

2.1. *The General Concept*

The concept of responsibility in Islamic law is, by itself, a separate institution. This is because the provisions of Islamic law cannot properly be enforced without the concept of the responsibility of its subjects. Thus, responsibility in Islamic law constitutes the core principle of the implementation and application of the principles of Islamic jurisdiction. Islamic law recognizes various types of responsibility for its subjects including moral, civil, contractual, brotherhood, family, neighbourhood, social, economic, taxation, universal and, criminal responsibility. The concept for all these types of responsibilities is essentially based on breaches of the Islamic code of behaviour.

Islamic law attributes the concept of criminal responsibility exclusively to individuals and therefore bases the concept of responsibility of the offenders on intentional or deliberate abuse of the freedom of choice in their social or international conduct.[5] It is on this theory that Islamic law does not agree with any other opinions regarding the concept of the criminal responsibility of individuals. For example, one of the chief differences between the Islamic concept of criminal responsibility and other criminal systems has been that Islamic jurisprudence totally contradicts the opinions of those earlier European writers who advocated that certain persons may habitually commit crimes and are therefore 'born criminals.' One clear example is Cesare Lombroso, the Italian criminologist who was the founder of the Italian School of positivist criminologist. According to him, the concept of criminality was inherited by persons.[6] Such an assumption is totally rejected by the Islamic jurisprudence of criminal law and according to it all crimes are, almost, essentially avoidable and not inevitable whether committed socially, generally or in the international conduct of individuals. In other words, the soul/spirit of all

[5] Moreover, 'The concept of personal responsibility is associated with the principle of equality and uniformity in punishment. It is a fundamental Islamic belief that every adult offender is responsible and should be punished for his crime. Moreover, penalties are to be inflicted equally on all, regardless of distinctive characteristics such as race, religion, colour sex, language, ethnic background or social class.' Lippman, Matthew, Sean McConville, and Mordechai Yerushalmi., Islamic Criminal Law and Procedure, p. 81.

[6] One of his writings was mainly published in many languages in Europe. Cesare Lombroso, *L'uomo delinquente* (1878).

individuals is free of sin and sin is the result of the actual conduct of a person in his/her temporary life and is not therefore substantive in the spirit of man.

It must, however, be added that Islamic law places great emphasis on the philosophical and spiritual idea that God is aware of the nature of man including his will, thoughts and desires and therefore God knows the fate of man. In spite of all this, it is still the person alone who decides his/her destiny, actions, will, good and evil deeds. The reason for this is that an individual generally has the capacity for thinking, choosing and understanding. God has given man the ability to be good and do good and whatever action a person may therefore take, it is his/her own desire and choice, although God is already omniscient of all actions during a lifespan; God is omnipotent.

The concept of criminal responsibility in Islamic law may be mitigated or even deleted under certain circumstances. This is when an action by a person is carried out without deliberation or unintentionally and the principle of the freedom of choice is lacking in those actions. This includes such conditions as duress, immaturity and mental disability including insanity. In these cases the concept of criminal responsibility cannot be attributed to an accused person who has unintentionally violated the law. However, in the cases of disability a guardian may be accountable before the Islamic criminal jurisdiction.

2.2. *International Aspects*

The concept of criminal responsibility of individuals in Islamic international criminal law is, more or less, similar to the concept of criminal responsibility in positive international criminal law. This is because Islamic international criminal law bases the concept of criminal responsibility of persons on the element of intention and consequently intention constitutes one of the essential elements for the imputation of the concept of criminal responsibility to the perpetrators of international crimes. Unintentional acts are not therefore classified under the concept of responsibility. For example, in time of war 'Muslim soldiers have to take care that they do not fire directly on neutrals, women and minors and other non-combatants, yet if any damage is done to them unintentionally, no responsibility is to be placed on the Muslim army.'[7] This

[7] Hamidullah, *The Muslim Conduct of State*, p. 194.

concept should not however release an Islamic state from the consequence of damages for the purpose of reparation.

In Islamic international criminal law only the perpetrators of international crimes bear the concept of international criminal responsibility and this responsibility is applicable to all persons who participate in the commission of international crimes. The concept applies regardless of their legal and political positions within the state system. Some of these international crimes involving the concept of the international criminal responsibility of individuals for violations of Islamic provisions of international criminal law include war crimes, crimes against humanity, mass killing or systematic destruction (genocide), aggression, drug offences and involvement in activities concerning obscene materials.[8]

One important point in the application of international criminal responsibility under Islamic international criminal law is that the violated legal provisions must be *de lege lata* and in all aspects of criminal jurisdiction the principle of legality must always be respected by all judges.[9] This is an important point in the protection of the criminally accused before the process of any criminal jurisdiction.

It must be emphasised that since all international crimes in Islamic international criminal law are treated under the principle of universality, because of their effects on mankind, all Muslim states are (according to the Islamic principles) authorized to prosecute and punish the perpetrators of international crimes which have come under their jurisdiction. On the grounds of political considerations, this theory may however not be respected by Islamic nations in practice. The consolidation of the theory is nevertheless a fact under Islamic jurisprudence of law. The theory is originally based on the assumption that all Muslim states are equal before divine law and that a serious violation of Islamic international criminal law can be regarded as a serious violation against all Muslims. In contrast to this, in the system of international criminal law, all international crimes cannot, at the present time, be treated under the principle of universality and there are only a few international crimes which are considered crimes against mankind and treated with the universality principle. These are such crimes as piracy, war crimes, genocide, crimes against humanity and narcotic offences. The theory of universality is, however, continuously extending in the international arena.

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[8] For an examination of these international crimes under the system of Islamic international criminal law see the relevant chapters.

[9] See part one, chapter one.

2.3. *High Ranking Officials*

Islamic international criminal law has, basically, promoted the concept of fear and appropriate justice in relations between superior or higher officials and others who come under their supervision. For example, the earlier practice of Islamic international criminal law provided full instruction concerning the decisions of commanders in the course of war. It requested that they should, in all situations, fulfil the humanitarian provisions of Islamic international criminal law and fear God regarding the treatment of those who accompany them. Some of these instructions can be found in the second source of Islamic law i.e. the *Sunnah* or exclusively in the traditions of the Prophet of Islam. Their provisions may adapt themselves to the circumstances of the present time governing the activities of superiors and the treatment of those who are at war with Muslims. According to one instruction by the Prophet, 'Fight ye all in the path of God and combat those who do not believe in God. Yet never commit breach of trust nor treachery nor mutilate anybody nor kill any minor or woman. This is the pact of God and the conduct of His Messenger for your guidance.'[10] This type of significant instruction by Muhammad the Prophet of Islam to commanders, superiors or high ranking officials of armed forces or government departments continued during his lifespan and can now be regarded as one of the chief reasons for the promotion of Islamic humanitarian regulations during armed conflicts.

The successors of the Prophet commanded the high ranking officials or superiors of armed forces to:

> 'remember … 'Souvenez-vous, disait-il à ses généraux, que vous êtes toujours sous les regards de Dieu et à la veille de la mort; que vous rendrez compte au dernier jour … Lorsque vous combattrez pour la gloire de Dieu, conduisez-vous comme des hommes, sans tourner le dos, mais que le sang des femmes, ou de celui des enfants et des vieillards, ne souille pas votre victoire. Ne détruisez pas les palmiers, ne brûlez pas les habitations, les champs de blé, n'abattez jamais les arbres fruitiers, et ne tuez le bétail que lorsque vous serez contraints de le manger. Quand vous accordez un traité ou une capitulation, ayez soin d'en remplir les clauses. A mesure que vous avancerez, vous rencontrerez des personnes religieuses qui vivent dans des monastères (moines) et qui servent Dieu dans la retraite: laissez-les seuls, ne les tuez point, et ne détruisez pas leurs monastères …[11]

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[10] Hamidullah, *The Muslim Conduct of State*, p. 299.

[11] 'Siyer. t. I, pp. 30–38;—Ockley, *La Conquête de la Syrie, de la Perse et de l'Egypte par les Sarrasins*, t.I, pp. 22–27, etc.; Gibbon, *The Decline and Fall of the Roman Empire* (1837), vol. II, p. 449.' Quoted in Rechid, 'L'Islam et le Droit des Gens', pp. 451–452.

The model of instructions for commanders must be read in conjunction with chapter on war crimes which lists the prohibited acts during an armed conflict and recognizes their violations as constituting war crimes and giving rise to the concept of international criminal responsibility of the perpetrators. This means that the activities of high ranking officials are limited during a war and must conform to the humanitarian principles of Islamic international criminal law. It also means that a person acting as pursuant to an order of a superior may not be permitted to be relieved of criminal responsibility for the violation of the law of armed conflicts.

In a comparative analogy, the provisions of Islamic international criminal law concerning the limitation of the scope of activities of superiors and the system of international criminal law are parallel and the scope of their applicability may, in many aspects, overlap each others' provisions. This is because both systems of international criminal law and their criminal justice put considerable weight on the recognition of the criminal responsibility of superiors, commanders and even the head of states. The Statue of the ICC has particularly provided several articles under the provisions of which the criminal responsibility of certain persons is strongly consolidated. In fact, the Court is permitted to put an end to the impunity of heads of states, commanders in chief and superiors. Generally speaking, international criminal justice and Islamic justice prohibit the shielding of perpetrators from criminal responsibility for crimes against humanity, war crimes and genocide. Some of the most significant provisions of both systems are the followings:

- Individuals have criminal responsibility for the violation of their provisions.
- Different forms of immunities which may be attached to the official capacity of a person whether empowered by national and international organizations, states and different forms of governments do not prevent the attribution of the concept of international criminal responsibility to that persons.
- The concept of individual criminal responsibility applies to all persons without any distinction stemming from their official capacity.
- The official capacity of persons as a head of government, a member of a government or other similar capacities do not exempt that person from international criminal responsibility.

- To take all reasonable measures for the prevention of criminally wrongful conducts is the duties of a superior. He/she may therefore bear criminal responsibility for the failure to comply with his/her duties.
- All persons acting or having the function of military commanders have the international criminal responsibility for the commission of certain crimes under both legal systems.
- The superiors have the international criminal responsibility for the acts of their subordinates because of their duties and liabilities to have effective control over their conducts.
- A failure to prevent subordinates from committing crimes calls upon the criminal responsibility of superiors.
- A superior, commander, head of state or government may be held criminally responsible for the *grave* violations of international humanitarian law of armed conflicts.

3. Islamic Components of Responsibility within the ICC

As we have demonstrated elsewhere, both concepts of law i.e., Islamic criminal jurisprudence and the system of international criminal jurisdiction recognizes the concept of the international criminal responsibility of individuals for the violations of their rules. Islamic law deals in fact with all the concepts of crimes found within the framework of the ICC. Thus, in Islamic criminal jurisdiction similar to the Statute of the ICC, responsibility is based on three key elements. These are legal, physical, and mental elements.

The legal element of criminal responsibility refers to the infringement of a legal norm of criminal law. This implies also an actual or potential injury to one of the subjects of law. The legal element also creates the concept of the attribution of criminal responsibility to a person. Thus, pure Islamic jurisdiction applies the concept of criminal responsibility to all actors without due regard to their ranks. The attribution of the concept of criminal responsibility may, therefore, similar to the criminal jurisdictions of the statutes (the ICTY, the ICTR, and the ICC) include the *accountability* of the individual, her/his *mens rea* and his/her responsibility for the consequence of crimes.

The physical element refers to the direct engagement of the person in a criminal conduct. The physical element does not only mean a direct physical involvement in the commission of the relevant crime,

but, it means also other types of engagements such as direct and indirect assistance, giving and providing instructions.

