The Shari^{c}ā *and Post-Conflict Justice*

by M. Cherif Bassiouni

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APPENDIX I – Armed Conflicts Involving Muslim States and the Victimization they Produced Among Muslims

APPENDIX II – The Cairo Declaration on Human Rights in Islam

The Shari^{c}ā *and Post-Conflict Justice*

by M. Cherif Bassiouni*

1. Introduction

The purpose of this study is to demonstrate that the *Shari^{c}ā*, the comprehensive system of Islamic law, is compatible with contemporary post-conflict justice international law requirements.[1]

The *Shari^{c}ā* has, since the days of Prophet Muhammad following the revelations from 610 to 632 CE, established norms on respecting treaty obligations with other nations and tribes, limitations on the resort to war,[2] and *jihad* (*see infra* section 8), as well as promulgated rules on the conduct of warfare (*see infra* section 7). All of these were put into practice for a period ranging from the Prophet's days until the 1200s.

The *Shari^{c}ā*'s development during the first five centuries of Islam was progressive and dynamic, reflecting the doctrinal and methodological defferences espoused by the different

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[1] *See* THE CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE (International Human Rights Law Institute, 2006) [hereinafter the CHICAGO PRINCIPLES]. *See also generally* TRICIA OLSON, LEIGH A. PAYNE, & ANDREW G. REITNER, TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY (2010); LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE (Rosalind Shaw, Lars Waldorf, & Pierre Hazan eds., 2010); HAKEEM O. YUSUF, TRANSITIONAL JUSTICE, JUDICIAL ACCOUNTABILITY, AND THE RULE OF LAW (2010); POST-CONFLICT PEACEBUILDING: A LEXICON (Vincent Chetail ed., 2009); STEVEN R. RATNER, JASON S. ABRAMS, & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (3d ed., Oxford: Oxford University Press, 2009); BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE (Kai Ambos, Judith Large, & Marieke Wierda eds., 2008); ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE (Edel Hughes, William A. Schabas, & Ramesh Thakur eds., 2008); MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (Cambridge: Cambridge University Press, 2007); TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); The Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, U.N. Doc. S/2004/616 (Aug. 23, 2004); JANE STROMSETH, ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES (2003); RUTI TEITEL, TRANSITIONAL JUSTICE (2002); POST-CONFLICT JUSTICE (Ardsley, NY: Transnational Publishers, M. Cherif Bassiouni ed., 2001); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (3 Vols., Neil Kritz ed., 1995).

See also the work of the International Center for Transitional Justice in New York, NY, *available at* http://www.ictj.org/en/index.html (last visited July 19, 2010); as well as the quarterly INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE, edited by the Centre for the Study of Violence and Reconciliation in South Africa and Human Rights Center of the University of California – Berkeley, and published by Oxford Journals.

[2] The two forms are *gharzon* and *harb*; the first being a limited and singular incursion or attack, and the second being all out war which assumes multiple battles over a certain period of time. *Gharzon* was a frequent practice of the *Jahilia* (pre-Islam Arab tribes), and continued in the days of the Prophet.

theological schools that characterized a system in the making.[3] It was also influenced by the particularities and distortions of those who sought to use the *Shari^{c}ā* in the pursuit or preservation of power and wealth. Thus, disputes and debates over the legitimacy of accession to power, the Khilafa, and means and methods of governance had an impact upon the *Shari^{c}ā*. This came about as a result of theologians and scholars becoming more involved in providing legal support for competing political claims. For the most part, these theologians and scholars were drawn into this role by their own pursuit of power and wealth. However, the first five centuries of Islam were also a time for great intellectual ferment, particularly the first three centuries when the Muslim world incorporated the knowledge systems of other civilizations, such as the Greek, Roman, Persian, Mesopotamian, Assyro-Babylonian, Byzantine, and Hindu. These civilizations' values and cultures, as well as their knowledge systems and methods, influenced the world of Islam.

The convergence of these different ideas and realities confronted those of the Muslim world, which were dominated by the Arab cultural matrix of Islam. Engaging with different cultures, knowledge systems, and their methods was an intellectual challenge which led to some absorbtion of what these differences had to offer. Inevitably, a struggle ensued between the

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[3] *See* WAEL B. HALLAQ, ISLAMIC LAW IN HISTORY AND PRACTICE (Cambridge: Cambridge University Press, 2009); MOHAMMED HASHIM KAMALI, THE INTRODUCTION TO THE *SHARI^{C}ĀH* (Oneworld Publications, Oxford, UK, 2008); SHARI'A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT (Abbas Amanat & Frank Griffel eds., Palo Alto, CA: Stanford University Press, 2007); BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW (2d ed., Athens, GA: University of Georgia Press, 2006); MAHMOUD M. AYOUB, ISLAM: FAITH AND PRACTICE (Oxford: Oneworld Publications, 2005); WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW (Cambridge: Cambridge University Press, 2005); MAWIL IZZI DIEN, ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE (South Bend, IN: Notre Dame University Press, 2005); WAEL B. HALLAQ, AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW (Cambridge: Cambridge University Press, 2001); WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI ŪSŪL AL-FIQH (Cambridge: Cambridge University Press, 1997); MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (London: I.B. Tauris & Company, Ltd, 1999); COLIN IMBER, ABU SU'UD: THE ISLAMIC LEGAL TRADITION (Edinburgh, Scotland: Edinburgh University Press, 1997); CHRISTOPHER MELCHERT, THE FORMATION OF THE SUNNI SCHOOLS OF LAW, 9TH-10TH CENTURIES C.E. (Leiden, The Netherlands: E.J. Brill, 1997); NORMAN CALDER, STUDIES IN EARLY ISLAMIC JURISPRUDENCE (Oxford, UK: Clarendon Press, 1993); IGNAZ GOLDZIHER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW (Andras Hamori & Bernard Lewis eds., Princeton, NJ: Princeton University Press, 1981); A.F. SOROUR, AL-SHARI'A WAL-IJRĀT AL-JINA'IA (_____,1977); JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW (Oxford, UK: Oxford University Press, 1964); NOEL J. COULSON, A HISTORY OF ISLAMIC LAW (Edinburgh: Edinburgh University Press, 1965); ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW (3d ed., Oxford, UK: Oxford University Press, 1964); JOSEPH SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE (Oxford, UK: Clarendon Press, 1950).

See also Abdullah Saad Alarefi, *Overview of Islamic Law*, 9 INT'L CRIM. L. REV. 707 (2009); M. Cherif Bassiouni & Gamal Badr, *The* Shari^{c}āh*: Sources, Interpretation and Rule-making,* 1 UCLA J. ISLAMIC & NEAR EASTERN L. 135 (2002); David A. Funk, *Traditional Islamic Jurisprudence: Justifying Islamic Law and Government,* 20 SOUTHERN U. L. REV. 213 (1993); Gamal Moursi Badr, *Islamic Law: its Relation to Other Legal Systems,* 26 AM. J. COMP. L. 187 (American Society of Comparative Law, New York, NY, 1974); Joseph Schacht, *Islamic Law in Contemporary States,* 8 AM. J. COMP. L. 133 (1959).

traditional Arab-centric approach which ultimately fostered what became known as fundamentalism (namely, a narrow and rigid adherence to a literal interpretation of the *Qur'ān* and the *hadith*, and a heavy reliance on the *Sunnah*), and more progressive doctrinal and methodological approaches.

Two areas of the *Shari^c^ā*, however, evolved without being influenced by these and other social, economic, and political considerations. They are: the regulation of armed conflicts, i.e., the *jus in bello* (*see infra* section 7), and a susbstantial part of the law of crimes, namely *hudud* and *qesas* (*see infra* section 5.7).

Of greater relevance to this study are the *Shari^c^ā*'s rules on the conduct of war, developed mostly during the first century, which are in many respects as advanced as post-WWII international humanitarian law (IHL).[4] Like contemporary post-conflict justice, the *Shari^c^ā*

[4] *See generally* NIAZ A. SHAH, SELF-DEFENSE IN ISLAMIC AND INTERNATIONAL LAW (Hampshire, UK: Palgrave MacMillan, 2008); MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM (Baltimore, MD: Johns Hopkins Press, 1955, *reprinted by* Clark, NJ: The Law Book Exchange, 2006); AMEUR ZEMMALI, COMBATTANTS ET PRISONNIERS DE GUERRE EN DROIT ISLAMIQUE ET EN DROIT INTERNATIONAL HUMANITAIRE (Geneva, Switzerland: International Committee of the Red Cross, 2001); MUHAMMAD IBN AL-HASAN SHAYBANI, THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYYAR (Majid Khadduri trans., rev. ed., Baltimore, MD: Johns Hopkins University Press, 2001); M. CHERIF BASSIOUNI, A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS (Ardsley, NY: Transnational Publishers, 2000); ABD AL KARIM AL DAHOOL, THE PROTECTION OF VICTIMS OF ARMED CONFLICTS: COMPARATIVE STUDY BETWEEN THE RULES OF INTERNATIONAL HUMANITARIAN LAW AND THE ISLAMIC SHARI'A (1998); MUHAMMAD HAMIDULLAH, THE BATTLEFIELDS OF THE PROPHET MUHAMMAD: A CONTRIBUTION TO MUSLIM MILITARY HISTORY (India: Islamic Book Services, 1973); MOHAMMAD TALAT AL-GHUNAYMI, THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH (Leiden, The Netherlands: Martinus Nijhoff, 1968); SAID RAMADAN, ISLAMIC LAW: ITS SCOPE AND EQUITY (London, UK: P.R. Macmillan, 1961); MUHAMMED HAMIDULLAH, MUSLIM CONDUCT OF STATE (Lahore, Pakistan: Sheikh Muhammad Ashraf, 1977)(1953); MUHAMMAD HAMIDULLAH, DOCUMENTS SUR LA DIPLOMATIC MUSULMANE À L'ÉPOQUE DU PROPHETE ET DES CALIFES ORTHODOXES (1935); NABJIB ARMANAZI, LE ISLAM EST LE DROIT INTERNATIONAL (Picart, 1929).

Ray Murphy & Mohamed M. El Zeidy, *Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War*, 9 INT'L CRIM. L. REV. 623 (2009); James Cockayne, *Islam and International Humanitarian Law: From a Clash to a Conversation Between Civilizations*, 84 INT'L REV. RED CROSS 597 (2002); Karim Bennoune, *As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT'L L. 605 (1994); Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine*, 117 RECUIL DES COURS 231 (1967); Roger Algasi, *Protection of Civilian Lives in Warfare: A Comparison Between Islamic Law and Modern International Law Concerning the Conduct of States*, 16 REVUE DE DROIT PENAL MILTAIRE ET DE DROIT DE LA GUERRE 246 (1957); Hanse Kruse, *al-Shaybani on International Instruments, in* 1 J. PAKISTAN HISTORICAL SOCIETY 90 (1953); Rabbath, *Pour une theorie du droit International Musulman*, 6 REV. EGYPTIENNE DROIT INT'L 1 (1950); Mohamed Abdallah Deraz, *Le Droit Internationale De Islam*, 5 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 17 (1949); Ahmed Rechid, *Islam est le droit des genes*, 60 RECUIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE, 371 (1937); Sayid Abdel Majjid, *The Muslim International Law*, 28 L. Q. REV. 89 (1912).

These works are based on those of the 12th century Muslim jurist Al-Shaybani, who documented the law and practice of Muslims during armed conflicts. It was not until the late 1800s that some of these Muslim rules of warfare became part of what is now international humanitarian law. Muslims, like other groups including those in contemporary times, have not always followed these rules in their practices. Human nature being what it is, people do not always rise to their best possible levels. For a discussion of *jihad*, see section 8.

requires the prosecution of persons who commit crimes corresponding to what has become known as *jus cogens* international crimes,[5] precludes governmentally-granted amnesties for these crimes,[6] provides for the legal protection of victims' rights,[7] and requires Muslim states to observe their international legal obligations which are not incompatible with the *Shari*^{c}*ā*.[8] What follows includes a description of these requirements and their applicability to contemporary post-conflict justice. The study also shows how Muslim states can and should apply contemporary modalities of post-conflict justice, whether by directly applying the *Shari*^{c}*ā'*s three categories of crimes (*hudud*, *qesas* and *ta*^{c}*azir*), and/or by following international legal norms which are binding upon Muslim states under the *Shari*^{c}*ā* (*see infra* section 6).

2. The *Shari*^{c}*ā* and Contemporary Post-Conflict Justice

The label "post-conflict justice" is used herein in preference to that of "transitional justice," because in almost every non-English language, the word transitional modifies the word justice, rather than indicating the application of certain modalities of justice in states going through a transitional period.[9] Justice cannot be transitional, though understandably there are in every nation's history transitional periods during which justice may be applied somewhat differently in order to achieve certain particular socio-political needs. This is frequently the case in societies which have been affected by violent conflicts, large-scale victimization, and social disruptions.[10] These situations and others cause a state's failure to function effectively and

[5] For a list of international crimes see M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 121 (Ardsley, NY: Transnational Publishers, 2003); M. Cherif Bassiouni, *International Crimes: The Ratione Materiae of International Criminal Law*, 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 129 (M. Cherif Bassiouni ed., 3d ed., Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008), as well as the appendix of international criminal law conventions, *id.* at 182-203.

[6] As discussed below, *hudud* crime cannot be amnestied because they are a transgression against the laws of God; *see infra* section 8.1; and *qesas* crimes are a victim's right, *see infra* section 8.2

[7] *Id. infra* section 8.2; *qesas* is the victim's right.

[8] *See infra* section 9.

[9] *See supra* note 1. Many prefer to use the term "transitional justice", such as the International Center for Transitional Justice. According to Alex Boraine, the Center's founding director, "Some prominent scholars have rejected the term itself, preferring instead to speak of post-conflict justice. But post-conflict justice doesn't address the complexities and processes of political transitions, whether through conflict, negotiation, or state collapse...." Alex Boraine, *Address on the Emerging Field of Transitional Justice* (International Center for Transitional Justice, Mar. 11, 2004).

[10] These situations are mostly the result of states' abuse of power and violent group interactions, such as those occurring between different religious, ethnic, and tribal groups. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY PRACTICE (Cambridge, UK: Cambridge University Press, 2010), at ch. 2, *Phenomenological Considerations*.

deliver services, including the preservation of the peace and security, public order, and justice – a condition often referred to as failed or failing states.[11]

How the international community has come to address these situations, with a view to restoring or establishing peace and security, stability, democracy, and good governance, has come to be called post-conflict justice, the modalities of which include:[12]

1. International and national prosecutions for all or some of the perpetrators of international and national crimes;

2. Establishment of truth commissions or truth-telling bodies;

3. Providing victims with various forms of remedies, reparations, and acknowledgement of their victimization;

4. Providing administrative and political sanctions for perpetrators to prevent them from having access to power and thus repeat their misdeeds;

5. Developing memorialization of events and educational programs to preserve historical memory and to strengthen social resolve against the repetition of victimization;

6. Instituting legal, administrative and political reform to prevent the recurrence of these conflicts; and

7. Providing support for the rule of law to restore public trust, promote human rights and enhance democracy and good government.

These modalities reflect several value-oriented goals founded on peace, justice, and truth, including: international and domestic criminal justice for retributive and deterrence purposes;[13] reconciliation between nations and peoples; providing relief and redress to victims; bringing closure to victims; the establishment of truth; putting to rest past grievances; and preventing

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[11] The British Department for International Development defines a "failed state" as having "governments that cannot or will not deliver core functions to the majority of its people, including the poor. …The most important functions of the state for poverty reduction are territorial control, safety and security, capacity to manage public resources, delivery of basic services, and the ability to protect and support the ways in which the poorest people sustain themselves." The Fund for Peace and *Foreign Policy* magazine publishes online an annual index of failed states, *available at* http://www.foreignpolicy.com/articles/2010/06/21/2010_failed_states_index_interactive_map_and_rankings (last viewed June 28, 2010). *See also* JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED (New York, NY: Penguin, 2005). Diamond's work adds a contemporary dimension to the classic study by H.G. Wells, THE OUTLINE OF HISTORY: BEING A PLAIN HISTORY OF LIFE AND MANKIND (2 vols., London: George Newnes Ltd., 1920), and ARNOLD TOYNBEE, A STUDY OF HISTORY (12 vols., Oxford, UK: Oxford University Press, 1961). A more recent multi-volume study was published by UNESCO in French under the title HISTOIRE DE L'HUMANITE (S.J. de Laet ed., 2000). Another study is by ANTHONY PAGDEN, WORLDS AT WAR: THE 2,500-YEAR STRUGGLE BETWEEN EAST AND WEST (New York, NY: Random House, 2008).

[12] *See* the *Chicago Principles*, and THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 1.

[13] *See* M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 U. VA. J. INT'L L. 269 (2009).

future conflicts. These value-oriented goals of post-conflict justice are reflected in both the *Shari^{c}ā*'s spirit and norms, as discussed below. Moreover, they are reflected in international legal obligations, which in accordance with the *Shari^{c}ā,* are binding on Muslim states as treaty obligations.[14] Obligations arising under international criminal law include the duty to prosecute *jus cogens* international crimes such as genocide, crimes against humanity, war crimes, torture, slavery and slave-related practices.[15] With the exception of war crimes, these prohibitions apply in times of war and peace, whereas war crimes apply only in time of war but extend without discrimination to "protected persons" (non-combatants, POWs, the injured and sick, and medical personnel) and to prohibited targets (medical facilities, civilian and public property, religious and cultural structures, and cultural property).[16]

Violations of contemporary IHL have long been part of the *Shari^{c}ā*.[17] Acts constituting *jus cogens* international crimes such as killing non-combatants, infliction of physical harm upon civilians and attack upon their personal integrity, including torture and rape, also constitute crimes under the *Shari^{c}ā*, whether as *hudud*, *qesas*, or *ta^{c}azir*.[18] It is important to note that the categorization and labeling of crimes varies in legal systems, and that is why comparative criminal law does not regard these categorizations and labelings as conclusive with respect to their meaning and contents. Thus, for example, in the practice of extradition where the requested

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[14] For classical positions see RAMADAN, ISLAMIC LAW, *supra* note 4; HAMIDULLAH, THE MUSLIM CONDUCT OF STATE, *supra* note 4. *See also* M. Cherif Bassiouni, *The Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609-33 (1980), describing how the Prophet observed international legal obligations and deemed them binding upon the *Ummah*.

[15] M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 L. & CONTEMP. PROBS. 63-74 (1996) (published in 1998); M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE*: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1995); INTERNATIONAL CRIMINAL LAW (3 vols., M. Cherif Bassiouni, 3d ed., Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008).

[16] *See* the four Geneva Conventions of 1949 and their two Additional Protocols of 1977: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. *See also* Convention with Respect to the Laws and Customs of War on Land art. 4, July 29, 1899, 32 Stat. 1803, *reprinted in* 1 AM. J. INT'L L. 129 (Supp. 1907); Convention Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, r*eprinted in* 2 AM. J. INT'L L. 90 (Supp. 1908).

[17] *See supra* note 4.

[18] *See infra* section 5.7.

state seeks to determine the existence of dual or double criminality, the inquiry focuses on whether the underlying facts constitute a crime in the legal systems of the requested and requesting state, and whether the crimes in the two legal systems have the same general meaning and purpose irrespective of how these crimes are respectively characterized or labeled, and irrespective of their legal elements.[19] The same method is used herein for purposes of ascertaining whether the *Shari*^{c}*ā* crimes correspond, and vice versa, to international crimes which require prosecution either by an internationally-established body or by national criminal courts.[20]

The *Shari*^{c}*ā*'s three categories of crimes, as discussed below, provide the legal basis for prosecuting those who commit international crimes, establish the truth about the facts, and provide for victim redress in a manner in which is consonant with the most progressive contemporary standards.[21] As stated above, the fact that the *Shari*^{c}*ā* refers to crimes by different labels and includes crimes in different categories should not divert attention from their substance and contents, which provides similar protections to the same human and social interests protected under international law.

3. The *Shari*^{c}*ā*: Some Basic Observations

3.1 *Introduction*

Islam regulates in a holistic manner all human relations and endeavors on earth, including: between the Muslim *ummah* and other non-Muslim states, internal governance of the *ummah*, inter-personal relations, and more importantly, relations between each human being and the Creator. Islam is a way of life, a code of inter-personal and collective conduct for humans on earth, and a guide for that which is connected to final judgment by the Creator. Justice is the cornerstone of this holistic approach.

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[19] *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: U.S. LAW AND PRACTICE (Oxford: Oxford University Press, 5th ed. 2007).

[20] For a survey of international criminal justice, see Bassiouni, *Perspectives on International Criminal Justice, supra* note 12.

[21] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 147, U.N. Doc. A/RES/60/147 (March 21, 2006); M. Cherif Bassiouni, *International Recognition of Victims' Rights, in* 6 HUM. RTS. L. REV. 203 (2006); and Naomi Roht-Arriaza, *Reparations in International Law and Practice, in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 1, at 655.

Contrary to what many *Shari^{c}ā* scholars advocate, justice is not narrow, formalistic, rigid, and blind. Instead, justice is inspired by the overriding divine attributes of compassion and mercy. With regard to human justice, it is to be pursued as a value-oriented goal, thus it must necessarily be constantly adapted as to its methods, modalities, and means in order to achieve the best possible outcomes which fulfill its goals.

The Islamic criminal justice system is compatible with contemporary post-conflict justice modalities; the problem is that Muslim states' governments neither apply the *Shari^{c}ā*, nor contemporary international law to post-conflict justice situations.

3.2 *Meaning and Scope*

The *Shari^{c}ā* is not to be confused with the whole of Islam. It is only that part of Islam which includes general principles, maxims, and specific norms.[22] Thus, it requires a legal method to rank the sources of the law, their interaction, interpretation and application. This method is called *^{c}ilm ūsūl al-fiqh*, which means the scientific method by which to learn *fiqh* (knowledge).[23] *^{c}Ilm ūsūl al-fiqh*, as described below in section 3.3, is the subject of different *Sunni* and *Shi^{c}ā* scholarly and methodological approaches. The purposes of *^{c}ilm ūsūl al-fiqh* is to reach *fiqh*, which consists of doctrine and jurisprudence.[24]

Because the *Shari^{c}ā* is not the sum total of Islam but only a part of it, its methods, norms, procedures, rules of evidence and anything else pertaining to this body of knowledge and its application, is at all times, and in all matters, subject to the fundamental values and principles of Islam.

There is a tendency among scholars, particularly since the third century of Islam, to enlarge the scope of the *Shari^{c}ā* and its place in Islam by making the *Shari^{c}ā* more important than its value-oriented goals which embody the spiritual dimension of Islam, thus juridicizing

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[22] There are 6,239 verses of the *Qur'ān*, of which there are seventy verses on family and inheritance law, seventy verses on contracts and legal obligations, thirty verses on criminal law, and twenty verses on judicial procedure. Consequently, the legal verses are more limited in number in relationship to others, but because they are stated in the *Qur'ān*, they are deemed to be binding, and therefore not modifiable by other rules. Nevertheless, they are subject to interpretation based on the various techniques of *^{c}ilm ūsūl al-fiqh*, see *infra* section 3.3.

[23] *Al-fiqh* is the science or knowledge of the prescriptions of the *Shari^{c}ā*, which derive from its specific sources. It includes all prescriptive norms, judgments and learned opinions. Some scholars consider *fiqh* to apply also to non-substantive aspects of legal knowledge, such as the principles applicable to the methods of *^{c}ilm ūsūl al-fiqh* the limits of disagreement, *ikhtilaf* and procedural and evidentiary rules legal claims. The parameters of what is *fiqh* are flexible and depend on the consensus of schools at a given time. Since consensus changes over time, so do the parameters of *fiqh*, and as consequences that which is deemed part of the *Shari^{c}ā.*

[24] *Id.*

Islam. The *Shari^{c}ā* is a means by which to fulfill the higher aspirations and expectations of Islam; it is not an end in and of itself. Those who throughout the history of Islam have sought to place the application of the *Shari^{c}ā* at the center of Muslim society's life at the expense of the higher values of Islam and its spiritual dimension have usually done so in order to advance the goals of power and wealth of a few over the many.[25]

The *Shari^{c}ā* as a legal system has evolved in different cultural environments over several centuries. More particularly, it has been exposed to different intellectual methods, some deriving from other civilizations and traditions than the Arab one. The tensions, and sometimes conflict between traditional Arab intellectual methods deriving from its Bedouin and other *jahilia* (pre-Islamic) culture and traditions, and other civilizations' methods (which intermingled during the second to the fifth centuries *hejira*, approximately the ninth to twelfth centuries CE), led traditionalists to preservationist reactions. In other words, to preserve the *Shari^{c}ā*'s integrality and consistency, traditionalists needed to prevent progressive change brought about by external intellectual influences. This in turn led to a historic Arab-centric fundamentalist tradition that has not only deeply influenced the *Shari^{c}ā*, but which has also prevented its evolution and progress in light of new knowledge, particularly of a scientific nature. Moreover, the internal divisions among schools of thought has increased, as has the emergence of sub-schools, as well as separate movements and sects whose different interpretations of the *Shari^{c}ā* have added to its complexities.