The mental element of the crime refers to the material elements which are actually the basis of criminal responsibility and liability for punishment. This means that the international crime is committed with the intent of the perpetrator and with his/her knowledge. These three principles are, generally, the basis of criminal responsibility in Islamic criminal jurisdiction and are also regarded as an integral part of the Statute of the ICC.[12]

3.1. *Age of Criminal Responsibility*

The attribution of the concept of criminal responsibility is indeed very complicated. The question is more problematic when the age of the accused person is involved and whether he/she bears criminal responsibility for the criminally wrongful conduct. Within the early Islamic criminal justice, the practice sometimes depended on the gravity and the cultural attitudes of the perpetrator and whether he/she had completed certain physical requirements. The practice has, however, been changed and due to the appropriate interpretation of Islamic rules as well as the entrance of the Islamic nations into international conventions on human rights law, the age of criminality has to be in conformity with international standard. Different theories for the defence of criminal responsibility of young age are weak and non-acceptable. A person may not be recognised criminally responsible when she/he has not attained the age of 18.[13] This age has also been strongly supported by the Islamic instruments of human rights law. The requirement of 18 years old is also supported by the ICC Statute. It reads clearly that "the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime." While, the words of the ICC are clear, the Statute is silent concerning the position of persons who are under eighteen years old.

3.2. *Intention*

We have noticed that Islamic international criminal law puts a heavy weight on the principle of intention or fault. But what the criteria are for this intention is rather complicated. The Islamic jurisdiction encour-

[12] Article 30.

[13] However see other opinions. Don Cripiani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (2009), pp. 79–82.

ages justice through good thoughts and good actions. However, this does not necessarily mean that bad thoughts are also officially prosecutable. In other words, good thoughts and actions refer *inter alia* to respect, non-violations, non-breach of moral, oral or legal contracts including physical and psychological. It is based on the spiritual and natural strength of a person not to violate the Divine law. Bad thoughts, as long they as are not, in one way or another, performed do not necessarily require punishment under Islamic law, but, decrease the morals and trust of a person in the spiritual rights of human beings. Thus, bad intention is not punishable, as long as, it is not jointed or shared with others. Nevertheless, this intention may, strongly, encourage other persons to carry out certain actions/functions which are not necessarily physical, but, solely psychological. Therefore, *mens rea* under the jurisdiction of Islamic international criminal law constitutes rather the specific psychological encouragement of a person in a given event. This psychological characteristic emerges from the knowledge and desires of the person. It means the person has the actual knowledge of the fact and possesses the necessary knowledge due to the provisions of criminal regulations.

Thus, in Islamic criminal jurisdiction fault "must be proven during the procedure of jurisdiction; as long as existing evidence does not prove that the defendant's conduct was criminal, his responsibility will be subject to debate. Thus, specific intent must be shown that leads to a definite result, or *dolus evenualis* (eventual intent), that also has the same result. Both positions denote deliberate intent."[14] Consequently, a casual relationship between the act committed and the resulting act has to exist.[15] Similarly, the system of international criminal prosecution puts considerable weight on the intention of the perpetrators. This intention can be physical or psychological. For instance, the ICTY concerning the intention of the perpetrators against Muslim population of the Herzegovina stated that many of those acts "constitute inhumane acts and are crimes against humanity committed during an armed conflict as part of a widespread or systematic attack on a civilian population and that the accused intended for discriminatory reasons to inflict severe damage to the victims' physical integrity and human dignity. The Trial Chamber further finds that the accused in some instances was himself the perpetrator and in others

[14] Malekian, 'The Homogeneity of International Criminal Court with Islamic Jurisprudence', p. 611.

[15] Ahmad Fathi Bahnassi, 'Criminal Responsibility in Islamic Law', in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System*, p. 172.

intentionally assisted directly and substantially in the common purpose of inflicting physical suffering upon them and thereby aided and abetted in the commission of the crimes."[16] Due to the above statement, within international criminal jurisdiction intent can be of two forms. One is psychological and the other physical intention both of which demand the criminal responsibility of the perpetrator. This means that without prejudice to the sources from which the Islamic criminal jurisdiction or the international criminal jurisdiction arise both systems rely heavily on the intention of the perpetrators and its effect on the commission of criminally wrongful conduct. Yet, if a person attempts to commit a crime but regrets doing so, his/her responsibility may be reduced. This however depends on the situation.

3.3. *Participations*

Islamic criminal justice like the international criminal justice system pays especial attention to several acts which may result in the prosecution and punishment of the perpetrators. The word participation is therefore used in the title of this section to identify certain acts which may, in one way or another, be helpful in the commission of a crime. In the frame of the word participation one may find the words assistance, aid, complicity, abet, help, attempt, encourage, joint, cooperation, united, solicit and, contribution. These are when:

- he/she assists in the preparation and performance of criminal conduct.
- he aids and abets in the performance of the crime.
- Without involvement in the commission of a crime, he/she carries out his intention through another person.
- he/she orders, in one way or another, a violation of the system of international criminal law.
- he/she attempts to commit a crime.
- he/she knows or has sufficient knowledge that the crime is going to be committed.
- he/she encourages or incites others to commit grave violations.
- he/she jointly commits a crime with another person.
- he/she solicits the commission of the crime
- he/she contributes in the preparation or commission of the crime.
- he/she cooperates in the commission of a crime.

[16] *Tadic* (IT-94–1-T), Judgement, 7 May 1997, para. 730.

3.4. *Mitigations*

Like many other criminal legal systems, Islamic criminal law encourages the elimination and prevention of criminal conducts. For this reason, it seems that there are different ways to mitigate or reduce the responsibility of a violator of Islamic international criminal law. However, all reasons for mitigation must strongly be proven and there should not be any state of doubt. Similar provisions have been found under the system of international criminal justice. These are when:

- the accused is juvenile.
- the accused succeeds in preventing the completion of the crime.
- he/she voluntarily give up the criminal purpose.
- he/she has committed the criminal conduct exclusively on the basis of self-defence.
- he/she was under immediate pressure to protect others from a grave criminal conduct.
- He/she attempted or committed the crime because of threats or coercion by other persons.
- Sometimes intoxication may be seen as the reason for the mitigation of criminal responsibility. This is just in the case when the intoxication is non-voluntarily and is not based on personal intentions.
- The accused suffers from total insanity or mental disorder.
- The involuntarily use of strong narcotic substances by the accused.
- The accused is in a state of unconsciousness. This means he/she is totally unaware of the surroundings.
- A mistake of law may be a basis for excluding criminal responsibility.

3.5. *Joint Criminal Enterprise*

Islamic international criminal law condemns any criminal intrigue against mankind. According to the main source of the law "whoever killed a human being should be looked upon as though he had killed all mankind."[17] Thus, it encourages peaceful relations between man and man and their cooperation to carry out an evil conduct is prohibited and is recognised as unjust. In this respect, it is stated that "guard yourselves against an affliction which may smite not only those who committed injustice among you in particular (but all of you)."[18] In general, Islamic

[17] The *Qur'ān*, 5:32.
[18] The *Qur'ān*, 8:25.

criminal justice applies punishment to all those who have, in complicity with one another, committed crimes against humanity, war crimes or genocide.[19]

Under the recent development of case laws within the practice of the ICTR and in particular the ICTY, the concept of joint criminal enterprise has come into recognition. The concept aims to criminalize all acts of participation in different manners and forms for the accomplishment of a criminally wrongful conduct. This means the contribution of two or more persons in carrying out a crime. The theory was originally developed from the consequence of the Second World War and the murdering of innocent Jews under group criminal actions. A joint criminal enterprise requires, therefore, a common design, plan or purpose to commit a crime. This means that all defendants are answerable for the charges before a court.

Similarly, the Islamic criminal justice calls upon the criminal accountability of all those who have participated in the commission of a common plan to kill, murder, torture, forcibly evict civilians belonging to a particular ethnic group by destroying their civil services such as religious houses. According to the ICTY "a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed."[20] Similarly, due to the provisions of Islamic justice and the Statute of the ICC, the killing of individuals on the basis of race, colour, culture, religion, language, ethnic origin, social and any other background are considered serious violations and the perpetrators of which have to be prosecuted and punished.

[19] Id.

[20] The *Tadic* case (IT-94–1-A), Judgement, 15 July 1999, para. 204.

CHAPTER THIRTY-THREE

PUNISHMENTS

1. The Philosophy of Punishment

Despite the fact that the civilisation of mankind has rapidly been developing from various points of view, the philosophy of punishment under the present national and international criminal systems is still similar to its primitive period. One cannot, however, deny the fact that the science of criminology has helped criminal justice and has tried to abolish or modify the old philosophy of punishments. Nevertheless, most states of the world still use punishment for different reasons and the application of severe punishments has not yet been abolished.[1]

The philosophy of punishment within Islamic international criminal law, like the system of international criminal law, has gone through many criticisms and evaluations by many writers. In particular, the severe punishments under the provisions of the former have been strongly criticised in the international arena and this has specifically been against the application of the death penalty, stoning and amputation. Regardless of the fact that the new interpretation of Islamic criminal justice under the Cairo Declaration on Human Rights in Islam prohibits all these old methods of punishment, their application is not rare. In particular, the capital punishment of hanging is common in Iran and is used as a political tool to stop radical as well as political movements.

2. Reasons for Punishments

The historical period under which Islamic law was presented was not united and required the temporary imposition of punishment. The Arab

[1] Even some Islamic states repeatedly use the capital punishment of hanging not just as a method of punishment of criminals, but also, as the most prevailing method of punishment of accused persons. This is especially notorious in the case of political prisoners, demonstrators against the government and young age juveniles under the military power of the Iranian regime.

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nations of the time were very barbarous and burying their daughters alive was a part of their culture. The rules of law would not, therefore, be so severe for the population, if they had been introduced without any punishment. However, a modern evaluation of the law reveals that punishment encouraged its own gradual modifications. In general, the followings are some of the reasons underlining the philosophy of punishment within Islamic criminal justice, some of which may also be found under international criminal justice too.

2.1. *Application of Human Rights*

An essential basic philosophy behind the law of punishment was to encourage human rights and human values and also decrease their violations. This is based on the fact that the pure Islamic law encourages equality and non-violation and this could not be achieved at the time of the revelation of Islamic law when human rights had no social values. In this respect, Islamic criminal justice for the purpose of the implementation of its norms, resorted to the severe punishment of criminals in order to decrease various violations of its norms and increase its respect. Similar to this philosophy, the system of international criminal justice for the maintenance of human rights' norms empowers states parties to international conventions to criminalize certain violations of human rights and apply appropriate punishments against the perpetrators of those crimes. These are such as apartheid, genocide and trafficking in person.

2.2. *Deterrent Philosophy*

Punishment had also a deterrent philosophy. This meant that it should avert other persons from committing criminal conducts. Therefore, the punishments were executed publicly and the idea was that the imposition of punishment could frighten others from committing the same act. The deterrent philosophy has also been entered into the structure of international criminal law. However, it is true that the deterrent policy is strongly objected to within both legal systems and the tendency of international legal community is to minimise punishments. Yet, the deterrent policy has proved to have scarcely any effect in the commission of criminal behaviours and states have consequently endeavoured to reach another strategy for the prevention of criminal behaviours. The policy of punishment applied under the ICC is certainly mixed with the deterrent philosophy; however, it is doubtful whether it will be successful in the long term.

2.3. *Retributive Character*

Punishment also has a retributive character. This means that it is vengeance for the wrongful behaviour which has been carried out by the condemned person. This philosophy is also entered into the legislation of international criminal law. The most usual terminologies used under this legal system are reprisal, retaliation and revenge. All these have also been used in the literature of Islamic law.[2] Yet, the system of international criminal law has permitted retaliation and reprisal as a method of punishment. States have been permitted under customary international criminal law to resort to reprisal, not only as a punishment of the wrongdoer, but also, a legal right of the victim.

2.4. *Protective Validity*

Another reason has been the protective validity of punishment. This means that the philosophy behind punishment has been to protect others from unlawful or illegal acts. The philosophy of protective validity has been employed by both legal systems and has been interpreted as one of the most essential reasons for the development of penal law. The protective validity of the punishment is normally stated within the provisions of international criminal conventions and this policy can also be understood from the provisions of the ICC. The Court is sanctioned to protect the international, legal and political community with its judgments and permission to apply certain punishments. The protective validity refers also to the high validity and respect of the *de lege lata* principle.

2.5. *Preventive Validity*

The systems of international criminal law and Islamic international criminal law have, more or less, struggled to prevent certain internationally criminal wrongful conduct.

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[2] Islamic law has however encouraged the principle of equality in order to minimize violations and revenge between individuals. It say that "O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grants any reasonable demand, and compensates him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty." The *Qur'ān* 2:178. Accordingly, "for you there is security of life in the law of equality, O man of understanding, so that you may guard yourselves against evil." The *Qur'ān*, 2:179 Although the above provisions permit revenge, its intention is to reduce it by redressing the aggravated party the same right, but, through compensation and the understanding of the ill nature of the criminal behaviour.

The philosophy of punishment under Islamic criminal justice may, therefore, be of a preventive nature. This means that punishment is supposed to prevent the further commission of the criminal act. This is also found within international criminal justice. In fact, most international criminal conventions aim to prevent the occurrences of certain acts.

2.6. *Restoration*

The philosophy of punishment has also been to restore to the rightful owner the movable and immovable materials that have been stolen. This is also called restitutive character of punishment. The philosophy has also been used under the international criminal justice system. Both systems with the implementation of punishment, aim to emphasise that stolen properties do not create the rights to the goods. The idea is here to minimize violations of the rights of other persons by stealing their goods. The term "restoration" also emphasizes the re-establishment of the rights of others through payment or a certain amount of money. The theory of restoration is also exercised by the ICTY and the ICTR. The function of both international tribunals has been to restore peace for the victims in order to achieve to their inalienable rights before the jurisdiction of the tribunals.

2.7. *Elimination of Evil*

Punishment may also have the purpose of the elimination of the commission of certain criminal behaviour. This purpose aims to criminalise certain conducts entirely that have been legitimated in the earlier practice of nations or states, such as slavery. The philosophy of elimination has been entered into both legal systems and has succeeded in the elimination or abolition of certain acts, although the contemporary practice speaks for the contrary. For instance, the elimination of slavery has been one of the dreams of both international legal systems, but, slavery under trafficking constitutes one of the permanent international offences. Furthermore, the outbreak of many wars since the end of the Nuremberg Tribunals demonstrate that elimination as one of the purposes of punishment has not been achieved and violations of the system of international criminal justice have repeatedly been carried out by many individuals under the legal personality of states.

2.8. *Rehabilitation*

Punishment may have a rehabilitatory purpose. According to this purpose the punishment intends to rehabilitate the offender and bring him/her back into normal social relations. Thus, due to this view the purpose is not permanently to identify the offender as a criminal, but, to treat him/her in order to understand social or international relations between human beings. The theory of the rehabilitation of criminals within prisons has not, however, been that successful and has sometimes increased the boundaries of criminality between criminals. However, certain new methods have been worked out to decrease the borderline of criminality and increase the awareness and knowledge of the offender in combination with the human rights law. The rehabilitation method is however not that strong within some Islamic nations and has even lost its practical intentions such as in Iran, Iraq and Afghanistan.

2.9. *Reformation of Norms*

The reformation of norms means to put an end to a special behaviour that has been practised for different reasons, such as slavery, institutions similar to slavery and trafficking in women and children. Even though the purpose of elimination and reformation may overlap one another field, the intention of the former is to combat special action and the aim of the latter is to increase the value of elimination. In any event, reformation and elimination have, in the final stage of implementation a similar policy of modification of certain norms. The theory of reformation can be found within both legal systems. Examples are slavery, inferior treatments of women, different sexual abuse of females and the use of children in armed forces.

2.10. *Redressive Purpose*

Another philosophy of punishment has been redressive purpose. According to this purpose, the punishment aims to teach individuals to lay the blame on their own behaviour. The intention is to create self-control and for the individual to recognise the intention of the law. This is one of the legal philosophies of Islamic law which recognises the individual's responsibility for the understanding of the truth and a right or wrong action. It helps the process of achieving human rights respect. The redressive purpose of punishment has also been to increase the moral capacity of individuals in order to realise the consequence of criminally wrongful

behaviour. The redressive mechanism may be imposed for the purpose of understanding the criminal nature of a wrongful conduct in a social context and its effect on the victim. The Statute of the ICC, the ICTY and the ICTR do not speak about their redressive purpose but the readings of different documents as well as the judgments of the courts contain this fact.

2.11. *Apology*

Both systems of criminal justice also base the reason of punishment on apology. This is the admission of guilt. It means to obtain the response to a crime by way of propitiation or appease. The position paves the way for conciliation. The intention is to calm down the criminal and society for the heinous behaviour which has occurred. It is, therefore, a pacific settlement of the crime. Accordingly, the perpetrators of crimes may understand the consequences of their criminal behaviour and voluntarily change their criminal policy and intentions. Both systems of international criminal law struggle for this end.

2.12. *Compensation*

Punishment may also have the purpose of reparation, compensation, reimbursement, return and reward. This goal traditionally constitutes one of the chief intentions within both legal systems. Besides, the implementation of punishment is still considered one of the most significant functions of jurisdiction over criminals and the restoring the wrongful behaviour. Compensation as punishment may also have a restitutive character.

The nature of compensation may vary from case to case, but, its substance and intent is the same. The request for compensation has, not only, been claimed in proceedings of criminal justice, but, has also been asked for by one state from another where damages have been caused to nationals or the interests of the requesting state.

2.13. *Amnesty*

The philosophy of punishment may also be to grant amnesty. This is when criminals admit guilt and express their repentance. Both systems of criminal justice have used this alternative. In fact, under special conditions and circumstances, to give mercy is one of the chief purposes of Islamic justice for the understanding of guilt and to go forward for

positive achievements. Here, amnesty cannot be given if the victims of the crimes have not given their consent. For instance, amnesty could not be granted to the perpetrators of apartheid in South Africa without their confession of guilt and the consent of the victims. Similarly, a confession of guilt may, in certain circumstances, be a strong reason for amnesty, forgiveness or mercy.

2.14. *Recreation of Civil Rights*

The philosophy of punishment in Islamic criminal justice is not just to implement certain penalties on the guilty party, but is also, to recreate the civil rights of the condemned person. The idea of the recreation of civil rights is based on the fact that a criminally wrongful conduct may be a reason for the criminal to lose his/her civil rights. Consequently, a person who has been punished for his/her criminal act is free of any charge and restrictions thereafter. The system of international criminal justice has also, more or less, similar rules regarding the person who has been punished for his/her internationally criminal wrongful act. The recreation of civil rights implies also the enforcement of the principles of human rights regarding the accused and condemned person.

2.15. *Methods of Punishment*

Historically, there are different methods of punishments under Islamic international criminal law which are not equivalent to the new methods of contemporary punishment. These methods, because of the development of the law and its adaptation to modern philosophy of punishment, have been abolished and are not any longer valid under Islamic national and international criminal law. They face the problem of interpretation and application and create controversy in the practical aspects of the law. These punishments *inter alia* include crucifixion, amputation of parts of bodies, capital or death penalty, stoning and torture.

Punishments in Islamic criminal justice were not all together the implementation of cruel and harsh penalties, it could also include, concerning certain crimes, the search for mercy, forgiveness and pardon by the offender. This could decrease the borderline of the penalty and increase the practical recognition of the guilt. The perpetrator of the crime could, through acts of reconciliation, enhance his/her understanding of the effect of the crime on the victims. This method is still employed by many Islamic nations for the purpose of reducing the effect of criminal action and increasing sympathetic goals. Similar methods are also used

under the system of international criminal law when the border of criminality is impossible investigate. In particular, the method is employed in the case of governments' or states' crime according to which most legal and political authorities are involved in the commission of criminal behaviour. Clear examples are the National Commission on the Disappearances of persons, Argentina, 1983; the United Nations Truth Commission in El Salvador, 1992/3; the Historical Clarification Commission, Guatemala, 1994; the Truth and Reconciliation Commission, Chile, 1994; the Truth and Reconciliation Commission, Sierra Leone, 1999; the National Commission on Political Imprisonment and Torture, Chile, 2004/5; the Truth and Reconciliation Commission, Republic of Korea, South Korea, 2005 and the Commission for Reception, Truth and Reconciliation in East Timor, 2002. The most well-known of these types of commissions is the Truth and Reconciliation Commission concerning the apartheid system. The Commission had a politico-legal character and was a type of court assembled in South Africa. Its function was to hear the witnesses, victims and the perpetrators of apartheid. The criminals provided testimonies and requested amnesty from civil and criminal investigations.

Both legal systems have also used the method of imprisonment. This means that a condemned person may be charged with imprisonment depending on the gravity of the crime. The terms of imprisonment may also depend on the financial ability of the condemned person to recover damages. In some cases, the exile of criminals could be decided in Islamic criminal justice. But this concept has been completely abolished in practice and by the Arab Charter on Human Rights. Individuals have the right to their homelands. In the case of international criminal law, criminals have been exiled or banished for the reason of the gravity of their crimes without necessarily being trialled in a criminal court. For instance, Napoleon Bonaparte who was the Emperor and the military leader of France, was banished by Six Coalition to the island of Elba. After his escape from Elba and the Battle of Waterloo, he was exiled by the United Kingdom of Britain in Saint Helena.[3] Nonetheless, the principles of human rights do not any longer permit a criminal justice system to expel a criminal from his/her homeland.

[3] These were occurred between 1813 and 1915.

2.16. *Abolition of Severe Penalties*

Due to the growing development of international criminal law, there is a strong tendency in Islamic justice and international criminal justice to abolish severe penalties. While the process of abolition has been very slow and controversial, many nations of the world have succeeded in abolishing certain punishments such as torture and capital punishment. However, one cannot deny that both punishments are still applied by many Islamic nations/states. Even, the Arab Charter on Human Rights permits its implementation. According to it "sentence of death may be imposed only for the most serious crimes in accordance with the laws in force at the time of the commission of the crime and pursuant to a final judgment rendered by a competent court. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence."[4] The application of death penalty may even be permitted against persons who are under eighteen years old. Accordingly, "sentence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime."[5] Capital punishment is also imposed on women, but, under special conditions.[6]

Similarly, on the one hand, torture has been abolished and recognised as a violation of the principles of international human rights law, but, on the other hand, it has been inflicted by many nations including the permanent members of the United Nations such as China, Russia, the United Kingdom and the United States. In particular, the recent examples are the torture of Irish prisoners by the British, the torture of Iraqi prisoners in the Abu Ghraib prison by the United States and the complicity of British commanders and the torture of Guantanimo Bay Prisoners by the authorities of the United States. Water torture has been one of the most notorious methods of torture that has been reported in the recent years.

Regarding the amputation of parts of the body, many of the provisions of international human rights law and even the content of the Cairo Declaration on Human Rights in Islam prohibit such punishments. Furthermore, since Islamic States have ratified most international conventions concerning the human rights law and the Statue of the ICC, they are,

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[4] Article 6.

[5] Article 7 (1).

[6] Due to Article 7 (2) "The death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases, the best interests of the infant shall be the primary consideration."

due to the principle of *pacta sunt servanda*, bound by the provisions of the conventions. The respect of this principle constitutes one of the most significant obligations of the Islamic states and its legal merit should not be violated. Equally, Islamic nations which may prosecute their own citizens or citizens of other nations for the violations of the Statute of the ICC are under international obligations to respect international provisions and not to violate their legal framework. This means *inter alia* that *a*) the application of torture is not permitted, *b*) capital punishment or the death penalty should not be allowed, *c*) the amputation of parts of the body is against the basic structure of the human legal legacy, *d*) Islamic criminal justice wherever it is necessary should adapt itself to the international rules, regulations, principles and norms including conventional and customary one. All these imply the fact that the integration of international methods of punishment should be the leading line of criminal justice wherever international criminal law is going to be applied.