At the risk of oversimplification, there are four major *Sunni* schools with several sub-schools in each, and four major *Shi^{c}ā* schools with several sub-schools and at least ten movements and sects with sizeable followers. This diversity makes it difficult to find a consensus among Muslims, although some consensus exists among the four authoritative *Sunni* schools.[26] These *Sunni* schools are relied upon by an estimated 90% of the overall 1.4 billion

[25] Emphasis on law and legal formalism, particularly on governance based on law and legal formalism reflects the unarticulated premise of the use and administration of powers. Almost every Muslim regime and political movement throughout the history of Islam is based on the proposition that the *Shari^{c}ā* is the foundation of governmental legitimacy, and that legitimate governance can only derive from it. Many *Shari^{c}ā* scholars have also resisted this trend throughout the last fourteen centuries, and maintained their intellectual integrity.

[26] The Sunni schools include the Hanafi, the Maliki, the Shafe^{c}i, and the Hanbali.

The Hanafi school is the first largest of the Sunni schools, founded by Imam Abu Hanifa Al-Nouman Ibn Thabet Mouli, born 80 AH, 767 CE in Al Kufa in Iraq, from which it spread to Syria, Lebanon and Egypt. It was the official scholar of the Turkish and Ottoman Empire, and is followed to date in the Indian sub-continent. Imam Abu Hanifa met the companions of the Prophet (saw) and is counted amongst the *Tabi^{c}ūn* (followers). He is renowned

Muslims throughout the world. The other ten percent are followers of the major *Shi^{c}ā* schools, who also have their differences like the *Sunni* schools, but which also reflect a certain degree of consensus.[27] In the end, it can be said that all of the *Shari^{c}ā* schools share a basic consensus, namely, their reliance on the *Qur'ān* as their fundamental and primary source of law.

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for his piercing intellect as *faqih*, his scrupulousness, integrity of character and his resoluteness in the face of oppression. Imam Abu Hanifa died in 150 AH (767 CE).

The Maliki school was founded in Medina by Imam Abu Abdallah Malik Ibn Anas Ibn Hareth, born in the year 93 AH (711 CE) in Al Madina, Saudi Arabia, who is to the present day regarded as the greatest authority on the *hadith*. Imam Malik was the first to have gathered all the *fatawa* (plural *fatwa*) from the first Khalifa, Abou Bakr (11 CE) to approximately 170 CE. This was done at the request of the Khalifa el-Mansour. Abu Hanifa, for Imam Nu'man ben Thabit who was referred to as Abu-Hanifa (which means literally, father of upright religion) (d. 150 CE). His treatise, *al-Muwatta*, was the first written compendium of laws produced in Islam, consisting of the Prophet's *Sunnah* based on the Muslim experience in Medina. He spent his life studying, recording and clarifying the legal parameters and precedents which were passed down to him by the first two generations of Muslims who were the direct inheritors of the perfected form of Islam left by the Prophet. Imam Malik died in the year 179 AH (785 CE) and was buried in Al Baki'a, Saudi Arabia.

The Shafe^{c}i school was established by Imam Abu Abdallah Mohamed Ibn Idris Ibn Al Abbas Ibn Al Shafe^{c}i, born in the year 159 AH (766 CE) in Egypt. The most significant of Al-Shafe^{c}i's contributions to the science of Islamic jurisprudence was his study of the four 'roots of law' (*^{c}ilm ūsūl al-fiqh*), whereby the recognition of the *hadith* of the Prophet as a source of the divine will complementary to the *Qur'ān* had a particularly strong impact on Islamic jurisprudence. The Shafe^{c}i school started from Cairo, where Shafe^{c}i spent the last years of his life, and prevails in Lower Egypt, in Hijaz, partially in South Arabia, and most of East Africa, as well as in almost all of Indonesia and Malaysia. He was remarkable in that he resolved the differences of opinion that arose in the still evolving Muslim community and brought them together in the most outstanding legal system in the whole history of mankind. Imam Al Shafe^{c}i died in the year 204 AH (820 CE) in Egypt. *See* RISALAT-EL-SHAFE^{c}I (Majid Khadduri, trans., 1961).

The Hanbali School was founded in Baghdad by Imam Ahmad Ibn Mohamed Ibn Hanbal. Imam Ibn Hanbal was born in the year 164 AH (780 CE) in Baghdad, Iraq. He collected more than 80,000 *ahadith* in his work entitled *Musnad*. The Hanbali School was saved extinction by the *Wahhabi* movement during the eighteenth century, which helped it to spread to the Arabian Peninsula. The *Hanbali* School is currently the principal school of law in Saudi Arabia and has a strong influence on various other legal systems, such as that of the United Arab Emirates. Imam Ibn Hanbal is chronologically the last of the four Imams and lived just after the first three generations of exemplary Muslims, thus confronting a slightly different situation from that faced by his three predecessors. This necessitated a fresh approach to the legal issues arising out of the situation of the rapidly expanding urban development and imperial government which had started to engulf much of the Muslim community. Imam Ibn Hanbal died in the year 241 AH (855 EC) at the age of 77.

[27] The term *Shi^{c}ā* literally means the Party. Early on, the *Shi^{c}ā* were referred to as Shiat Ali, or the Party of Ali. *Shi^{c}ā* Muslims believe that the descendents from Muhammad through his beloved daughter Fatima Zahra and his son-in-law Ali (the Imam) were the best source of knowledge about the *Qur'ān* and Islam, the most trusted carriers and protectors of Muhammad's *Sunnah* (traditions), and the most worthy of emulation. *Shi^{c}ā* Muslims believe that Ali was appointed successor by Muhammad's direct order on many occasions, and that he is therefore the right leader of the Muslim faith. By some estimates, approximately ten percent of the world's Muslims are *Shi^{c}ā*. A large portion of the world's *Shi^{c}ā* live in the Middle East. They constitute a majority of Azerbaijan, Iraq, Bahrain and especially Iran, where ninety percent of the population is *Shi^{c}ā*, giving it the highest Percentage of *Shi^{c}ā* Muslims of any country in the world. Iran is the only Muslim state that is almost entirely *Shi^{c}ā* and it follows the school known as the *Ithna-Asharia* or the twelfth, after the *Shi^{c}ā* twelfth recognized Imam, ruler, who, in their belief was "occulted" while in a cave, and who is expected to "reappear" at some time to lead the righteous to the right path. *See e.g.* SHI^{c}ISM: DOCTRINES, THOUGHT AND SPIRITUALITY (Seyyed Hossein Nasr ed., Albany, NY: State University of New York Press, 1988).

The *Qur'ān*, however, specifies that only Jesus of Nazareth who has been elevated alive to the side of *Allāh* is to return to earth before judgment day to lead the people of the world to the righteous path of Islam. In Lebanon

While there is no question among all Muslims that the *Qur'ān* is the first source of the *Shari^{c}ā*, followed by the *Sunnah*,[28] there are differences among the four *Sunni* and the four major

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Shi^{c}ā from a plurality, and they remain as significant minorities in Afghanistan, Syria, India, Pakistan, Turkey and Yemen. *Shi^{c}ā* Islam, like *Sunni* Islam, has at times been divided into many branches; however, only three of these currently have a significant number of followers. The best known and the one with most adherents is the *Twelvers* which have a large percentage in Iran and Iraq; the others are *Isma^{c}îlî*, and *Zaydi*. The *Twelvers*, who believe there were twelve Imams, as distinct from *Isma^{c}îlî* & Zaydi Shia Muslims, who believe in a different number of Imams or in a different path of succession. Most *Shi^{c}ā* are *Twelvers* (around eighty percent).

Twelvers: established by Jafir ibn Sadiq (702-765 AH/ 83-148 CE), who is the sixth Imam for *Twelvers*. His rulings are the basis of the *Twelvers*, but he is highly respected by *Sunnis* for his contributions to the *Sunni* scholarship as well. The dispute over who was to succeed him led to the split of the *Isma^{c}îlî* from the mainstream *Twelver Shi^{c}ā.* As a child, Ja^{c}afar studied under his grandfather, Ali ibn Husayn. After his grandfather's death, he studied under and accompanied his father, Muhammad al-Baqir, until Muhammad died in 743 AH/129 CE Ja^{c}afar became well versed in Islamic sciences, including *Qur'ān,* and *Sunnah* (tradition). In addition to his knowledge of Islamic sciences, Ja^{c}afar was also an adept in natural sciences, mathematics, philosophy, astronomy, anatomy, chemistry and other subjects.

Isma^{c}îlî: The *Isma^{c}îlî* derive their name from their acceptance of Ismail ibn Ja^{c}afar (755 AH /141 CE) as the successor (Imam) to Ja^{c}afar ibn Sadiq, wherein they differ from the *Twelvers*, who accept Musa al-Kazim, younger brother of Ismail, as their Imam. Ismaeil died before his father. The *Isma^{c}îlî* are found primarily in South Asia, Syria, Saudi Arabia, Yemen, China, Tajikistan, Afghanistan and East Africa, but have in recent years emigrated to Europe and North America.

Zaydi: established by Zayd ibn ^{c}Ali (698-740 AH / 84- 126 CE), the son of the Fourth *Shi^{c}ā* Imam, ^{c}Ali Zain al Abidin. Followers of the Zaydi fiqh recognise the first four Imams, but they accept Zayd ibn ^{c}Ali as their Fifth Imām instead of his brother Muhammad al-Baqir. Zayd led a rebellion against the *Umayyads* in the middle of 8th century, renewing hostilities that existed between the *Umayyads* and the *Hashemites* who are descendents of the Prophet. Zayd was killed during fighting in 740 AH / 126 CE. The Zaydis reject any form of sufi tradition. Theologically they are closest to the *Mu^{c}tazila* School. Zaydis form the dominant religious group in Yemen, with followers in Saudi Arabia.

[28] The sayings and practices of the Prophet are the *hadith*. The plural of *hadith* is *ahadith.* The just complete record of the *Sunnah* was compiled by Ishaq ibn Yassar 136 years after the death of the Prophet in 11 AH, which is the beginning of the Islamic calendar. 1 AH corresponds to the year 622 CE, which is the year of the Prophet's flight from Makkah to Medina. The most reliable sources of the *Sunna* are IMAM MUHAMAD AL-BUKHARI, AL-SAHIH AL-BUKHARI (9 vols., Muhammad Muhsin Khan trans., Alexandria, VA: Al-Saadawi Publications, 1996) which contains 7,275 confirmed *hadith* and IMAM MUSLIM IBN HAJJAJ, AL-SAHIH MUSLIM (7 vols. Nasiruddin al-Khattab trans., Houston, TX: Dar-us-Salaam Publications, 2007). Imam al-Bukhari and Imam Muslim were contemporary, they died respectively A.H. 257 and A.H. 261 and their works endured the passage of time. Al-Bukhari notes that there is agreement concerning the 7,275 *Hadith* contained in his *sahih*, though, because of repetition and overlaps, there are actually only 2,762 separate *hadith*. At that time there were 250,000 alleged *Hadith* in circulation. The debate over what *Hadith* is *sahih*, meaning true, is as extensive as the one over the interpretation of each *Hadith*. The reconciliation of inconsistent and contradictory *Hadith* is another complex issue which is best addressed in IBN QUTAYBA, TA'WIL MUKHTATAFAT AL-*HADITH* (Interpretation of Differences in the *Hadith*, 1936), translated as LE TRAITÉ DES DIVERGENCES DU *HADITH* D'IBN QUTAYBA (G. Lecomte Translation., 1962).

The Center for Muslim-Jewish Engagement of the University of Southern California hosts a comprehensive, searchable online database of *ahadith*, *available at*
http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/ (last viewed July 19, 2010).