CHAPTER THIRTY-FOUR

CONCLUSION

The principles of the Islamic public international law and Islamic international criminal law have originally been developed from the consequence of the historical evolution of international relations between Islamic and non-Islamic nations. They present some of the most central values of the Islamic system and its function in the development of certain rules of conducts. They can be found within the rules of international criminal law and the Statute of the International Criminal Court (ICC) simultaneously.

Although the principles of the Islamic law of nations offer a considerable number of provisions governing the protection of individual's values, the Islamic original theory has, seriously been violated during the civilisation of mankind. From a philosophical perspective, Islamic law had a democratic intention, but, this purpose was buried from the beginning by its allies and opponents. The law has been misinterpreted and been used for personal interests by different regimes of Islamic nations. This is also true in the case of the contemporary Muslim nations of the world who are monopolized by religious authorities for different purposes. Some present very fanatical ideas and others directly violate the norms of the international human rights law that are for the benefit of human beings. In other words, the original idea of Islam did not permit aggression, inequalities and injustices, but, the practices of many Islamic governments, like the practices of many Western governments, do.

The whole idea of Islam is to treat humanity as an end in itself and bring the population of the world into a universal human rights' system, but, this does not necessarily mean that Islamic law has to be practised by the population of the world as such an idea is, by itself, a violation of the principles of the Islamic human rights law. This is because the law speaks of equalities of all religions, nations, cultures, races, languages, traditions, ideologies and philosophies without any due regard to ethnic origin. The original inspiration of Islamic law is to seek to release all human beings from all concepts of limitations, restrictions and superficial differences and ignorance. Therefore, to say that Islam offers itself concurrently to be the first and the best is almost incorrect.

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The general interpretation of Islamic sources means progressively to put an end to all political, legal, cultural and religious conflicts by all means including Islam itself, but, at the same time, to achieve and give a high level of value to humankind, human morality, a natural understanding of man, the philosophy of existence, universal recognition of values and the principles of international human rights law. These ought to be implemented on the basis of equality, humanity, justice and peace without due regard to political, juridical, economic, and nationality factors. This indicates and demands the real value of the principles of the international human rights law and their effect for the safeguarding of universal humanity. *All these values must be applied on equal footings and if this is done than all concepts of religions will automatically disappear*. It means the religions will reach their ultimate function. This will be the end of religious conceptualization.

The above interpretation may be strongly criticized or defended by religious and political mentalities. Nevertheless, it is true and a fact that various nations of the world have a physical and moral tendency to move towards justice and peace which is not dictated by various theories of monopolization and holiness. The aim is to attain the natural existence of man's will to create a universal human rights law behaviour for the protection and safeguarding of every single human being and nature which is free from all ties of religious segregations and differentiations. The law has to integrate human beings under universal human rights laws, but not by the force of religious or political modalities, but through universal consent based on human understanding and reciprocity. As Kant clarifies:

> Such a contract, whose intention is to preclude forever all further enlightenment of the human race, is absolutely null and void, even if it should be ratified by the supreme power, by parliaments, and by the most solemn peace treaties. One age cannot bind itself, and thus conspire, to place a succeeding one in a condition whereby it would be impossible for the later age to expand its knowledge (particularly where it is so very important), to rid itself of errors, and generally to increase its enlightenment. That would be a crime against human nature, whose essential destiny lies precisely in such progress; subsequent generations are thus completely justified in dismissing such agreements as unauthorized and criminal.[1]

Therefore, the basic philosophy of law is evolution and no authority has a justifiable right to enact a permanent law for the future relations of mankind.

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[1] Immanuel Kant, *An Answer to the Question: What is Enlightenment?* (1784) in www.english.upenn.edu/ mgamer/Etexts/kant.html.

APPENDICES

The Cairo Declaration on Human Rights in Islam, 1990[1]

The Member States of the Organization of the Islamic Conference,

Reaffirming the civilizing and historical role of the Islamic Ummah which God made the best nation that has given mankind a universal and well-balanced civilization in which harmony is established between this life and the hereafter and knowledge is combined with faith; and the role that this Ummah should play to guide a humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilization.

Wishing to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah

Convinced that mankind which has reached an advanced stage in materialistic science is still, and shall remain, in dire need of faith to support its civilization and of a self-motivating force to guard its rights;

Believing that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God and were sent through the last of His Prophets to complete the preceding divine messages thereby making their observance an act of worship and their neglect or violation an abominable sin, and accordingly every person is individually responsible—and the Ummah collectively responsible—for their safeguard.

Proceeding from the above-mentioned principles,

Declare the following:

[1] Adopted and Issued at the Nineteenth Islamic Conference of Foreign Ministers in Cairo on 5 August 1990.

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Article 1

(a) All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.

(b) All 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.

Article 2

(a) Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and it is prohibited to take away life except for a Shari'ah-prescribed reason.

(b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind.

(c) The preservation of human life throughout the term of time willed by God is a duty prescribed by Shari'ah.

(d) Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Shari'ah-prescribed reason.

Article 3

(a) In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children. The wounded and the sick shall have the right to medical treatment; and prisoners of war shall have the right to be fed, sheltered and clothed. It is prohibited to mutilate dead bodies. It is a duty to exchange prisoners of war and to arrange visits or reunions of the families separated by the circumstances of war.

(b) It is prohibited to fell trees, to damage crops or livestock, and to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means.

Article 4
Every human being is entitled to inviolability and the protection of his good name and honour during his life and after his death. The state and society shall protect his remains and burial place.

Article 5
(a) The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right.
(b) Society and the State shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare.

Article 6
(a) Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.
(b) The husband is responsible for the support and welfare of the family.

Article 7
(a) As of the moment of birth, every child has rights due from the parents, society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the fetus and the mother must be protected and accorded special care.
(b) Parents and those in such like capacity have the right to choose the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the Shari'ah.
(c) Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the Shari'ah.

Article 8
Every human being has the right to enjoy his legal capacity in terms of both obligation and commitment. Should this capacity be lost or impaired, he shall be represented by his guardian.

Article 9

(a) The quest for knowledge is an obligation, and the provision of education is a duty for society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee educational diversity in the interest of society so as to enable man to be acquainted with the religion of Islam and the facts of the Universe for the benefit of mankind.

(b) Every human being has the right to receive both religious and worldly education from the various institutions of education and guidance, including the family, the school, the university, the media, etc., and in such an integrated and balanced manner as to develop his personality, strengthen his faith in God and promote his respect for and defence of both rights and obligations.

Article 10

Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.

Article 11

(a) Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High.

(b) Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all States and peoples to support the struggle of colonized peoples for the liquidation of all forms of colonialism and occupation, and all States and peoples have the right to preserve their independent identity and exercise control over their wealth and natural resources.

Article 12

Every man shall have the right, within the framework of Shari'ah, to free movement and to select his place of residence whether inside or outside his country and, if persecuted, is entitled to seek asylum in another country. The country of refuge shall ensure his protection until he reaches safety, unless asylum is motivated by an act which Shari'ah regards as a crime.

Article 13
Work is a right guaranteed by the State and Society for each person able to work. Everyone shall be free to choose the work that suits him best and which serves his interests and those of society. The employee shall have the right to safety and security as well as to all other social guarantees. He may neither be assigned work beyond his capacity nor be subjected to compulsion or exploited or harmed in any way. He shall be entitled—without any discrimination between males and females—to fair wages for his work without delay, as well as to the holidays, allowances and promotions which he deserves. For his part, he shall be required to be dedicated and meticulous in his work. Should workers and employers disagree on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.

Article 14
Everyone shall have the right to legitimate gains without monopolization, deceit or harm to oneself or to others. Usury (riba) is absolutely prohibited.

Article 15
(a) Everyone shall have the right to own property acquired in a legitimate way, and shall be entitled to the rights of ownership, without prejudice to oneself, others or to society in general. Expropriation is not permissible except for the requirements of public interest and upon payment of immediate and fair compensation
(b) Confiscation and seizure of property is prohibited except for a necessity dictated by law.

Article 16
Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical production and the right to protect the moral and material interests stemming there from, provided that such production is not contrary to the principles of Shari'ah.

Article 17
(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.

(b) Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources.
(c) The State shall ensure the right of the individual to a decent living which will enable him to meet all his requirements and those of his dependents, including food, clothing, housing, education, medical care and all other basic needs.

Article 18

(a) Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property.
(b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference.
(c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted.

Article 19

(a) All individuals are equal before the law, without distinction between the ruler and the ruled.
(b) The right to resort to justice is guaranteed to everyone.
(c) Liability is in essence personal.
(d) There shall be no crime or punishment except as provided for in the Shari'ah.
(e) A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.

Article 20

It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.

Article 21
Taking hostages under any form or for any purpose is expressly forbidden.

Article 22
(a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.
(b) Everyone shall have the 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.
(c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.
(d) It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.

Article 23
(a) Authority is a trust; and abuse or malicious exploitation thereof is absolutely prohibited, so that fundamental human rights may be guaranteed.
(b) Everyone shall have the right to participate, directly or indirectly in the administration of his country's public affairs. He shall also have the right to assume public office in accordance with the provisions of Shari'ah.

Article 24
All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.

Article 25
The Islamic Shari'ah is the only source of reference for the explanation or clarification to any of the articles of this Declaration.

Cairo, 14 Muharram 1411H
5 August 1990

Arab Charter on Human Rights, 2004[2]

Based on the faith of the Arab nation in the dignity of the human person whom God has exalted ever since the beginning of creation and in the fact that the Arab homeland is the cradle of religions and civilizations whose lofty human values affirm the human right to a decent life based on freedom, justice and equality,

In furtherance of the eternal principles of fraternity, equality and tolerance among human beings consecrated by the noble Islamic religion and the other divinely-revealed religions,

Being proud of the humanitarian values and principles that the Arab nation has established throughout its long history, which have played a major role in spreading knowledge between East and West, so making the region a point of reference for the whole world and a destination for seekers of knowledge and wisdom,

Believing in the unity of the Arab nation, which struggles for its freedom and defends the right of nations to self-determination, to the preservation of their wealth and to development; believing in the sovereignty of the law and its contribution to the protection of universal and interrelated human rights and convinced that the human person's enjoyment of freedom, justice and equality of opportunity is a fundamental measure of the value of any society,

Rejecting all forms of racism and Zionism, which constitute a violation of human rights and a threat to international peace and security, recognizing the close link that exists between human rights and international peace and security, reaffirming the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and having regard to the Cairo Declaration on Human Rights in Islam,

The States parties to the Charter have agreed as follows:

Article 1

The present Charter seeks, within the context of the national identity of the Arab States and their sense of belonging to a common civilization, to achieve the following aims:

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[2] League of Arab States, Arab Charter on Human Rights, May 22, 2004, came into force March 15, 2008.

1. To place human rights at the centre of the key national concerns of Arab States, making them lofty and fundamental ideals that shape the will of the individual in Arab States and enable him to improve his life in accordance with noble human values.
2. To teach the human person in the Arab States pride in his identity, loyalty to his country, attachment to his land, history and common interests and to instill in him a culture of human brotherhood, tolerance and openness towards others, in accordance with universal principles and values and with those proclaimed in international human rights instruments.
3. To prepare the new generations in Arab States for a free and responsible life in a civil society that is characterized by solidarity, founded on a balance between awareness of rights and respect for obligations, and governed by the values of equality, tolerance and moderation.
4. To entrench the principle that all human rights are universal, indivisible, interdependent and interrelated.