There is ample literarture on the hadith and the sunnah, and a different exigesis applicable to it than to the *Qur'ān*. *See generally* HADITH AND SUNNAH: IDEALS AND REALITY (P.K. Koya ed., Kuala Lumpur, Malaysia: Islamic Book Trust, 2008); YUSUF AL-QARADAWI, APPROACHING THE SUNNAH: COMPREHENSION AND CONTROVERSY (Herndon, VA: International institute for Islamic Thought, 2006); MOHAMMED HAMIDULLAH, AN INTRODUCTION TO THE CONSERVATION OF HADITH (Kuala Lumpur, Malaysia: Islamic Book Trust, 2003). Among the Prophet's hadith are those that are referred to as *qudsi*, which are deemed binding as interpretive of the *Qur'ān*, and which are therefore distinct from the other ahadith. *See* MOHAMED HASHIM KAMALI, A TEXTBOOK OF HADITH

Shi^{c}ā schools of jurisprudence as to the ranking of the other sources of law. Depending upon the method of legal interpretation followed by each of these schools of thought (referred to as *madhahib*), the *Shari^{c}ā* is interpreted and applied differently. This complex science is called *^{c}ilm ūsūl al- fiqh*, and it, too, has a rich diversity of analytic approaches.

The historic baggage of *fiqh* is enormous considering that each school of thought, both *Sunni* and *Shi^{c}ā*, has its origin going back between twelve and fourteen centuries, and consists of numerous writings on different subject matters and topics produced in the diverse cultures of the world of Islam as it has evolved; all of which reflect a wide range of methods and analysis which have produced substantive differences as to the same subjects, topics, and questions. As a result, there is no single authoritative codex embodying all the views of all schools concerning all subject matters and topics.[29] This situation has hindered uniformity and prevented certainty in the *Shari^{c}ā*, leaving its application subject to the doctrinal pronouncements of scholars from the various schools at different periods in different places, whose following by other scholars and the general population over time has also differed. These scholarly views, depending on their acceptance in Muslim societies at different times, have had an impact on judicial decisions as well as on different rulers. Their differences, however, particularly with regard to matters of ritual and form, are innumerable, and attest to the loss of the spiritual compass of Islam.

One of the consequences of this situation has been a tendency by Muslim societies in different places and at different times to reduce the diverse scholarly positions of the *madhahib* on different subjects, topics, and questions to simplified versions, whose trickle-down effect to the masses has resulted in even further simplification. This has necessarily caused a loss in the range and nuances of what is otherwise a body of sophisticated scholarly views. However, it has also meant that popular perceptions of what the *Shari^{c}ā* contains and how it is to be applied has been colored by local cultural characteristics. Lastly, conclusions and outcomes reached by rulers, judges, and others in the ruling elites have also been likely to vary in time and place.

STUDIES (Leicestershire, UK: Islamic Foundation, 2005); MAULANA MUHAMMAD ALI, A MANUAL OF HADITH (London: Kurzon Press, 1977).

[29] There have been a few encyclopedic works prepared in Egypt and Kuwait. The Egyptian project which started in the late 1950s reached 26 volumes but was not completed. The Kuwait project, which reached 45 volumes, is in the process of being completed. These works are very useful compilations but they relate mostly to interpretations of the *Qur'ān*, reflecting the positions of the major *Sunni* and *Shi^{c}ā* schools. There is also a similar project in Syria which started much earlier, but it has not been completed. It developed in a more piecemeal approach, although it is more thorough than the other two.

In contemporary times, the *Shari^{c}ā* is applied differently by various Muslim states and their courts, depending upon what they deem to be the applicable *madhhab* that they respectively follow, and in some cases the sub-schools of these primary schools. There are 53 states who are members of the Organization of the Islamic Conference, and the way each state addresses the application of the *Shari^{c}ā* differs. The practice of these states can be divided in three categories.

The first category consists of states that are secular, such as Turkey and Tunisia. Their laws are neither subject to the *Shari^{c}ā*, nor necessarily in conformity or non-conformity therewith. Depending upon these states' constitutions and systems of government, their laws are developed by a legislative process or by decrees enacted by their respective executive branch of government. Thus, the connection between these laws and the *Shari^{c}ā* is either moral or cultural.

The second category consists of states whose respective constitutions establish that their laws are to be subject to the *Shari^{c}ā*. In these states, the relationship between enacted laws and the *Shari^{c}ā* can be described by comparison to secular states, to that of a higher constitutional law background. Egypt and Iraq fall within this category. Their respective constitutional courts decide on whether a given law is in conformity with the *Shari^{c}ā*, or is incompatible therewith. These constitutional courts can also review the manner in which other national courts interpret and apply the laws to ensure the compatibility of these judicial interpretations and applications with the *Shari^{c}ā*. In these two countries, the prevailing *Sunni* school is the *Hanafi* school. Egypt, however, also looks at the other three *Sunni* schools to arrive at what can be called the best solution to a given legal issue. This approach is based on methods recognized by all four *Sunni* schools, namely, *istihsan*, *istislah*, and *maslaha*, which can be summarized as the best outcome in terms of social policy in relationship to a given issue.

The third category includes those states which proclaim the direct applicability of the *Shari^{c}ā*, which is the law to be followed in connection with legislative enactments, and the direct application of the *Shari^{c}ā* by the courts. Saudi Arabia, Afghanistan, and Iran are among these states, but what constitutes the applicable *Shari^{c}ā* varies depending upon the school that they deem applicable. In Saudi Arabia it is the *Sunni Hanbali* school as further interpreted by the *Wahabi* sub-school. In Iran, it is the *Shi^{c}ā Ja^{c}afari* school.[30] Thus, what is applied in various Muslim states as being the *Shari^{c}ā* varies from one country to another.

[30] Article 12 of the 1979 Constitution of the Islamic Republic of Iran states:

The state of the *Shari^{c}ā*'s scope, meaning, content, and application can at best be described as a tree with many branches. The fact that this tree has grown over fourteen hundred years explains the strength of the trunk, and also the diversity of the branches. While the trunk remains unchanged, the branches are constantly expanding in different directions, assuming new shapes and sizes. However, some of these branches fall from the tree or wither away, while others grow stronger, taller, wider, or even move out in different directions. To see the tree as a whole is a challenging undertaking, for it depends upon one's vantage point. This is why so few have the full knowledge of the *Shari^{c}ā*'s multifaceted subjects and their applications over the span of fourteen centuries and across so many cultures in which Islam has taken root. This explains why Muslim reformists have had such difficulties in facing the challenges of progressive development, and why traditionalists have been more successful in preserving the status quo.

3.3 *^{c}Ilm Ūsūl al-Fiqh*[31]

The *Shari^{c}ā* is based on two primary sources of law – the *Qur'ān*[32] and the *Sunnah*[33] – the latter consisting in the sayings and deeds of the Prophet Muhammad. The *Qur'ān* is the

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> The official religion of Iran is Islam and the Twelver Ja'fari school [ilm usul al-Din and fiqh], and this principle will remain eternally immutable. Other Islamic schools, including the Hanafi, Shafi'i, Maliki, Hanbali, and Zaydi, are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites. These schools enjoy official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law. In regions of the country where Muslims following any one of these schools of fiqh constitute the majority, local regulations, within the bounds of the jurisdiction of local councils, are to be in accordance with the respective school of fiqh, without infringing upon the rights of the followers of other schools.

Available at: http://www.iranonline.com/iran/iran-info/government/constitution.html (last visited July 16, 2010). *See also supra* note 26; Silvia Tellenbach, *Aspects of the Iranian Code of Islamic Punishment: The Principle of Legality and the Temporal, Spatial, and Personal Applicability of the Law*, 9 INT'L CRIM. L. REV. 689 (2009).

[31] *See* Bassiouni & Badr, *The* Shari^{c}ah*: Sources, Interpretation and Rule-making, supra* note 3. *^{c}Ilm ūsūl al-fiqh* was developed in the second century of *hijra* in part after Muslims from many different cultures whose language was not Arabic needed to be guided by certain rules of interpretation to avoid the confusion that different linguistic and cultural perspectives can bring to the interpretation of the *Shari^{c}ā*. Thus, it is the science of the rules through which to ascertain the prescriptions of the *Shari^{c}ā*. It includes the ranking of sources of law and sources of interpretation, rules of linguistic and as well other substantive rules of interpretation. For example: The *Qur'ān* has precedence over all other sources followed by the *Sunnah*; for the *Qur'ān*, the latest verse in time controls and the specific verse control over the general one. The same goes for the *hadith*. The first text on *^{c}ilm ūsūl al-fiqh* was compiled by Iman Mohammed ibn Idriss el-Shafe^{c}i (d. 204 AH) in his authoritative text AL-RISALA, see *supra* note 26. *See also* ZAKARIA EL-BERRI, ŪSŪL AL-FIQH FIL ISLAM (Cairo, Egypt: Dar al-Nahda, 1980); AL-GHAZALI, AL-MUSATAFA (Cairo: al-Matabah al-Amiriyya, 1973); IBN HAZM AL-ANDALOSY, AL-IHKAM FI USUS AL-AHKAM (Cairo: Al-Sahada, 1958); MUHAMMAD ABU ZAHRA, ŪSŪL AL-FIQH (1958); ABDEL-WAHAB KHALLAF, ^{c}ILM ŪSŪL AL-FIQH (8th ed. 1947).

principal source of the *Shari^{c}ā* and is supplemented by the *Sunnah*.[34] The prescriptions contained in these two primary sources of Islamic law, however, require interpretation. Some of the Prophet's sayings or *ahadith* interpret some of the verses of the *Qur'ān* and are deemed *qudsi* (binding). Scholars have long debated which of these *ahadith* are binding *qudsi*, and which are not.[35] Most of the *Sunnah* is in the nature of teachings, and there are different views as to which of these are *sahih* (real or genuine), and as to which are deemed binding as opposed to being simply recommendations.

After the Prophet's death in 11 AH (632 CE), the need for interpretation of the *Qur'ān* became more acute,[36] and this led in turn to the need for supplemental sources of law to apply whenever the two primary sources were silent on a given question. These sources of law include, but are not limited to: *ijma^{c}* (consensus), *qiyas* (analogy), *^{c}urf* (custom), *istihsan* and *istihlas*

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[32] The *Qur'ān* contains the "words of *Allāh*" (God) inspired by God upon the Prophet through *wahy* and uttered by him in the presence of others who memorized these utterances and wrote fragments of them at that time. There are many verses attesting to the divine origins of the *Qur'ān*, such as: 42:51, 26:192, 42:7, 16:102, 17:106, 41:11-12-99. The *Qur'ān* was transcribed some forty years after the death of Prophet Muhammad by the third Khalifa, ^{c}Uthman ibn ^{c}Affan. It was completed in 651 CE. The work on that compilation commenced under the first Khalifa, Abu Bakr. Four copies were made in 651 CE, some say seven. The text was verified by the Prophet's surviving companions, the *sahaba*. One copy was kept in Makkah, one was sent to Damascus, another to Iraq, and the fourth to Yemen. All subsequent books containing the *Qur'ān* were based on them. The authenticity or accuracy of that original transcription was never challenged. The *Qur'ān*, is arranged in 114 *suwar* or chapters of unequal length and numbered consecutively. Starting with each *sūrat* differs in the number of *ayat* or verses, which range from three to 286 verses. The number of verses is 6,206. The opening chapter, *al-Fatiha*, is a short, with only seven verses. It is followed by other chapters in the order of their length.

Since the end of the first century of Islam, corresponding to the late seventh century CE, there have been many interpretators of the *Qur'ān*. The first comprehensive interpretation was that of Ibn Kathir Al-Haliz Aboul-Fidā', AL-HĀLIZ ABOUL-FIDĀ' ISMA^{C}IL IBN ^{C}UMAR IBN KATHIR AL-QURAISHY AL-BASRAWI, TAFSIR AL-QŪR'ĀN AL-^{C}AZIM, (circa 770 H). ISMĀ^{C}ĪL IBN KATHĪR, TAFSĪR AL-QUR'ĀN, 7 vols. (Beirut, Lebanon, 1385/1966). For an English translation, see Ibn Kathīr, TAFSIR IBN KATHĪR (abridged) (10 vols., A Group of Scholars Under the Supervision of Shaykh Safiur-Rahman al-Mubarakpuri abd. & trans., Riyadh, Saudi Arabia: Dar Al Salam Publications, 2000). For a contemporary interpretation see SAYYID QUTB, FĪ DHILĀL AL QUR'ĀN (Beirut, Lebanon: Dār ash-Shurūq, 1393/1973).

Note that throughout this article, whenever a verse of the *Qur'ān* is quoted, the name of one of three translators appears afterwards, ABDULLAH YUSUF ALI, THE HOLY QUR'ĀN (London, UK: Wordsworth Editions Ltd. 2001), MUHAMMAD ASAD, THE MESSAGE OF THE QUR'ĀN (Watsonville, CA: The Book Foundation, 2d ed. 2008), or the author himself.

[33] *See supra* note 27.

[34] This interpretation is based on the *Qur'ān*. *See Sūrat al-Nisā'*: "O you who have attained to faith! Pay heed unto God, and pay heed unto the Apostle and unto those from among you who have been entrusted with authority; and if you are at variance over any matter, refer it unto God and the Apostle, if you [truly] believe in God and the Last Day. This is the best [for you], and best in the end." 4:59 [Asad translation]

[35] *See supra* note 27.

[36] This was due to the fact that the number of alleged *hadith* proliferated and because several *hadith* were inconsistent. Some were inconsistent with the *Qur'ān*. *See* IBN QUTNAYBA, *supra* note 27. This required the development of a new technique to reconcile or explain away these divergences. *See* AHMAD HASSAN, THE EARLY DEVELOPMENT OF ISLAMIC JURISPRUDENCE (Islamic Research Institute, Islamabad, Pakistan, 1991).

(equity), *maslaha* (public interest), and *ijtihad*[37] (progressive reasoning). The four *Sunni* schools (*madhahib*) differ in some respects as to their rankings of the sources of the *Shari*^{c}*ā*, the interaction between these sources (particularly where one source conflicts with another), and their method of application. Each of these schools has in time spawned sub-schools which add their particularity to the ranking of sources, methods of interpretation, and application. The same phenomena exist in the four major *Shi*^{c}*ā* schools and their sub-schools.

There were also other jurisprudential schools that came out of certain religious movements and sects that developed throughout the history of Islam, and they too had their particularities as to *ᶜilm ūsūl al-fiqh* and as to *fiqh*.[38]

All *madhāhib* and other movements and sects rank the secondary and tertiary sources of law differently, and pursue different analytical approaches and methods with respect to the *Shari*^{c}*ā*.[39] Thus, to formulate a consensus is a form of *ijtihad*, and what follows is this writer's *ijtihad* in formulating a mainstream approach to *ᶜilm ūsūl al-fiqh*'s ranking of the sources of law. They are:

Principal Sources

1. The *Qur'ān*
2. The *Sunnah*

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[37] An early illustration of the ranking of the sources of the *Shari*^{c}*ā* and recognition of *ijtihad* is a dialogue, more like an interview, between the Prophet and Muadh Ibn-Jabal whom he appointed a judge in Yemen. The *Hadith* is essentially as follows:

> The Prophet: "How wilt thou decide when a question arises?"
> Muadh: "According to the Book of Allah" [the Qur'an].
> The Prophet: "And if thou findest naught therein?"
> Muadh: "According to the Sunna of the messenger of Allah."
> The Prophet: "And if thou findest naught therein?"
> Muadh: "Then I shall apply my own reasoning." [Meaningful *Ijtihad*]

The *Hadith* indicates the Prophet's agreement with this approach. It should be noted however that not everyone is capable of *ijtihad*. There are several conditions and qualifications concerning who may exercise that function. *See also* MUHAMMAD T. AMINI, FUNDAMENTALS OF *IJTIHAD* (Idarah-i Adabiyat-i Delli, 1986); Ilias Bantekas, *The Disunity of Islamic Criminal Law and the Modern Role of* Ijtihad, 9 INT'L CRIM. L. REV. 651 (2009).

[38] Among these are the *mu*^{c}*tazala*, the *Khawarij* and the *sūfi* whose movement spawned several branches in different Muslim countries at different periods. *See* CYRIL GLASSÉ, THE CONCISE ENCYCLOPEDIA OF ISLAM (Rev. ed., Lanham, MD: Alta Mira Press, 2003).

[39] For a historical analytical technique, *see* IBN KHALDUN, AL-MUQADDIMAT (3 vols., F. Rosenthal trans., Princeton, NJ: Princeton University Press, 1958) and IBN KHALDUN, KITAB AL-'IBAR, multi-volume work. For an analysis of Ibn Khaldoun's philosophy of history, see MUHSEN MAHDI, IBN KHALDOUN'S PHILOSOPHY OF HISTORY (Chicago, IL: University of Chicago Press, 1971). Another leading Muslim historian is al-Tabari, see AL-TABARI, KITAB IKHTILĀF AL FUQAHA'A (The Book on the Differences of Scholarly Interpretation) (F. Kern ed. 1902). For a short contemporary analysis, see Joseph Schacht, *The Schools of Law and Later Developments, in* LAW IN THE MIDDLE EAST (Majid Khadduri & Herbert Liebesny eds., Middle East Institute, 1955).

3. *Ijmā*, consensus of opinion of learned scholars and judges[40]
4. *Qiyas*, analogy[41]
5. *ᶜUrf*, custom and usage

Supplemental Sources

6. *Istislah* or *Maslaha*, consideration of the public good
7. *Istihsan*, reasoning based on the best outcome, or equity
8. The practices of the four first "wise" *Khalifa*, a form of authoritative precedent
9. The decisions of learned judges
10. Treaties and pacts
11. Contracts (the *Shariᶜā* considers a contract the binding law between the parties, so long as it does not violate the *Shariᶜā*)
12. The edicts of the *Khalifa*s and local rulers which are in conformity with the *Shariᶜā*
13. *Fatawa* (plural of fatwa) of the most learned scholars
14. *Ijtihad*

[40] *Ijmā* literally means consensus. The application of the rule of consensus is at the legislative and judicial levels. Consensus is therefore the basis for legislation, but it is different from consensus meaning that which a certain category of persons agree on as opposed to agree to. Judicial consensus means that prior decisions have established a particular position, and it is relied upon by subsequent decisions. Similarly, there can be a consensus on a doctrine or among major theologians, or for that matter, a consensus among scientists on the interpretation of a scientific phenomenon. Used in *ᶜilm ūsūl al-fiqh*, *ijmā* means the consensus of the leading scholars on a given question. Thus, if it is a theological question, then it is the consensus of the leading scholars on theology, whereas if it is a scientific question, it would be the consensus of the leading scientists on that question. Legislative consensus, which is the product of political negotiations, is not the type of *ijmā* or consensus that is meant herein as one of the sources of law. Nevertheless, political consensus in a legislative body produces laws, and these laws in turn are binding. However, this is a different meaning of consensus.

[41] *Qiyas* is reasoning by analogy. However, in *ᶜilm ūsūl al-fiqh*, there is a wide range of how restrictive or extensive analogy can be applied. Literalists will limit analogy to that which is either precisely the same or substantially the same. Non-literalists, using a policy approach, frequently called *siyassat al Shariᶜā*, will extend the reasoning by analogy to that which roman law referred to as a jus dem generis, meaning, of the same genre. This type of reasoning could be extended to the doors of *ijtihad*, which is a form of reasoning by analogy when no other precedent exists to guide the interpreter of the question, whether it be a theological interpretation in response to a particular question by a particular individual, or a response to a particular question which has general application. Both of these are referred to as fatwa, which literally means a pronouncement. It is different, however, from when a judge seeking to rule in a given case with two or more parties having divergent interests, expect justice. If none of the other higher sources of law in *ᶜilm ūsūl al-fiqh* can apply, then the judge can resort to *ijtihad*, which for all practical purposes is a form of *qiyas* plus, meaning in effect that the judge having no binding source of law to rely upon or precedent, will seek to use his legal imagination in order to arrive at a particular outcome. But intellectually, as well as emotionally, it is unlikely that such a process can be undertaken in a total vacuum, and the one engaging in that type of *ijtihad* does not do it in a total vacuum, but in the context of pre-existing knowledge that the person has.

Since the *Shari^{c}ā* is presumed to be God-given law to humankind, it must be integral; consequently, doctrinal concepts, legal approaches, techniques of interpretation, and judicial decisions cannot, if they are to be deemed in accordance with the *Shari^{c}ā*, be conflicting, or contradictory, but merely different as to one another.[42]

One of the great doctrinal debates among all schools of jurisprudence, but more so between *Sunni* and *Shi^{c}ā,* is whether the *Qur'ān* and the *Sunnah* are to be interpreted literally, or on the basis of the intent and purpose of the text, or both, depending upon the text.[43] Whether one approach or the other is followed will determine if the unstated legislative policies of the many different aspects of the *Shari^{c}ā* are taken into account in connection to the textual interpretation of the *Qur'ān* and the *Sunnah*.[44] This is referred to as *Siyasat al-Shari^{c}ā.* It is probably in this respect that there exists the greatest divergence of views between the *Sunni* and the *Shi^{c}ā* schools of thinking.

For purposes of this study, it can be said that there are three major trends in *Shari^{c}ā* scholarship (as categorized by this writer). They are: traditionalist-fundamentalist, traditionalist-reformist, and progressive. The first category represents the prevailing religious establishments in both the *Sunni* and *Shi^{c}ā* worlds, their differences notwithstanding.[45] They are the Universities of *Al-Azhar* (Cairo, Egypt, which is the *Sunni*'s foremost academy), and *Najaf* (Iraq) and *Qum*

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[42] For a contemporary perspective, see generally, WEISS, THE SPIRIT OF ISLAMIC LAW, *supra* note 3. There is an entire body of fiqh which deals with the subject of ikhtilaf (disagreement), its rules, and limits. AL-TABARI, KITAB IKHTILĀF AL FUQAHA'A, *id.*; Muhammad Khalid Masud, Ikhtilaf al-Fuqaha*: Diversity in* Fiqh *as a Social Construction, in* EQUALITY AND JUSTICE IN THE MUSLIM FAMILY (Zainah Anwar ed., Musawah, 2008); TAHA JABIR AL-ALWANI, ADAB AL IKHTILAF FI AL ISLAM (Herndon, VA: International Institute of Islamic Thought, 1987). For a different perspective, see George Makdisi, *The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court*, 1 ZEITSCHRIFT FÜR GESCHICHTE DER ARABISCH-ISLAMISCHEN WISSENSCHAFFEN 233 (1984). It should be noted that these four schools or *madhaheb* are not deemed contradictory to one another, but different in a way that is not inconsistent with the *Qur'ān* and the *Sunnah.*

[43] This is characterized by the great debate between *al-zaher*, the obvious or literal meaning, and *al-baten*, the hidden meaning or the purpose. The *Sunni* support the *al-zaher* approach, which is more objective, unless the purpose or hidden meaning is evidenced in some *al-zaher* aspect of the *Qur'ān* or *Sunnah*. The *Shi^{c}ā* allow resort to the *al-baten* meaning for interpretation of the literal text, whis is more subjective. For a contemporary perspective, see generally WEISS, THE SPIRIT OF ISLAMIC LAW, *supra* note 3.

[44] For a contemporary "traditionalist" reformist approach, see FAZLUR RAHMAN, ISLAM AND MODERNITY: TRANSFORMATION OF AN INTELLECTUAL TRADITION (Chicago, IL: University of Chicago Press, 1986). *See also* MUHAMMAD IQBAL, THE RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM (Lahore, Pakistan: Muhammad Ashraf, 1960). For a "traditionalist" view, see ABU ALA'A MAWDUDI, TOWARD UNDERSTANDING ISLAM (A. Ghandi trans., 5th ed., Islamic Circle of North America, 1954).

[45] The *Shi^{c}ā* have an established hierarchical religious structure that gives its clergy even more authority over their followers than the *Sunni*. This is due to the fact that the *Shi^{c}ā* clergy originated in Southern Iraq and in Iran where, particularly in Iran, the historical role of organized clergy in prior "religious" regimes was well entrenched. Suffice it to recall the Zoroastrian tradition and its dominant hierarchical clergy. For an early history of Iranian society, see J.M. COOK, THE PERSIAN EMPIRE (London, UK: Dent, 1983). *See also*, R. FRYE, ISLAMIC IRAN AND CENTRAL ASIA 7TH-12TH CENTURIES (London, UK: Variorum Reprints, London, 1979).

(Iran) which are the *Shi^{c}ā*'s foremost academies. There are also other theological schools throughout the Muslim world, particularly in Indonesia (the state with the largest Muslim population, at 202 million) and Pakistan (174 million), making their views the most popularly diffused ones. *Sunni* traditionalists are essentially literalists, but their approach also includes the recognition that the Prophet and his four first successors, called the wise ones, relied on the purposes of the *Shari^{c}ā* in their interpretations of the letter of the *Qur'ān*. Among them the more fundamentalist are dogmatic and intransigent, and their approach to the interpretation of the *Qur'ān* and the *Hadith* is literal. They seek the solutions of earlier times as a panacea for complex contemporary problems. Some of them turn to political activism and violence as ways of propagating their views.[46] The influence of these establishments is controlling in part because of their dominant role in education in nearly all Muslim states.