Article 2

1. All peoples have the right of self-determination and to control over their natural wealth and resources, and the right to freely choose their political system and to freely pursue their economic, social and cultural development.
2. All peoples have the right to national sovereignty and territorial integrity.
3. All forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples; all such practices must be condemned and efforts must be deployed for their elimination.
4. All peoples have the right to resist foreign occupation.

Article 3

1. Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.
2. The States parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the

rights and freedoms enshrined in the present Charter in order to ensure protection against all forms of discrimination based on any of the grounds mentioned in the preceding paragraph.

3. Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.

Article 4

1. In exceptional situations of emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States parties to the present Charter may take measures derogating from their obligations under the present Charter, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.
2. In exceptional situations of emergency, no derogation shall be made from the following articles: article 5, article 8, article 9, article 10, article 13, article 14, paragraph 6, article 15, article 18, article 19, article 20, article 22, article 27, article 28, article 29 and article 30. In addition, the judicial guarantees required for the protection of the aforementioned rights may not be suspended.
3. Any State party to the present Charter availing itself of the right of derogation shall immediately inform the other States parties, through the intermediary of the Secretary-General of the League of Arab States, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Every human being has the inherent right to life.
2. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 6
Sentence of death may be imposed only for the most serious crimes in accordance with the laws in force at the time of commission of the crime and pursuant to a final judgment rendered by a competent court. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.

Article 7
1. Sentence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime.
2. The death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases, the best interests of the infant shall be the primary consideration.

Article 8
1. No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment.
2. Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.

Article 9
No one shall be subjected to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian and professional rules are followed and medical procedures are observed to ensure his personal safety pursuant to the relevant domestic laws in force in each State party. Trafficking in human organs is prohibited in all circumstances.

Article 10
1. All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances.

2. Forced labor, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited.

Article 11
All persons are equal before the law and have the right to enjoy its protection without discrimination.

Article 12
All persons are equal before the courts and tribunals. The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats. They shall also guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels.

Article 13
1. Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights.
2. Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights.

Article 14
1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.
2. No one shall be deprived of-his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.
3. Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members.
4. Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.

5. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule.
6. Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.
7. Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation.

Article 15
No crime and no penalty can be established without a prior provision of the law. In all circumstances, the law most favourable to the defendant shall be applied.

Article 16
Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgment rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees:

1. The right to be informed promptly, in detail and in a language which he understands, of the charges against him.
2. The right to have adequate time and facilities for the preparation of his defence and to be allowed to communicate with his family.
3. The right to be tried in his presence before an ordinary court and to defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially.
4. The right to the free assistance of a lawyer who will defend him if he cannot defend himself or if the interests of justice so require, and the right to the free assistance of an interpreter if he cannot understand or does not speak the language used in court.
5. The right to examine or have his lawyer examine the prosecution witnesses and to on defence according to the conditions applied to the prosecution witnesses.
6. The right not to be compelled to testify against himself or to confess guilt.

7. The right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal.
8. The right to respect for his security of person and his privacy in all circumstances.

Article 17
Each State party shall ensure in particular to any child at risk or any delinquent charged with an offence the right to a special legal system for minors in all stages of investigation, trial and enforcement of sentence, as well as to special treatment that takes account of his age, protects his dignity, facilitates his rehabilitation and reintegration and enables him to play a constructive role in society.

Article 18
No one who is shown by a court to be unable to pay a debt arising from a contractual obligation shall be imprisoned.

Article 19
1. No one may be tried twice for the same offence. Anyone against whom such proceedings are brought shall have the right to challenge their legality and to demand his release.
2. Anyone whose innocence is established by a final judgment shall be entitled to compensation for the damage suffered.

Article 20
1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. Persons in pre-trial detention shall be separated from convicted persons and shall be treated in a manner consistent with their status as un-convicted persons.
3. The aim of the penitentiary system shall be to reform prisoners and effect their social rehabilitation.

Article 21

1. No one shall be subjected to arbitrary or unlawful interference with regard to his privacy, family, home or correspondence, nor to unlawful attacks on his honour or his reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 22
Everyone shall have the right to recognition as a person before the law.

Article 23
Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 24
Every citizen has the right:

1. To freely pursue a political activity.
2. To take part in the conduct of public affairs, directly or through freely chosen representatives.
3. To stand for election or choose his representatives in free and impartial elections, in conditions of equality among all citizens that guarantee the free expression of his will.
4. To the opportunity to gain access, on an equal footing with others, to public office in his country in accordance with the principle of equality of opportunity.
5. To freely form and join associations with others.
6. To freedom of association and peaceful assembly.
7. No restrictions may be placed on the exercise of these rights 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 health or morals or the protection of the rights and freedoms of others.

Article 25
Persons belonging to minorities shall not be denied the right to enjoy their own culture, to use their own language and to practice their own religion. The exercise of these rights shall be governed by law.

Article 26

1. Everyone lawfully within the territory of a State party shall, within that territory, have the right to freedom of movement and to freely choose his residence in any part of that territory in conformity with the laws in force.

2. No State party may expel a person who does not hold its nationality but is lawfully in its territory, other than in pursuance of a decision reached in accordance with law and after that person has been allowed to submit a petition to the competent authority, unless compelling reasons of national security preclude it. Collective expulsion is prohibited under all circumstances.

Article 27

1. No one may be arbitrarily or unlawfully prevented from leaving any country, including his own, nor prohibited from residing, or compelled to reside, in any part of that country.
2. No one may be exiled from his country or prohibited from returning thereto.

Article 28

Everyone has the right to seek political asylum in another country in order to escape persecution. This right may not be invoked by persons facing prosecution for an offence under ordinary law. Political refugees may not be extradited.

Article 29

1. Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality.
2. States parties shall take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother's nationality, having due regard, in all cases, to the best interests of the child.
3. Non one shall be denied the right to acquire another nationality, having due regard for the domestic legal procedures in his country.

Article 30

1. Everyone has the right to freedom of thought, conscience and religion and no restrictions may be imposed on the exercise of such freedoms except as provided for by law.
2. The freedom to manifest one's religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others.

3. Parents or guardians have the freedom to provide for the religious and moral education of their children.

Article 31
Everyone has a guaranteed right to own private property, and shall not under any circumstances be arbitrarily or unlawfully divested of all or any part of his property.

Article 32
1. The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.
2. Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.

Article 33
1. The family is the natural and fundamental group unit of society; it is based on marriage between a man and a woman. Men and women of marrying age have the right to marry and to found a family according to the rules and conditions of marriage. No marriage can take place without the full and free consent of both parties. The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution.
2. The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children. They shall also ensure the necessary protection and care for mothers, children, older persons and persons with special needs and shall provide adolescents and young persons with the best opportunities for physical and mental development.
3. The States parties shall take all necessary legislative, administrative and judicial measures to guarantee the protection, survival, development and well-being of the child in an atmosphere of freedom and dignity and shall ensure, in all cases, that the child's

best interests are the basic criterion for all measures taken in his regard, whether the child is at risk of delinquency or is a juvenile offender.

4. The States parties shall take all the necessary measures to guarantee, particularly to young persons, the right to pursue a sporting activity.

Article 34

1. The right to work is a natural right of every citizen. The State shall endeavour to provide, to the extent possible, a job for the largest number of those willing to work, while ensuring production, the freedom to choose one's work and equality of opportunity without discrimination of any kind on grounds of race, colour, sex, religion, language, political opinion, membership in a union, national origin, social origin, disability or any other situation.
2. Every worker has the right to the enjoyment of just and favourable conditions of work which ensure appropriate remuneration to meet his essential needs and those of his family and regulate working hours, rest and holidays with pay, as well as the rules for the preservation of occupational health and safety and the protection of women, children and disabled persons in the place of work.
3. The States parties recognize the right of the child to be protected from economic exploitation and from being forced to perform any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development. To this end, and having regard to the relevant provisions of other international instruments, States parties shall in particular:
   (a) Define a minimum age for admission to employment;
   (b) Establish appropriate regulation of working hours and conditions;
   (c) Establish appropriate penalties or other sanctions to ensure the effective endorsement of these provisions.
4. There shall be no discrimination between men and women in their enjoyment of the right to effectively benefit from training, employment and job protection and the right to receive equal remuneration for equal work.
5. Each State party shall ensure to workers who migrate to its territory the requisite protection in accordance with the laws in force.

Article 35

1. Every individual has the right to freely form trade unions or to join trade unions and to freely pursue trade union activity for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights and freedoms except such as are prescribed by the laws in force and that are necessary for the maintenance of national security, public safety or order or for the protection of public health or morals or the rights and freedoms of others.
3. Every State party to the present Charter guarantees the right to strike within the limits laid down by the laws in force.

Article 36

The States parties shall ensure the right of every citizen to social security, including social insurance.

Article 37

The right to development is a fundamental human right and all States are required to establish the development policies and to take the measures needed to guarantee this right. They have a duty to give effect to the values of solidarity and cooperation among them and at the international level with a view to eradicating poverty and achieving economic, social, cultural and political development. By virtue of this right, every citizen has the right to participate in the realization of development and to enjoy the benefits and fruits thereof.

Article 38

Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights.

Article 39

1. The States parties recognize the right of every member of society to the enjoyment of the highest attainable standard of physical and mental health and the right of the citizen to free basic health-care services and to have access to medical facilities without discrimination of any kind.

2. The measures taken by States parties shall include the following:
   (a) Development of basic health-care services and the guaranteeing of free and easy access to the centres that provide these services, regardless of geographical location or economic status.
   (b) efforts to control disease by means of prevention and cure in order to reduce the morality rate.
   (c) promotion of health awareness and health education.
   (d) suppression of traditional practices which are harmful to the health of the individual.
   (e) provision of the basic nutrition and safe drinking water for all.
   (f) Combating environmental pollution and providing proper sanitation systems;
   (g) Combating drugs, psychotropic substances, smoking and substances that are damaging to health.

Article 40

1. The States parties undertake to ensure to persons with mental or physical disabilities a decent life that guarantees their dignity, and to enhance their self-reliance and facilitate their active participation in society.
2. The States parties shall provide social services free of charge for all persons with disabilities, shall provide the material support needed by those persons, their families or the families caring for them, and shall also do whatever is needed to avoid placing those persons in institutions. They shall in all cases take account of the best interests of the disabled person.
3. The States parties shall take all necessary measures to curtail the incidence of disabilities by all possible means, including preventive health programmes, awareness raising and education.
4. The States parties shall provide full educational services suited to persons with disabilities, taking into account the importance of integrating these persons in the educational system and the importance of vocational training and apprenticeship and the creation of suitable job opportunities in the public or private sectors.
5. The States parties shall provide all health services appropriate for persons with disabilities, including the rehabilitation of these persons with a view to integrating them into society.
6. The States parties shall enable persons with disabilities to make use of all public and private services.

Article 41

1. The eradication of illiteracy is a binding obligation upon the State and everyone has the right to education.
2. The States parties shall guarantee their citizens free education at least throughout the primary and basic levels. All forms and levels of primary education shall be compulsory and accessible to all without discrimination of any kind.
3. The States parties shall take appropriate measures in all domains to ensure partnership between men and women with a view to achieving national development goals.
4. The States parties shall guarantee to provide education directed to the full development of the human person and to strengthening respect for human rights and fundamental freedoms.
5. The States parties shall endeavour to incorporate the principles of human rights and fundamental freedoms into formal and informal education curricula and educational and training programmes.
6. The States parties shall guarantee the establishment of the mechanisms necessary to provide ongoing education for every citizen and shall develop national plans for adult education.

Article 42

1. Every person has the right to take part in cultural life and to enjoy the benefits of scientific progress and its application.
2. The States parties undertake to respect the freedom of scientific research and creative activity and to ensure the protection of moral and material interests resulting from scientific, literary and artistic production.
3. The state parties shall work together and enhance cooperation among them at all levels, with the full participation of intellectuals and inventors and their organizations, in order to develop and implement recreational, cultural, artistic and scientific programs.