The second category, traditionalist-reformist, range in their views about how to address new realities and their challenges. Mainstream traditionalist-fundamentalists refer to such reformist thinkers (in varying degrees of disapproval) as the *^{c}ilmani* – those who seek to achieve the legislative goals of the *Shari^{c}ā* in light of scientific knowledge.[47] The *^{c}ilmani*, however,

[46] This was not however always the case. In fact, the term "fundamentalist" has its origins in several reform movements which sprang out at different times and places over the last seven centuries. What these movements have in common is their search for a more ascetic, orthodox and simpler way. The *muwahhidun* was a fundamentalist movement in Morocco in the 12th century CE, while a similar movement was developed by Ibn Taymiya in Syria (1263-1328 CE), and Ibn Khaldoun in Egypt (1332-1408). This gave rise to the *al-Salaf al-Salih* (the right path) movement in Egypt at the turn of the 20th century CE spurred by Sheikh Mohammad Abdou, *Mufti*, who was a disciple of Jamal el-din el-Afghani, a reformist of the mid-1800s. These however were reform movements grounded in established "traditionalist" *Sunni* doctrine. Contemporary movements however are a reaction to, or a consequence of corruption, bad government and poverty in different Muslim countries. As a result, they have also developed a political movement, and some groups believe in carrying out a *jihad* or holy war by use of violent means. *See, e.g.*, KHALED ABOU EL FADL, THE GREAT THEFT: WRESTLING ISLAM FROM THE EXTREMISTS (New York, NY: Haprper, 2005); OLIVER ROY, GLOBALISED ISLAM: FUNDAMENTALISM, DE-TERRITORIALISATION, AND THE SEARCH FOR A NEW UMMAH (London, UK: C. Hurst & Co. Publishers, 2004); GILLES KEPEL, JIHAD: THE TRAIL OF POLITICAL ISLAM (2d ed., Cambridge, MA: Belknap Press, 2003); HAMID ENAYAT, MODERN ISLAMIC POLITICAL THOUGHT (London, UK: I.B. Tauris, 2001); W. MONTGOMERY WATT, ISLAMIC FUNDAMENTALISM AND MODERNITY (London, UK: Routledge, 1989); JOHN L. ESPOSITO, ISLAM AND POLITICS (2d ed., Syracuse, NY: Syracuse University Press, 1987); Hassan Hanafi, *The Origin of Modern Conservatism and Islamic Fundamentalism* in ISLAMIC DILEMMAS: REFORMERS, NATIONALISTS AND INDUSTRIALIZATION (Ernest Gellner ed., Berlin, Germany: Mouton, 1985); MARTIN S. KRAMER, POLITICAL ISLAM (Thousand Oaks, CA: Sage Publications, 1980). *See also* M. Cherif Bassiouni, *A Search for Islamic Criminal Justice: An Emerging Trend in Muslim States, in* THE ISLAMIC IMPULSE 244 (Barbara Freyer Stowasser ed., Washington, DC: Georgetown University Press, 1987). See also section 8 for a discussion of *jihad*.

[47] Which means those who use *ilm* or knowledge. Those opposed to this approach argue that the use of scientific knowledge to re-examine the assumptions, interpretations and applications of the *Shari'ā* is either inappropriate, unacceptable or anathema depending upon one's degree of intellectual closeness and religious fanaticism. But the Ilmani approach has been advocated by no lesser scholars than Ibn Taymia and Ibn Khaldoun, *supra* note 15. For two contemporary scholarly views, see RAHMAN, ISLAM AND MODERNITY, *supra* note 42, and IQBAL, THE RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM, *supra* note 42. The 20th century had such leading reformists

search for the purposes and policies of the *Shari^{c}ā* on the basis of scientific knowledge in order to address contemporary problems and find appropriate solutions. They frequently break traditional paradigms and rely on general principles adduced from the *Qur'ān* to formulate new interpretations consonant with modern requirements.[48] Because they break away from irrelevant traditions and eschew rulings based solely on fundamentalist interpretation, their views are rejected by traditionalist-fundamentalists.

The third category, the progressives, are reformists who are willing to break with past interpretations and practices, and who seek to innovate interpretations that may have little or no linkage to previous ones. Their views are more likely to be called heretic by traditionalist-fundamentalists.[49]

Writings by Muslim scholars reflect a wide spectrum of the views encompassing all three trends identified above and their variants. Consequently, those who are unfamiliar with these distinctions and with the complexities of the *Shari^{c}ā* face difficulties in understanding the diversity of these views and their applications. Nevertheless, there is a common core based on the *Qur'ān* that unites all Muslims, and preserves their identity in the face of the distinctions mentioned.

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from among the ranks of "traditionalists" clergy, like Sheikh Mohammad Abdu of Egypt and later in the 1940s. Sayed Qutb of Egypt who was the intellectual light of the Muslim Brotherhood, *see, e.g.*, SAYED QUTB, SOCIAL JUSTICE IN ISLAM (Hamid Algar trans., Oneonta, NY: Islamic Publications International, 2000).

Sheikh Muhammad Sayyed Tantawi, Rector of al-Azhar from 1996 until his death in 2010, became a mild reformist among the *Sunni* clergy. Earlier, as Egypt's *Mufti*, he issued a statement that bank interests are not *riba* (usury). This was the first time that such a statement was issued by a leading *mufti* since Imam Ahmad Abdou had ruled in the 1930s that postal savings passbooks could bear a "fixed profit." Since the 70s, a new concept called "Islamic banking" has developed to get around the problem of usury and banking interests. *See* M. CHERIF BASSIOUNI & GAMAL M. BADR, INTERESTS AND BANKING IN ISLAM 34 (Chicago, IL: Mid-America Arab Chamber of Commerce, 1990).

For a reformist view of Islamic criminal justice and contemporary standards of human rights, see M. Cherif Bassiouni, *Sources of Islamic Law and Protection of Human Rights in the Islamic Criminal Justice System, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 3 (M. Cherif Bassiouni ed., Dobbs Ferry, NY: Oceana Publications, 1982). It should be noted that *^{c}ilmani* is to be distinguished from *almani* which refers to agnostics.

[48] *See e.g.*, REZA ASLAN, BEYOND FUNDAMENTALISM: CONFRONTING RELIGIOUS EXTREMISM IN THE AGE OF GLOBALIZATION (New York, NY: Random House, 2010); TARIQ RAMADAN, ISLAM, THE WEST, AND THE CHALLENGES OF MODERNITY (Leisestershire, UK: Islamic Foundation, 2009); TARIQ RAMADAN, RADICAL REFORM: ISLAMIC ETHICS AND LIBERATION (Oxford, UK: Oxford University Press, 2008); REZA ASLAN, NO GOD BUT GOD: THE ORIGINS, EVOLUTION, AND FUTURE OF ISLAM (New York, NY: Random House, 2006); ABDULLAHI AL-NA^{C}IM, TOWARD AN ISLAMIC REFORMATION (Syracuse, NY: Syracuse University Press, 1996).

[49] *Id*. For a traditionalist-reformist view, see RAMADAN, RADICAL REFORM, *id*. For a traditionalist-fundamentalist who argues for some reform, see the many pamphlets and publications of Sheikh Yusuf al-Qaradawi, who presently resides in Qatar, e.g., YUSUF AL-QARADAWI, APPROACHING THE SUNNAH: COMPREHENSION AND CONTROVERSY (Herndon, VA: International Institute of Islamic Thought, 2006).

4. The Postulates of Human Rights and the Place of Justice in Islam

4.1 Introduction

Islam is founded on the belief that there is but one God, who is the beginning and the end of everything, the Creator of the universe and all that lives within it. Thus, human creation is one (whether arising out of an Adam and Eve created by God through a single divine stroke, or as a result of a scientific evolutionary scheme established by God), and human beings are infused with the spirit of God.[50] Among the basic postulates of Islam which are applicable to this study are the dignity accorded to each and every human being, and the pursuit of individual and collective justice.[51]

The protection of human dignity and the pursuit of justice are entrusted to each and every Muslim who is deemed God's trustee on earth, as well as to the collectivity, whether in the form of a Muslim state or a group of individuals living in a non-Muslim state. In other words, it is the duty of the *ummah* (nation), however it is constituted, as well as that of every Muslim to carry

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[50] *See e.g.* AYOUB, ISLAM: FAITH AND PRACTICE, *supra* note 3.

[51] For human rights in Islam, see generally ABDULLAHI AN-NA'IM, ISLAM AND HUMAN RIGHTS: COLLECTED ESSAYS (Mashood A. Baderin ed., Surrey, UK: Ashgate, 2010); HUMAN RIGHTS IN ARAB THOUGHT: A READER (Salma Jayyusi ed., London, UK: I.B. Tauris, 2008); NISRINE ABIAD, SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY (London, UK: British Institute for International and Comparative Law, 2008); MOHAMMED ABED AL-JABRI, DEMOCRACY, HUMAN RIGHTS, AND LAW IN ISLAMIC THOUGHT (London, UK: I.B. Tauris, 2008); ABDULAZIZ SACHEDINA, ISLAM AND THE CHALLENGE OF HUMAN RIGHTS (Oxford, UK: Oxford University Press, 2009); ISLAM AND HUMAN RIGHTS IN PRACTICE (Shahram Akbarzadeh & Benjamin MacQueen eds., Routledge, 2008); KATERINA DALACOURA, ISLAM, LIBERALISM, AND HUMAN RIGHTS (London, UK: I.B. Tauris, 3d. ed., 2007); ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS (Boulder, CO: Westview Press, 4th ed., 2006); MASHOOD BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW (Oxford, UK: Oxford University Press, 2005); ISLAM AND HUMAN RIGHTS: ADVANCING A U.S.-MUSLIM DIALOGUE (Shireen Hunter & Huma Malik eds., Washington, DC: Center for Strategic and and International Studies, 2005); AL WATHA'EQ AL-DAWLIĀ AL-MĀ'NEIA BI HUQUQ AL-INSAAN (2 vols., M. Cherif Bassiouni ed., Cairo, Egypt: Dar El Shorouk, 2003); AHMED S. MOUSSALI, THE ISLAMIC QUEST FOR DEMOCRACY, PLURALISM, AND HUMAN RIGHTS (Gainesville, FL: University of Florida Press, 2003); MOHAMMAD HASHIM KAMALI, THE DIGNITY OF MAN: AN ISLAMIC PERSPECTIVE (Cambridge, UK: Islamic Texts Society, 2d. ed., 2002); HUQUQ AL-INSAAN (4 vols., M. Cherif Bassiouni, M.S. Dakkak, & Abdel Azim Wazir eds., Beirut, Lebanon: Dar-ilm lil-Malayan Publishers, 1989); ABUL ALA MAWDUDI, HUMAN RIGHTS IN ISLAM (Leicester, UK: The Islamic Foundation, 1976).

Mohammad H. Fadel, *Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law*, 8 CHI. J. INT'L L. 1 (2007); Naz K. Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM. RTS. J. 191 (2006); Abdullahi A. An-Na'im, *Human Rights in the Arab World: A Regional Perspective*, 23 HUM. RTS. Q. 701 (2001); Riffat Hassan, *Religious Human Rights and the Qur'an*, 10 EMORY INT'L L. REV. 85 (1996); M.A. Baderin, *Establishing Areas of Common Ground Between Islamic Law and International Human Rights Law*, 5 INT'L J. HUM. RTS. 72 (2001); Abdullahi Ahmed An-Nai'm, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 40 (1990); Abdullahi A. An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 CORNELL INT'L L.J. 318 (1987).

out the work of God on earth, and to pursue, *inter alia*, the goal of justice. In a *Hadith* the Prophet stated:

> Everyone of you is a shepherd, and everyone of you will be questioned about those under his rule: the Amir is a shepherd and he will be questioned about his subjects, the man is a ruler in his family and he will be questioned about those under his care: and the woman is a ruler in the house of her husband and she will be questioned about those under her care.[52]

4.2 *The Dignity of Humanity*

To communicate with human beings, God chose prophets and messengers to convey divine commands and messages. These prophets and messengers, starting with Abraham, are referred to in the *Qur'ān,* as they are in the holy scriptures of Judaism and Christianity. Moses and the Prophet Mohammad are considered in Islam as the only two messengers of God who were entrusted with a comprehensive codex, which in Islam includes the *Shari^{c}ā*, often referred to as the Law of God, although it is mostly arrived at by man's intellectual endeavors.[53]

The *Shari^{c}ā* establishes prescriptive and proscriptive norms which derive from the *Qur'ān* and the Prophet Mohammad's *Sunnah* (which is a compilation of his sayings, *ahadith*, plural of *hadith*, and of his deeds).[54] The *Shari^{c}ā* norms provide for what is permissible and what is prohibited, as well as that which is encompassed within a range of conduct from the preferred to the disapproved. The subject matters covered by the *Shari^{c}ā* range from the very personal and intimate to the very public and social.[55] Central to these subject matters is the respect for human life and for human dignity. Respect for human life and the dignity of a person is a paramount interest that is protected by the *Shari^{c}ā.* Any legally unjustifiable attack upon the life and dignity of a person is also an attack upon God, who created each and every human being and infused each person with something of the divine spirit. This concept is expressed in several verses of the *Qur'ān,* among which which refers to humankind as follows:

> *sūrat al-Hujurāt*: "We have created you men and women, peoples and tribes, [in order that you may] know one another. Verily, the best among you is the most pious. [The best in conduct]" (49:13) [author's translation].