Article 43

Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set force in the international and regional human rights instruments which the states parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities.

Article 44
The states parties undertake to adopt, in conformity with their constitutional procedures and with the provisions of the present Charter, whatever legislative or non-legislative measures that may be necessary to give effect to the rights set forth herein.

Article 45
1. Pursuant to this Charter, an "Arab Human Rights Committee", hereinafter referred to as "the Committee" shall be established. This Committee shall consist of seven members who shall be elected by secret ballot by the states parties to this Charter.
2. The Committee shall consist of nationals of the states parties to the present Charter, who must be highly experienced and competent in the Committee's field of work. The members of the Committee shall serve in their personal capacity and shall be fully independent and impartial.
3. The Committee shall include among its members not more than one national of a State party; such member may be re-elected only once. Due regard shall be given to the rotation principle.
4. The members of the Committee shall be elected for a four-year term, although the mandate of three of the members elected during the first election shall be for two years and shall be renewed by lot.
5. Six months prior to the date of the election, the Secretary-General of the League of Arab States shall invite the States parties to submit their nominations within the following three months. He shall transmit the list of candidates to the States parties two months prior to the date the election. The candidates who obtain the largest number of votes cast shall be elected to membership of the Committee. If, because two or more candidates have an equal number of votes, the number of candidates with the largest number of votes exceeds the number required, a second ballot will be held between the persons with equal numbers of votes. If the votes are again equal, the member or members shall be selected by lottery. The first election for membership of the Committee shall be held at least six months after the Charter enters into force.
6. The Secretary-General shall invite the States parties to a meeting at the headquarters the League of Arab States in order to elect the member of the Committee. The presence of the majority of the States parties shall constitute a quorum. If there is no quorum, the secretary-General shall call another meeting at which

at least two thirds of the States parties must be present. If there is still no quorum, the Secretary-General shall call a third meeting, which will be held regardless of the number of States parties present.

7. The Secretary-General shall convene the first meeting of the Committee, during the course of which the Committee shall elect its Chairman from among its members, for a two-year n which may be renewed only once and for an identical period. The Committee shall establish its own rules of procedure and methods of work and shall determine how often it shall et. The Committee shall hold its meetings at the headquarters of the League of Arab States. ~ay also meet in any other State party to the present Charter at that party's invitation.

Article 46

1. The Secretary-General shall declare a seat vacant after being notified by the Chairman of a member's:
   (a) Death;
   (b) Resignation; or
   (c) If, in the unanimous, opinion of the other members, a member of the Committee has ceased to perform his functions without offering an acceptable justification or for any reason other than a temporary absence.
2. If a member's seat is declared vacant pursuant to the provisions of paragraph 1 and the term of office of the member to be replaced does not expire within six months from the date on which the vacancy was declared, the Secretary-General of the League of Arab States shall refer the matter to the States parties to the present Charter, which may, within two months, submit nominations, pursuant to article 45, in order to fill the vacant seat.
3. The Secretary-General of the League of Arab States shall draw up an alphabetical list of all the duly nominated candidates, which he shall transmit to the States parties to the present Charter. The elections to fill the vacant seat shall be held in accordance with the relevant provisions.
4. Any member of the Committee elected to fill a seat declared vacant in accordance with the provisions of paragraph 1 shall remain a member of the Committee until the expiry of the remainder of the term of the member whose seat was declared vacant pursuant to the provisions of that paragraph.

5. The Secretary-General of the League of Arab States shall make provision within the budget of the League of Arab States for all the necessary financial and human resources and facilities that the Committee needs to discharge its functions effectively. The Committee's experts shall be afforded the same treatment with respect to remuneration and reimbursement of expenses as experts of the secretariat of the League of Arab States.

Article 47

The States parties undertake to ensure that members of the Committee shall enjoy the immunities necessary for their protection against any form of harassment or moral or material pressure or prosecution on account of the positions they take or statements they make while carrying out their functions as members of the Committee.

Article 48

1. The States parties undertake to submit reports to the Secretary-General of the League of Arab States on the measures they have taken to give effect to the rights and freedoms recognized in this Charter and on the progress made towards the enjoyment thereof. The Secretary-General shall transmit these reports to the Committee for its consideration.
2. Each State party shall submit an initial report to the Committee within one year from the date on which the Charter enters into force and a periodic report every three years thereafter. The Committee may request the States parties to supply it with additional information relating to the implementation of the Charter.
3. The Committee shall consider the reports submitted by the States parties under paragraph 2 of this article in the presence of the representative of the State party whose report is being considered.
4. The Committee shall discuss the report, comment thereon and make the necessary recommendations in accordance with the aims of the Charter.
5. The Committee shall submit an annual report containing its comments and recommendations to the Council of the League, through the intermediary of the Secretary-General.
6. The Committee's reports, concluding observations and recommendations shall be public documents which the Committee shall disseminate widely.

Article 49

1. The Secretary-General of the League of Arab States shall submit the present Charter, once it has been approved by the Council of the League, to the States members for signature, ratification or accession.
2. The present Charter shall enter into effect two months from the date on which the seventh instrument of ratification is deposited with the secretariat of the League of Arab States.
3. After its entry into force, the present Charter shall become effective for each State two months after the State in question has deposited its instrument of ratification or accession with the secretariat.
4. The Secretary-General shall notify the States members of the deposit of each instrument of ratification or accession.

Article 50

Any State party may submit written proposals, though the Secretary-General, for the amendment of the present Charter. After these amendments have been circulated among the States members, the Secretary-General shall invite the States parties to consider the proposed amendments before submitting them to the Council of the League for adoption.

Article 51

The amendments shall take effect, with regard to the States parties that have approved them, once they have been approved by two thirds of the States parties.

Article 52

Any State party may propose additional optional protocols to the present Charter and they shall be adopted in accordance with the procedures used for the adoption of amendments to the Charter.

Article 53

1. Any State party, when signing this Charter, depositing the instruments of ratification or acceding hereto, may make a reservation to any article of the Charter, provided that such reservation does not conflict with the aims and fundamental purposes of the Charter.
2. Any State party that has made a reservation pursuant to paragraph 1 of this article may withdraw it at any time by addressing a notification to the Secretary-General of the League of Arab States.

BIBLIOGRAPHY[1]

Abal-Haqq, Irshad, 'Islamic Law: An Overview of Its Origin and Elements', 1 *Journal of Islamic Law and Culture* (1996), 1–60.

———, 'Legal Injuctions of the Qur'an', 2 *Journal of Islamic Law* (1997), 53–92.

———, 'The Legal Definition of Islam: An Examination of Judicial, Legislative, Mainstream and Nontraditional Interpretations', 1 *Journal of Islamic Law* (1996), 105–185.

———, 'Islamic Law: An Overview of Its Origin and Elements', 7 *Journal of Islamic Law and Culture* (2002), 27–110.

Abdel Haleem, M. (ed.), *Criminal Justice in Islam: Judicial Procedure in the Shari'Ah* (2000).

Abdelkader, Deina, *Social Justice in Islam* (2000).

Abd-el-Malek al-Saleh, Osman, *The Right of the Individual to Personal Security in Islam*, in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (1982), pp. 55–90.

Abd-elrahim, Gaafer Mohamed, *The Concept of Punishment in Islamic Law in Relation to Contemporary Legal Trends* (1987).

Abdul Hakim, Khalifa, *Fundamental Human Rights* (1952).

———, 'The Natural Law in the Moslem Tradition', 5 *Natural Law Institute Proceeedings* (1951).

Abdul-Rauf, Feisal, *Islam: A Sacred Law, What Every Muslim Should Know about the Shari'ah* (2000).

Abdur, Rahim, *The Principles of Muhammadan Jurisprudence* (1911).

Abou El Fadl, Khaled, 'Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries', 1 (2) *Islamic Law and Society* (1994), 141–187.

———, 'Political Crime in Islamic Jurisprudence and Western Legal History', 4 (1) *UC Davis J. of Int'l Law and Pol.* (1998).

———, *Rebellion and Violence in Islamic Law* (2001).

Abul-Fazl, M., *Sayings of the Prophet Muhammad* (1980).

Abu-Lughod, Janet, *Before European Hegemony: the World System A.D. 1250–1350* (1989).

Abu-Sahlieh, Sami A. Aldeeb, 'Les Droits de l'homme et l'Islam', 89 *Revue general de droit international public* (1985), 625–716.

Aghnides, Nicolas P., *Mohammedan Theories of Finance with an Introduction to Mohammedan Law and a Bibliography* (1916).

Ahmad, Muhammed Khalafalla, 'Islamic Law, Civilization and Human Rights', 12 *Egyptian Review of International Law* (1956).

[1] This is a selected bibliography. Mention here neither includes nor precludes the appearance of the title in the content of the book.

Ahmed, Akbar S., *Islam Today: A Short Introduction to the Muslim World* (1999).
Al ʿAlwani, Taha Jabir, *The Ethics of Disagreement in Islam* (1993).
———, 'Usul al Fiqh al-Islami: Source Methodology in Islamic Al ʿAlwani, Taha Jabir, "The Crisis in Fiqh and the Methodology of Ijtihad," ' 8 (2) *The American Journal of Islamic Social Science* (1991), 317–337.
Aʾla Mawdudi, Abul, *Human Rights in Islam* (1990).
Al-Amir, Muhammad, *Kitab al-Iklil Sharh Muktasar Khalil* (A.H. 1224).
Alarefi, Abdullah Saad, 'Overview of Islamic Law', 9 (4) *International Criminal Law Review* (2009), pp. 707–731.
Al-ʿAwwa, Muhammad Salim, 'The Basis of Islamic Penal Legislation', in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (1982), pp. 127–147.
Al-Azami, M. Mustafa, *On Schacht's Origins of Muhammadan Jurisprudence* (1996).
Al-Ghunaimi, Mohammad Talaat, *The Muslim Conception of International Law and Western Approach* (1968).
Ali, Muhammad, *A brief Sketch of the Life of the Prophet of Islam* (1928).
———, *Islam or the Natural Religion of Man: A Brief Sketch of Its Principles as given in the Holy Quran* (1912).
Ali, S.A., *The Ethics of Islam* (1893).
———, *The Spirit of Islam* (1896 and 1981).
Ali, Shaheen Sardar, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal before Man?* (2002).
Allahdin, Abdullah, *Extracts from the Holy Quran and Sayings of the Holy Prophet Mohammad*, 7th ed. (1933).
Anderson, J.N.D., *Decision by Majority in Islamic Law* (1973).
———, *Islamic Law in the Modern World* (1959).
———, *Law Reform in the Muslim World* (1976).
An-Naʿim, Abdullahi, 'A modern Approach to Human Rights in Islam: Foundations and Implications for Africa', in Claude Welch and Ronald Meltzer (eds.), *Human Rights and Development in Africa* (1984).
———, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (1990).
Anwarullah, *The Criminal Law of Islam* (1997).
Arabi, Abdel Rahman, *L'Islam et la guerre à l'Epoque du Prophète Mahomet* (1954).
Armanazi, Najib, *Les Principes Islamiques et les Rapports Internationaux en Temps de Paix et de Guerre* (1929).
Arnold, Sir T.W., *The Preaching of Islam* (1896 and 1913).
Attia, Gamal El Din, 'The Right to a Fair Trial in Islamic Countries', in David Weissbrodt and Rüdiger Wolfrum (eds.), *The Right to a Fair Trial* (1997), pp. 343–371.
Bachrach, Michael, 'The Permanent International Criminal Court: An Examination of the Statutory Debate', 5 (139) *ILSA Journal of International and Comparative Law* (1998).
———, 'The Protection and Rights of Victims under International Criminal Law', 34 (1) *The International Lawyer* (2000).

Badar, Mohamed Elewa, 'Islamic Criminal Justice in the 21st Century', 9 (4) *International Criminal Law Review* (2009), pp. 591–593.
Baderin, Mashood A., *International Human Rights Law and Islamic Law* (2005).
———, *International Law and Islamic Law* (2008).
Badr, G.M., 'A Survey of Islamic International Law', 76 *Proceedings of the American Society of International Law* (1982).
Bantekas, Ilias, 'The Disunity of Islamic Criminal Law and the Modern Role of Ijtihād', 9 (4) *International Criminal Law Review* (2009), pp. 651–665.
Bantekas, Ilias, and Susan Nash, *International Criminal Law*, 3rd ed. (2007)
Bar, Ludwig von, *Das Internationale Private- und Strafrecht* (1862).
Bassiouni, M. Cherif (ed.), *The Islamic Criminal Justice System* (1982).
———, *International Criminal Law*, 1st ed. 3 vols. (1986).
———, *International Criminal Law*, 2nd ed. 3 vols. (1999).
———, *International Criminal Law*, 3rd ed. 3 vols. (2008).
Bassiouni, M. Cherif, and Daniel Derby, 'Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant Instruments', 7 (523) *Hofstra Law Review* (1981).
Bassiouni, M. Cherif, and Edward M. Wise, *Aut Dedere, Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995).
Bassiouni, M. Cherif, and P. Manikas, *The Law of The International Criminal Tribunal for The Former Yugoslavia* (1996).
Bassiouni, M. Cherif, and Ved P. Nanda (eds.), *A Treatise on International Criminal Law: Crimes and Punishment*, 2 vols. (1973).
Bassiouni, M. Cherif, *Protection of Collective Victims in International law, New York Law School Human Rights Annual* (1985).
———, 'A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality, Including the Establishment of an International Criminal Court', 15 (353) *Nova Law Review* (1991).
———, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, 2nd rev. ed. (1987).
———, 'Combating Impunity for International Crimes', 71 (409) *University of Colorado Law Review* (2000).
———, *Crimes against Humanity in International Criminal Law* (1999).
———, *Introduction to International Criminal Law* (2003).
———, 'Principles of Legality in International and Comparative Criminal Law', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. I, pp. 73–105 (2008).
———, 'The Discipline of International Criminal Law', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. I, pp. 3–40 (2008).
———, *The Statute of the International Criminal Court: A Documentary History* (1998).
———, *The Statute of the International Criminal Court and Related Instruments: Legislative History, 1994–2000* (2001).
———, 'Protection of Diplomats under Islamic Law', 74 *American Journal of International Law* (1980), pp. 609–633.

———, 'Islam: Concept, Law and Word Habeas Corpus', 2 *Rutgers Camden Law Journal* (1970).
———, 'Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System', in Bassiouni, *The Islamic Criminal Justice System*, pp. 3–53.
———, *Studies in Early Hadith Literature* (1978).
Bell, Richard, *Introduction to the Qur'an* (1953).
Boas, Gideon, and William A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (2003).
Bockle, F., and J. Pohier (eds.), *The Death Penalty and Torture* (1979).
Boot, Machteld, *Genocide, Crimes against Humanity, War Crimes: V. 12: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002).
Bosworth-Smith, R., *Mohammed and Mohammedanism* (1889).
Bottigliero, Ilaria, *Redress for Victims of Crimes under International Law* (2004).
Bourdon, William, *La Cour Pénal Internationale* (2000).
Breiner, Bert, 'Shari'ah and Religious Pluralism,' in Tarek Mitri (ed.), *Religion, Law and Society* (1995).
Brevli, Mahmud, *Islam and the Contemporary Faiths* (1965).
Brownlie, Ian, *International Law and the Use of Force by States* (1963).
———, *Principles of Public International Law*, 5th ed. (1998).
———, *Principles of Public International Law*, 6th ed. (2003)
Bryce, J., *Studies in History and Jurisprudence*, vol. 2 (1901).
Bukhush Khuda, S., *Contribution to the History of Islamic Civilization* (1930).
Busuttil, J., 'Humanitarian Law in Islam', 30 *The Military Law and Law of War Review* (1991).
Calder, Norman, 'Al-Nawawi's Typology of Muftis and its Significance for a General Theory of Islamic Law,' 3 (2) *Islamic Law and Society* (1996), 137–164.
Cheragh Ali, *A Critical Exposition of the Popular Jihad* (1988).
Coulson, N.J., *Conflict and Tensions in Islamic Jurisprudence* (1969).
———, *Islamic Surveys: A History of Islamic Law* (1964).
———, *Succession in the Muslim Family* (1971).
———, 'The State and the Individual in Islamic Law', 6 *International and Comparative Law Quarterly* (1957).
———, 'Muslim Custom and Case-Law,' *Die Welt des Islam* 6 (1959), pp. 13–24.
———, *A History of Islamic Law* (1964).
Courbage, Youssef, and Philippe Fargues, *Christians and Jews under Islam* (1997).
Diwan, Paras, *Muslim Law in Modern India* (1977).
Doi, ʿAbdur Rahman I., *Shari'ah: the Islamic Law* (1984).
Donnelly, J., 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', 76 *American Political Science Review* (1982).
Dutton, Yasin, 'Review of John Burton, The Sources of Islamic Law: Islamic Theories of Abrogation', in Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta' and Madinian 'Amal* (1999).
El-Awa, Mohammad, *Punishment in Islamic Law* (1982).

Ferencz B. Benjamin, 'An International Criminal Code and Court: Why They Stand and Where They're Going', 30 (375) *Columbia Journal of Transnational Law* (1992).
———, *An International Criminal Court: A Step Toward World Peace* (1975).
———, *Defining International Aggression: The Search for World Peace* (1975).
———, *Enforcing International Law: A Way to World Peace* (1983).
———, *Global Survival: New Legal Foundations for Global Survival* (1995).
———, *Less Than Slaves: Jewish Forced Labor and the Quest for Compensation* (2002).
———, *World Security for the 21st Century: A Colloquium Between American and Soviet Legal Experts* (1991).
Firestone, Reuven, *Jihad: The Origin of Holy War in Islam* (1999).
Forte, David F., *Studies in Islamic Law: Classical and Contemporary Applications* (2000).
Freamon, Bernard K., 'Slavery, freedom, and the doctrine of consensus in Islamic jurisprudence', 11 *Harvard Human Rights Journal* (1998), pp. 1–64.
Friedlander, Robert A., 'The Foundations of International Criminal Law: A Present-Day Inquiry', 15 (13) *Case Western Reserve Journal of International Law* (1983).
Fyzee, A.A.A., *Outlines of Muhammadan Law* (1955).
Gerber, Haim, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (1994).
Gibb, H.A.R., *Mohammedanism: An Historical Survey* (1949).
Glaser, Stefan, *Droit International Pénal Conventionnel*, 2 vols. (1970).
———, *Droit international pénal: son origine, son état actuel et son développement, l'indice pénale* (1968).
———, *Infraction internationale* (1957).
———, *Introduction à l'étude du droit international pénal* (1954).
Glueck, Sheldon, *The Nuremberg Trial and Aggressive War* (1946).
Goldstone, Richard J., *For Humanity: Reflections of a War Crimes Investigator* (2000).
Green, Leslie C., *The Contemporary Law of Armed Conflict*, 2nd ed. (2000).
Guillaume, Alfred, *The Summa Philosophiae of Al-Shahrastani, Kitab Nihayatu 'L-Iqdam fi 'Ilmi 'L-Kalam*, edited with a translation from manuscripts in the Libraries of Oxford, Paris and Berlin (1934).
———, *The Traditions of Islam: An Introduction to the Study of the Hadith Literature* (1924).
Hallaq, Wael B., *A History of Islamic Legal Theories* (1997).
———, 'Model Shurut Works and the Dialectic of Doctrine and Practice', 2 (2) *Islamic Law and Society* (1995), 109–134.
———, *Authority, Continuity and Change in Islamic Law* (2001).
Hamidullah, Muhammad, *Le Prophète de l'Islam*, 2 vols. (1959).
———, *The Muslim Conduct of State* (1945).
———, *The Battlefields of the Prophet Muhammad* (1953).
———, *The First Written Constitution in the World*, 2nd. ed. (1968).
Hamilton, Charles, *The Hedaya, or A Commentary on the Mussulman Laws* (1791).

Hammad, Ahmad Zaki, *Islamic Law: Understanding Juristic Differences* (1992).
Hasan, Ahmad, *Analogical Reasoning in Islamic Jurisprudence—A Study of the Juridical Principle of Qiyas* (1986).
Hazan, Pierre, *Justice in a Time of War, the True Story behind the International Criminal Tribunal for the Former Yugoslavia*, translated by James Thomas Snyder (2004).
Hegler, Alfred, *Prinzipien des internationalen Strafrechts* (1906).
Henzelin, Marc, *Le principle de l'universalité en droit pénal international* (2000).
Higgins, Rosalyn, *Problems and Process: International Law and How We Use It* (1994).
Hourani, Georges F., 'The Basis of Authority of Consensus in Sunnite Islam', 21 *Studia Islamica* (1964), pp. 13–60.
Hughes, Thomas Patrick, *Dictionary of Islam* (1899).
Huxley, Andrew, *Religion, Law and Tradition: Comparative Studies in Religious Law* (2002).
Ingadottir, T. (ed.), *The International Criminal Court: Recommendations on Policy and Practice: Financing, Victims, Judges, and Immunities* (2003).
International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal in Nuremberg (1947).
Iqbal Siddiqi, Muhammad, *The Penal Law of Islam* (1979).
Iqbal, Afzal, *Diplomacy in Islam, An Essay on the Art of Negotiation as Conceived and Developed by the Prophet of Islam* (1965).
Jafary Langaroody, Muhammad Jafar, *Islamic Law* (in Persian, 1978).
Janis, Mark W. (ed.), *International Courts for the Twenty-First Century* (1992).
Jarrett, H.S., *History of the Caliphs* (1881).
Jescheck, Hans-Heinrich, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (1952).
Johansen, Baber, *Contingency in Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (1998).
Johnson, Bo, *Islamisk rätt: Studier i den islamiska rätts- och samhällsordningen* (1975).
Jones, Adam (ed.), *Genocide, War Crimes and the West History and Complicity* (2004).
Jones, John R.W.D., *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2nd ed. (2000).
Jori, Mario (ed.), *Legal Positivism* (1992).
Jullundri, L.A.A.K. (transl.), *The Glorious Holy Quran*, (Pakistan, 1962).
Kairys, David (ed.), *The Politics of Law: A Progressive Critique* (1982).
Kamali, Mohammed Hashim, *Freedom of Expression in Islam*, rev. ed. (1997).
———, *Principles of Islamic Jurisprudence* (1991).
———, 'Siyasah Shar'iyah or the Policies of Islamic Government', 6 (1) *The American Journal of Islamic Social Sciences* (1989), pp. 59–80.
Kassim, Husain, *Sarakhsi: Concepts of Treaties and the Doctrine of Juristic Preference in Islamic Jurisprudence* (1995).
Kelman, Mark, *A Guide to Critical Legal Studies* (1987).
Kelsen, Hans, *Peace Through Law* (1973).
———, *Pure Theory of Law*, translated by Maz Knight (1967).