[52] AL-SAHIH AL-BUKHARI, *supra* note 28, No. 5195; AL-SAHIH MUSLIM, *supra* note 28, No. 1829.
[53] This male gender reference is intentional because in Islam, as in Orthodox Judaism and Catholicism, only men made theological doctrine and interpret theology.
[54] *See supra* note 27.
[55] *See supra* note 12.

> *sūrat Al-^{c}Isrāa'*: "Now, Indeed, we have conferred dignity on the children of Adam, and borne them over land and sea, and provided for them sustenance out of the good things of life, and favoured them far above most of Our creation." (17:70) [Asad translation]

These verses do not address only Muslims, but all of humankind. Thus, no human being has the right to kill, injure, dehumanize, or debase another, because all humans are created by God and infused with God's spirit. Consequently, an attack upon a human being without valid legal justification constitutes a crime. This is expressed in *sūrat al-Mā'idah*, which holds that killing a human being is equal to killing all of humanity, and that saving one human being is equal to saving all of humanity:

> *sūrat al-Mā'idah*: Because of this did we ordain unto the children of Israel that if any one slays a human being – unless it be [in punishment] for murder or for spreading corruption on earth – it shall be as though he had slain all mankind; whereas, if anyone saves a life, it shall be as though he had saved the lives of all mankind… (5:32) [Asad translation]

These postulates are not absolutes, however, because the *Shari^{c}ā* provides for the death penalty in connection with certain *hudud* crimes,[56] and also in connection with certain *qesas* and *ta^{c}azir* crimes by analogy to *hudud* crimes.[57] *Hudud* crimes also provide for corporal punishment, which by analogy may be extended to similar *ta^{c}azir* crimes.[58] *Qesas* allows the exaction of similar harm on the person of the perpetrator as was inflicted on the victim. This is the same norm which is found in the Torah and the Old Testament.[59]

4.3 *Justice*

Justice is the cornerstone of the *Shari^{c}ā*, whether it be social or individual. The concept of justice derives from the proposition that God has created humankind and communicated to it divine commands by which God expects humankind to live by on earth, and to be judged by on Judgment Day. Thus the *Shari^{c}ā* is not only the law that applies to humans during their lifetime,

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[56] *See* M. Cherif Bassiouni, *Death as a Penalty in the* Shari'a, *in* CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION (Peter Hodgkinson & William A. Schabas eds., 2004).

[57] *See* Ghauti Benmelha, *Ta^{c}azir Crimes*, *in* ISLAMIC CRIMINAL JUSTICE, *supra* note 45, at 211; ABDEL KADER ODEH, AL-TASHRI'I AL-JINAI'I AL-ISLAMI (4 vols., Cairo, Egypt: Dar el Shorouq, 2001); ABDUL-AZIZ AMER, AL-*TA^{C}AZIR* FIL *SHARI'A* AL-ISLAMI (*Ta^{c}azir* in the Islamic *Shari^{c}ā*) (1969).

[58] *See supra* note 3.; Bassiouni & Badr, *The Shari^{c}ah: Sources, Interpretation and Rule-Making, supra* note 3.

[59] "If… hurt is done, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, bruise for bruise, wound for wound." (Exodus 21:23-24); and "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." (Genesis 9:6).

but it is also the law that God will apply to them in the hereafter, subject to God's compassion and mercy. This holistic approach not only links life on earth to life in the hereafter, but it also links the concept of justice to that of the hereafter. The following verses of the *Qur'ān* address this concept:

> *sūrat al-Nahl:* "Behold, *God enjoins justice* and the doing of good, and generosity towards one's fellow human being; and God forbids all that is shameful and all that runs counter to reason, as well as [all forms of] envy; [and] God exhorts you so that you might bear [all this] in mind." (16:90) (emphasis added) [author's translation]
>
> *sūrat al-Nisā:* "Behold, God bids you to deliver all that you have been entrusted with unto those who are entitled thereto, and *whenever you judge do so with justice*. Verily, most excellent is what God exhorts you to do: verily God is all-hearing, all-seeing!" (4:58) (emphasis added) [author's translation][60]

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[60] *See also*:

sūrat al-Nisā: "O You who have attained to faith! *Be ever steadfast in upholding equity, bearing witness to the truth for the sake of God,* even though it be against your own selves or your parents and kinsfolk. Whether the person concerned be rich or poor, God's claim takes precedence over the claims of either of them. *Do not, then, follow your own desires, lest you swerve from justice:* for if you distort the truth, or refuse to testify, behold, God is indeed aware of all that you do!" (4:135) (emphasis added) [author's translation.]

sūrat al-Baqara: "And the divorced women shall undergo, without remarrying, a waiting period of three monthly courses: for it is not lawful for them conceal what God may have created in their wombs, if they believe in God and the Last Day. And during this period their husbands are fully entitled to take them back, if they desire reconciliation; but in accordance with *justice*, the rights of the wives [with regard to their husbands] are equal to the [husbands'] rights with regard to them, although men have precedence over them [in this respect]. And God is almighty, wise." (2:228) (emphasis added) [author's translation]

sūrat al-An'am: Say: "Come, let me convey unto you what God has [really] forbidden to you: "Do not ascribe divinity, in any way, to aught beside Him; and [do not offend against but, rather,] do good unto your parents; and do not kill your children for fear of poverty - [for] it is We who shall provide sustenance for you as well as for them; and do not commit any shameful deeds, be they open or secret; and do not take any human being's life-[the life] which God has declared to be sacred -otherwise than in [the pursuit of] *justice*: this has He enjoined upon you so that you might use your reason;" (6:151) (emphasis added) [author's translation]

*sūrat al-An'am: "*And do not touch the substance of an orphan – save to improve it – before he becomes of age. And [in all your dealings] give full measure and weight, with equity: [however,] We do not burden any human being with more than he is well able to bear, and when you voice an opinion, be just, even though it be [against] one near of kin. And [always] observe your bond with God: this has He enjoined upon you, so that you might keep it in mind. (6:152) [author's translation]

sūrat Al-Hadîd: "And, indeed, [to same end] we sent forth Noah and Abraham [as our message- bearers], and established prophethood and revelation among their descendents; and some of them were on the right way, but many were iniquitous." (57:25) [author's translation]

sūrat Al-Mā'idah: "O you who have attained to faith! Be ever steadfast in your devotion to God, bearing witness to the truth in all equity; and never let hatred of anyone lead you into the sin of deviating from

In the *Qur'ān* as well as in the holy scriptures of Judaism and Christianity, God is defined as a God of justice, and as a just God.[61] In the *Qur'ān*, God is also described with 99 attributes

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justice. Be just: this is closest to being God-conscious. And remain conscious of God: verily, God is aware of all that you do." (5:8) (emphasis added) [author's translation]

sūrat Al- 'An^{c}ām: "They are saying, too, "Why has not an angel [visibly] been sent down unto him?" But had We sent down an angel, all would indeed have been decided, and they would have been allowed no further respite [for repentance]." (6:8) [author's translation]

sūrat al-Isra: "And do not take any human being's life -[the life] which God has willed to be, sacred- otherwise than in [the pursuit of] *justice*. Hence, if anyone has been slain wrongfully, We have empowered the defender of his rights [to exact a just retribution]; but even so, let him not exceed the bounds of equity in [retributive] killing. [And as for him who has been slain wrongfully -] behold, he is indeed succored [by God]!" (17:33) (emphasis added) [author's translation]

sūrat al-Saba: "Say: "Our Sustainer will bring us all together [on Judgment Day], and then He will lay open the truth between us, in *justice* – for He alone is the One who opens all truth, the All-Knowing!" (34:26) (emphasis added) [author's translation]

sūrat al-Suad: "As they came upon David, and he shrank back in fear from them, they said: "Fear not! [We are but] two litigants. One of us has wronged the other: so judge thou between us with *justice*, and deviate not from what is right, and show [both of] us the way to rectitude." (38:22) (emphasis added) [author's translation]

sūrat al-Az-Zumar: "And the earth will shine bright with her Sustainer's light. And the record [of everyone's deeds] will be laid bare, and all the prophets will be brought forward, and all [other] witnesses; and judgment will be passed on them all in *justice*. And they will not be wronged" (38:26) (emphasis added) [author's translation]

sūrat al-Az-Zumar: "And thou wilt see the angels surrounding the throne of [God's] almightiness, extolling their Sus-tainer's glory and praise. And judgment will have been passed in *justice* on all [who had lived and died], and the word will be spoken: "All praise is due to God, the Sustainer of all the worlds!" (39:75) (emphasis added) [author's translation]

sūrat al-Ghafir: "And God will judge in accordance with truth and *justice*, whereas those [beings] whom they invoke beside Him [15] cannot judge at all: for, verily, God alone is all-hearing, all-seeing. (40:20) (emphasis added) [authors' translation]

sūrat al-Ghafir: "And, indeed, [O Muhammad,] We sent forth apostles before thy time; some of them We have mentioned to thee, and some of them We have not mentioned to thee. And it was not given to any apostle to bring forth a miracle other than by God's leave. Yet when God's will becomes manifest, judgment will [already] have been passed in all *justice*, and lost will be, then and there, all who tried to reduce to nothing [whatever they could not understand]. (40:78) (emphasis added) [author's translation]

sūrat al-Hujurat: "Hence, if two groups of believers fall to fighting, make peace between them; but then, if one of the two [groups] goes on acting wrongfully towards the other, fight against the one that acts wrongfully until it reverts to God's commandment; and if they revert, make peace between them with *justice*, and deal equitably [with them]: for verily, God loves those who act equitably!" (49:9) (emphasis added) [authors' translation]

[61] For the perceptions of God, see KAREN ARMSTRONG, THE BATTLE FOR GOD: FUNDAMENTALISM IN JUDAISM, CHRISTIANITY AND ISLAM (New York, NY: Random House, 2000).

referred to as *Asma' Allah al-Husna*,[62] among which the two most important are God's mercy and compassion. From that, Muslims are to learn that human justice is also to be tempered by compassion and mercy. The *Shari^{c}ā* requires adherence to the ideals of fair and impartial justice based on due process and evidentiary requirements, which are needed in order to protect the innocent and to insure the integrity of the legal system. This is evident in many verses of the *Qur'ān*, some of which are quoted above, and others which follow below:

> *sūrat al-Nisa^{c}*: "Behold, God bids you to deliver all that you have been entrust with unto those who are entitled thereto, and whenever you judge between people, to judge with justice, verily, most excellent is what God exhorts you to do: verily, God is all-hearing, all-seeing!" (4:58)
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> *sūrat al-Nisa^{c}*: "O you who have attained to faith! Be ever steadfast in upholding equity, bearing fitness to the truth for the sake of God, even though it be against your own selves or your parents and kinsfolk. Whether the person concerned be rich or poor, God's claim takes presence over [the truth], or refuse to testify, behold God is indeed aware of all that you do!" (4:135)
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> *sūrat al-Nahl*: "Behold, enjoins justice, and the doing of good and generosity towards [one's] fellow/men; and He forbids all that runs counter to reason, as well as envy; [and] He exhorts you [repeatedly] so that you might bear [all this] in mind." (16:90)
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> *sūrat al-Nahl* "Call thou [all mankind] unto thy Sustainer's path with wisdom and goodly exhortation, and argue with them in the most kindly manner: for, behold, thy Sustainer knows best as to who strays from His path, and best knows He as to who are the right-guided." (16:125)

Abul Ala Mawdudi, a traditionalist-fundamentalist scholar of the 20th century, was one of the most influential scholars of his period. He explained the Islamic concept of the right to justice as follows:

> This is a very important and valuable right which Islam has given to man as a human being. The Holy Quran has laid down: "Do not let your hatred of a people incite you to aggression" (5:3). "And do not let ill-will towards any folk incite you so that you swerve from dealing justly. Be just; that is nearest to heedfulness" (5:8). Stressing this point the Quran again says: "You who believe stand steadfast before God as witness for [truth and] fairplay" (4:135). This makes the point clear the Muslims have to be just not only with ordinary human beings but even with their enemies. In other words, the justice to which Islam invites her followers is not limited only to the citizens of their own country, or the people of their tribe,

[62] AL-GHAZALI, THE NINETY-NINE BEAUTIFUL NAMES OF GOD (D. Burrell & L. Goodman trans., Cambridge, UK: Cambridge University Press, 1992).