———, *What is Justice? Justice, Law and Politics in the Mirror of Science* (1957).
———, 'Will the Judgement of the Nürenberg Trial Constitute a Precedent in International Law?', 1 (153) *Int'l L.Q* (1947).
Kerr, Rachel R., *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (2004).
Khadduri, Majid (ed.), 'Islam and the Modern Law of Nations', 50 *American Journal of International Law* (1956), pp. 358–372.
Khadduri, Majid (transl.) *The Islamic Law of Nations: Shaybani's Siyar*, translated with an introduction, notes and appendices (1966).
Khadduri, Majid (ed.), *Law in the Middle East* (1955).
Khadduri, Majid, 'The Islamic Theory of International Relations and Its Contemporary Relevance', in J. Harris Proctor (ed.), *Islam and International Relations* (1965), pp. 24 ff.
———, *War and Peace in the Law of Islam* (1955).
———, *Major Middle Eastern Problems in International Law* (1972).
Kirsch, Phillipe, Alain Pellet and Bert Swart (eds.), *International Criminal Law for an International Criminal Court* (2001).
Kittichaisaree, Kriangsak, *International Criminal Law* (2005).
Knoops, Geert-Jan G.J., *Defenses in Contemporary International Criminal Law* (2001).
Kohler, Josef, *Internationales Strafrecht* (1917).
Kup, P., *A History of Sierra Leone 1400–1787* (1961).
Larsen, Laurence Burgorgue (ed.), *La répression internationale du génocide rwandais* (2003).
Lattanzi, Flavia and Valeria Santori (eds.), *Essays on The Rome Statute of The International Criminal Court* (2004).
Lippman, Matthew, 'Genocide', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. I (2008), pp. 403–435.
———, 'Towards an International Criminal Court', 3 (1) *San Diego Justice Journal* (1995).
———, Sean McConville, and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction* (1988).
Lombois, Claude, *Droit Pénal International* (1971).
———, *Droit Pénal International* (1979).
Lombroso, Cesare, *L'uomo delinquente* (1878)
MacCormack, G., 'Scandinavian Realism', 11 *Juridical Review* (1970), pp. 33–35.
Macdonald, D.B., *Development of Muslim Theology, Jurisprudence, and Constitutional Theory* (1903).
MacGoldrick, Dominic (ed.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004).
MacIntyre, Alasdair, *After Virtue: A Study in Moral Theory* (1982).
Malcolm, Helen, and Rodney Dixon (eds.), *International Criminal Law Reports* (2000).
Malekian, Farhad, *International Criminal Responsibility of States: A Study on the Evolution of State Responsibility with Particular Emphasis on the Concept of Crime and Criminal Responsibility* (1985).

———, *The System of International Law: Formation, Treaties, Responsibility* (1987).
———, *International Criminal Law: The Legal and Critical Analysis of International Crimes*, 2 vols. (1991).
———, *Condemning the Use of Force in the Gulf Crisis* (1st ed. 1992, 2nd ed. 1994).
———, *The Monopolization of International Criminal Law in the United Nations, A Jurisprudential Approach* (1st ed. 1993, 2nd ed. 1995).
———, *The Concept of Islamic International Criminal Law, A Comparative Study* (1994).
———, 'International Criminal Responsibility', in M. Cherif Bassiouni (ed.), *International Criminal Law: Crimes*, 2nd ed. (1999).
———, 'Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal', 38 (3) *Cornell International Law Journal* (2005).
———, 'Prohibition Governing Child Soldiers Constituting an Integral Part of Jus Cogens and Obligatio Erga Omnes', paper presented at the XVII World Congress of the International Association of Youth and Family Judges and Magistrates, Belfast, Northern Ireland, 27 August–2 September 2006.
———, 'Armenian Genocide and the Questions of Responsibility of the Turkish Government', paper presented at the House of Commons Conference on the Armenia Genocide, 2007.
———, *Documents on the Principles of International Human Rights* (2007).
———, *Mutilating the Philosophy of Justice in the Time of Armed Conflicts, Contemporary Journal of International Criminal Law* (2007).
———, *The Functions of International Criminal Law and the Problem of Positivism and Neutralism Philosophy, Contemporary Journal of International Criminal Law* (2007).
———, 'The Homogeneity of International Criminal Court with Islamic Jurisprudence', 9 (4) *International Criminal Law Review* (2009), pp. 595–562
———, 'The Miserable Wedding of Naturalism into Positivism', 2 *ID EST Journal* (2009).
———, 'The Laws Governing Crimes against Women Constituting Obligatio Erga Omnes', in David Wingeate Pike (ed.), *Crimes Against Women* (2010).
———, 'The Principle of Good Faith within the Sources of International Criminal Law', 131 (4) *Retfærd* (2010), pp. 41–65.
Mallat, Chibli, *Introduction to Middle Eastern Law* (2009).
Margoliousth, D.S., *The Early Development of Muhammadanism* (1914).
Maulana, Muhammad Ali, *Back to the Qur'an, Back to Muhammad, Rise! Advance!* (1926).
———, *Muhammad the Prophet* (1924).
———, *The Call of Islam*, 2nd ed. (1926).
Maulvi, Muhammad Ali, *Islam the Religion of Humanity* (1926).
Mawdudi, Sayyid Abul A'la, *The Islamic Law and Constitution*, 7th ed. (1980).
Mawlawi, Muhammad Ali, *The Religion of Islam* (1936).
May, Larry, *Aggresion and Crimes Against Peace* (2008).
Mégret, Frédéric, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice', 38 (3) *Cornell International Law Journal* (2005), pp. 725–751.

Mohammedi, A., *The Principles of Deduction in Islamic Law*, (in Persian, 2535).
Moinuddin, Hasan, *The Charter of the Islamic Conference and Legal Framework of Economic Co-Operation among its Member States: A Study of the Charter, the General Agreement for Economic, Technical and Commercial Co-operation and the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the OIC* (1987).
Morland, Samuel, *History of the Evangelical Churches of the Valleys of Piedmont* (1658).
Mueller, G.O.W., and E.M. Wise (eds.), *International Criminal Law*, 2 vols. (1965).
Mueller, Gerhard O.W., 'International Criminal Law: Civitas Maxima', 15 *Case Western Reserve Journal of International Law* (1983).
Munson, Henry, *Islam and Revolution in the Middle East* (1988).
Murphy, Ray, and Mohamed M. El Zeidy, 'Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War', 9 (4) *International Criminal Law Review* (2009), pp. 623–649.
Mushkat, R., 'Is War Ever Justifiable? A Comparative Survey', 9 *Loyola of Los Angeles International and Comparative Law Journal* (1987).
Nawaz, M.K., 'The Doctrine of 'Jihad' in Islamic Legal Theory and Practice', 8 *The Indian Year Book of International Affairs* (1959), pp. 32 ff.
Nordlöf, Kerstin, *Straffprocessuella Tvångsmedel: Gripande, Anhållande och Häktning* (1987).
———, *Straffrättens Processer för Unga Lagöverträdare* (1991).
———, 'The Legal Philosophy of Protecting a Suspect Child', paper presented at the XVII World Congress of the International Association of Youth and Family Judges and Magistrates, Belfast, Northern Ireland, 27 August–2 September 2006.
———, *Unga Lagöverträdare i Social, Straff- och Processrätt* (2005).
Osiel, Mark J., 'Modes of Participation in Mass Atrocity', 38 (3) *Cornell International Law Journal* (2005), pp. 791–822.
———, 'Obeying Orders: Atrocity, Military Discipline and the Law of War', 86 (939) *California Law Review* (1998).
———, 'Why Prosecute? Critics of Punishment for Mass Atrocity', 22 (118) *Human Rights Quarterly* (2000).
Pella, Vespasian V., 'Fonctions Pacificatrices du Droit Pénal Supranational et Fin du Système Traditionnel des Traités de Paix', 1 *Le Droit International Public* (1947).
———, 'La codification du droit pénal international', 56 (337) *Revue Génerale de Droit International Public* (1952).
———, 'Plan for World Criminal Code', 17 *Revue Internationale de Droit Penal* (1946).
———, 'Plan d'un Code Répressif Mondial', 6 *Revue International de Droit Pénal* (1935).
———, 'Towards an International Criminal Court', 44 (37) *American Journal of International Law* (1950).
Pike, David Wingeate, *Crimes Against Women* (2010).

Piscatori, James P., *Islam in a World of Nation-States* (1986).
Proctor, J. Harris (ed.), *Islam and International Relations* (1965).
Publications of Centre Culturel Islamique—Introduction to Islam (1957).
Rechid, Ahmed, 'L'Islam et le Droit des Gens', 2 *Recueil des Cours, Académie de Droit International* (1937), pp. 371–506.
Reisman, Michael W. (ed.), *The Definition of Aggression and the ICC* (2002).
Rhodes, Richard, *The Making of the Atomic Bomb* (1995).
Robertson, Geoffrey, 'Ending Impunity: How International Criminal Law Can Put Tyrants on Trial', 38 (3) *Cornell International Law Journal* (2005), pp. 649–671.
Rosenthal, Franz, *The Muslim Concept of Freedom Prior to the Nineteenth Century* (1960).
Sadat, Leila Nadya and S. Richard Carden, 'The New International Criminal Court: An Uneasy Revolution', 88 (381) *Georgetown Law Journal* (2000).
Sadat, Leila Nadya, 'Competing and Overlapping Jurisdictions', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. II (2008), pp. 201–229.
———, 'Custom, Codification and Some Thoughts about the Relationship Between the Two: Article 10 of the ICC Statute', 49 (909) *Depaul Law Review* (2000).
———, 'The French Experience', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. III (2008), pp. 329–358.
———, *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium* (2002).
Safferling, Johannes Christoph Maria, *Towards an International Criminal Procedure* (2001).
Schabas, William A., *An Introduction to the International Criminal Court* (2001).
———, *An Introduction to the International Criminal Court*, 2nd ed. (2004).
———, *Genocide in International Law, the Crime of Crimes* (2000).
———, Ramesh Thakur and Edel Hughes (eds.), *Atrocities and International Accountability: Beyond Transnational Justice* (2007).
———*The Abolition of the Death Penalty in International Law* (2002 and 2003).
———, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006).
Schwarzenberger, Georg, *The Frontiers of International Law* (1962).
Shihata, Ibrahim, 'Islamic Law and the World Community', 1 (4) *Harvard International Club Journal* (1962).
Singh, Nagendra, *India and International Law*, vol. I (1973).
Sliedregt, Elies van, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003).
Smith, R. Bosworth, *Muhammad and Muhammedanism, Lectures delivered at the Royal Institute of Great Britain*, 2nd ed. (1876).
Sukhash, Khuda S., *Contribution to the History of Islamic Civilization*, vols. I and II, 1st ed. (1930).
Tawfik, Ahmed Hamdy, 'The Concept of Crime in the Afghan Criminal Justice System: The Paradox between Secular, Tradition and Islamic Law: A Viewpoint of an International Practitioner', 9 (4) *International Criminal Law Review* (2009), pp. 667–687.

Tellenbach, Silvia, 'Aspects of the Iranian Code of Islamic Punishment: The Principle of Legality and the Temporal, Spatial and Personal Applicability of the Law', 9 (4) *International Criminal Law Review* (2009), pp. 689–705.
Ubaidul Akbar, Mumtaz-Ul-Muhaddetheen Maulana A.M.G.M. Muhammad, *The Orations of Muhammad: The Prophet of Islam* (1972).
Warberg, Lasse A., 'Shari'A: Om den Islamiske Strafferetten (Uqûbât)', 80 (4) *Nordisk Tidsskrift for Kriminalvidenskab* (1993), pp. 260–283.
Watt, W. Montgomery, *Free Will and Predestination in Early Islam* (1948).
———, *Islam and the Integration of Society* (1961).
———, *Islamic Philosophy and Theology* (1962).
———, *Muhammad at Medina* (1956).
———, *Muhammad, Prophet and Statesman* (1961).
———, *The Formative Period of Islamic Thought* (1973).
Weeramantry, C.G., *Islamic Jurisprudence: An International Perspective* (1988).
Ziai Bigdeli, M.R., *Islam and International Law* (in Persian, 1368).
Ziegler, David W., *War, Peace and International Politics*, 7th ed. (1997).
Zwanenburg, Marten, 'The Statute of an International Criminal Court and the United States: Peace without Justice?', 12 (1) *Leiden Journal of International Law* (1999), pp. 1–8.

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