> nation or race, or the Muslim community as a whole, but it is meant for all the human beings of the world. Muslims, therefore, cannot be unjust to anyone. Their permanent habit and character should be such that no man should ever fear injustice at their hands, and they should treat every human being everywhere with justice and fairness. [63]

As to the security of personal freedom, Mawdudi states:

> 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 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 gotten 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 the Islamic law and therefore he 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 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

[63] MAWDUDI, HUMAN RIGHTS IN ISLAM, *supra* note 49, at 19. The taking and detention of the hostages and the failure by the Iranian Government to secure their release also threaten the right to security of life and property under Islamic law. *See also* Bassiouni, *The Protection of Diplomats Under Islamic Law, supra* note 13.

> 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.[64]

The revered Ali ibn Abi-Taleb, Islam's fourth *Khalifa* who was the Prophet's cousin and son-in-law, adhered to this position in his dealings with the *Khawarej* who opposed him and even threatened to kill him. He held that they could not be arrested so long as they lived in peace in reliance on the *Qur'ān*, which states:

> *sūrat al-Ma'idah*: You who believe stand out firmly for God as witnesses to fairness, and let not the hatred of others make you swerve to wrong and depart from justice. Be just, which is next to piety, and fear God, for God is well acquainted with all that you do. (17:9)

These and other verses potulate a duty equal to that of piety and belief to uphold justice and fairness, and that the contrary is a wrong against God, as well as against one's fellow human beings. To commit such a wrong requires redress, including criminal and civil penalties. The *Shari*^{c}*ā*'s policy tends toward reconciliation, and that is why compensation, the victim's choice of *diyya*, is included in redress for *qesas* crimes. However, material compensation is only a part of victim redress. Acknowledgment of the wrong by the wrongdoer is more important. Thus, the *Shari*^{c}*ā*'s policy is toward healing and reconciliation, or *sulh*.[65] This approach is, in the most progressive views of post-conflict justice, the preferred one.

4.4 The State and the Individual in the Shari^{c}ā

The prescriptive and proscriptive norms of the *Shari*^{c}*ā* reflect the fundamental values of Islam, which include justice and the protection of what we call human rights. The *Shari*^{c}*ā* deems the protection of these values to be both an individual and a collective responsibility. This is accomplished through principles and norms applicable to the *ummah*'s governance, and the balancing of the rights and duties of individuals within the collectivity. Enforcement of such

[64] MAWDUDI, HUMAN RIGHTS IN ISLAM, *supra* note 50, at 25-26.
[65] *See, e.g.*, Mohamed Abu-Nimer, *Conflict Resolution in an Islamic Context*, 21 PEACE & CHANGE 22 (2009); Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration* (London, UK: London School of Economics Legal Studies Working Paper No. 12, 2008); George Irani & Nathan Funk, *Rituals of Reconciliation: Arab-Islamic Perspectives* (Kroc Institute Occasional Paper No. 19, 2000).

rights is by various means of social controls, but also through criminal sanctions applicable to the three categories of crimes discussed below.

Islam introduced a social revolution in its earliest years, with individual and collective morality as its cornerstone. Unlike other sources of secular law, the *Qur'ān* emphasizes duties over rights.[66] It insists upon the fulfillment of individual obligations before the individual can claim privileges. The individual is neither apart from nor separate from society, and rights are neither different from nor conflicting with those of the community. This represents a holistic approach that differs from western, secular liberal approaches to individual rights, and is closer to the Socialist and then Marxist approaches to the theories of rights and obligations within a given social context. This distinction is reflected in the two international covenants adopted by the United Nations in 1966, namely; the International Covenant on Civil and Political Rights (ICCPR),[67] and the International Covenant on Economic, Social and Cultural Rights.[68] In an effort to bridge these differences, the Organization of the Islamic Conference adopted the Cairo Declaration on Human Rights in Islam at the Nineteenth Islamic Conference on August 5, 1990, which is attached herein as Appendix 2.

In Islam, the fulfillment of individual obligations constitutes the reservoir of social benefits which are to be shared by all.[69] The individual enjoys as many privileges as society can afford, and society affords just as much as it receives from the individual. This approach is reflected in Rousseau's social contract.[70] The individual is the shepherd of society, and in turn society takes care of its shepherd, the individual.[71] Thus, society is not separate from the individual, but the Muslim integration of the individual in the collectivity. The individual is expected to exercise social responsibility on the basis of social solidarity. The meaning of this concept of society is found in the context of God's mandate to human creation to the effect that

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[66] *See* Muhammad ᶜAbid al-Jabiri, *The Concepts of Rights and Justice in Arab-Islamic Texts, in* HUMAN RIGHTS IN ARAB THOUGHT, *supra* note 50, at 17, 18-21.

[67] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976.

[68] International Covenant on Economic, Social and Cultural Rights, adopted by U.N. G.A. Res. 2200 A (XXI), 16 December 1966, *entered into force* 3 January 1976, in accordance with article 17.

[69] SIR THOMAS W. ARNOLD, THE PREACHING OF ISLAM (2d. ed., London, UK: Constable Press, 1913); ROBERT ROBERTS, THE SOCIAL LAWS OF THE QURAN: CONSIDERED AND COMPARED WITH THOSE OF HEBREW AND OTHER ANCIENT CODES (London, UK: William and Norgot Ltd., 1925).

[70] JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL (Ronald Grimsley ed., Oxford, UK: The Clarendon Press, 1972).

[71] *See supra* note 78; ABD-AL-RAHMAN ᶜAZZAM, THE ETERNAL MESSAGE OF MOHAMMED (Caesar E. Farah, trans., New York, NY, 1964); The original in Arabic is ABD-AL-RAHMAN ᶜAZZAM, AL-RISALAH AL-KHALIDAH (Cairo, Egypt: The House of Arabic Books, 2d ed. 1954).

each person is God's trustee on earth. Hence, every person owes a duty of due diligence, prudence, and judiciousness in the exercise of this function, which includes the duty of care to other humans and to all other creations of God, be they animal or natural. Humans must preserve life and material objects subject to their prudent and judicious use. Most of all, humans must preserve those values which are at the core of humanity's creation. This includes the preservation of life, the protection of freedom, and the application of justice. Thus, the protection of life, liberty, and property and the pursuit of human fulfillment is secured by divine law and can only be abridged by due process of law in light of other social interests. This enlightened concept of the individual's integration in society and society's obligations toward the individual, particularly those who are vulnerable in society, is reflected in many modern constitutions[72] and human rights instruments.[73]

Freedom, justice, and equality are inherent in Islamic belief. They lie at the very foundation of a Muslim world order and they are universal in scope. The *Qur'ān* states in *sūrat al Nahl:* "Lo! Allah enjoineth justice and kindness ..." (16:90) Elevating justice to the level of a duty-obligation incumbent upon all individuals and upon society is reflected in the verses cited above in section 3. Accountability as a means of achieving justice is strictly personal. The vast body of Islamic learning consisting of jurists' work indicates the complexity of Islamic legal thinking.[74] While their work has accumulated through centuries without periodic synthesis, it has become stultified and resistant to change. The untidy relationship between the theory and goals of Islamic law and the practice by Muslim leaders and their governments has resulted in confusion between theological and social policy.[75] Theological concepts have become a hindrance to the development of legal concepts and norms capable of addressing the modern needs of Muslim societies, and the ability of these societies to integrate themselves effectively within the modern policies of globalization without breaking faith with the fundamental values of Islam. This phenomenon of stultification has produced not only intellectual rigidity, but has reduced Islam as practiced by Muslim societies to a greater adherence to traditional formalities and ritualism which overlook the substantive significance of fundamental Muslim values.

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[72] *See* ALBERT P. BLAUSTEIN, THE CONSTITUTIONS OF THE WORLD (Dobbs Ferry, NY: Oceana Publications, 20 vols., 1971-93).
[73] *See* Bassiouni, 1, 2 AL WATHA'EQ AL-DAWLIĀ AL-MĀ'NEIA BI HUQUQ AL-INSAAN, *supra* note 51.
[74] SIR HAMILTON R. GIBB, THE LAW IN THE MIDDLE EAST (Washington, DC: Middle East Institute, 1955).
[75] *See generally* Schacht, *Islamic Law in Contemporary States*, *supra* note 3.

The dignity of human being is foremost – in Islam it is reflected in the values of freedom, equality, justice and social solidarity. Nowhere are these values better stated than in the following verse of the *Qur'ān* in *sūrat al Isra*: "Surely we have accorded such dignity to the sons [descendants] of Adam." (17:7) (author's translation). This alone explains why the "dignity" of humankind occupies a high position in Islam, though admittedly seldom practiced in contemporary Muslim societies. The *Qur'ān* abounds with references to justice and admonishments and warnings against "persecution," which is referred to 299 times in the *Qur'ān*. Denunciations of "aggression" and its aims are stated eight times in the *Qur'ān*. Warnings against such "violations" are referred to twenty times in the *Qur'ān*.[76] The purpose of upholding dignity is that each person is not only the creature of God, but is the only creature susceptible of the choice of Islam (surrender to God), from that we derive the *raison d'etre* of human rights, which are designed to insure the dignity of human beings.

It must be noted that whatever differences exist in the Islamic legal system generally between Muslims and non-Muslims, they have no bearing on the fundamentals of the integrity of the criminal process in its pursuit of truth and justice, the determination of individual responsibility, and the remedy of the victim, whether the accused or victim is Muslim or non-Muslim. Nevertheless, there are some differences. These are: 1) the social remedy, which is that portion of the punishment predicated on social obligation, to which a Muslim is held in different ways than a non-Muslim because of the concept of lslam as a social order; and, 2) the method of proof, which in the Islamic criminal justice system relies heavily on oath-taking by the accused, the victim, and the witness, which for the Muslim is an oath on the *Qur'ān* to which a non-Muslim is not eligible, creating an imbalance in evidence.[77]

Within the context of the broader question of Islamic criminal justice and international protection of human rights, the issue of the place of the individual, and implicitly of individual rights, is derivative of the conceptual relationship between the individual and the state.[78] Unlike

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[76] MUHAMMAD MOUSSA, ISLAM AND HUMANITY'S NEED OF IT (Cairo, Egypt: Supreme Council for Islamic Affairs, 1966).

[77] *See* El-Berri, *La prestation de serment comme Processus d'Instruction des crimes d'Homicide das la legislation islalyique* 46 REVUE INTERNATIONALE DE DROIT PENAL, 373 (1975). *See also* George Baroody, *Shari^{c}ā: The Law of Islam* 72 CASE & COMMENT 2 (1967).

[78] *See generally* Shamsuddin al-Kaylani, *Concepts of Human Rights in Islamic Doctrines (Sunnis, Shi'ites, Isma'ilis, Qarmatians, Mu'tazilis, Sufis, Wahhabis), in* HUMAN RIGHTS IN ARAB THOUGHT, *supra* note 50, at 183 and 196 (discussing Al-Ghazali's position that one cannot properly perform one's duties to God without the conditions of one's human rights first being satisfied).

western philosophical and political perceptions on the separability of the individual and the state, Islamic social concepts do not make such a distinction. The individual does not stand in an adversary position *vis à vis* the state but is an integral part thereof. The consequences of this relationship which flows from the concept of Islam, as discussed earlier, is that there is no apparent need to delineate individual rights in contraposition to the state. Thus, the question more appropriately asked about the individual in the Islamic criminal justice is: what qualitative standards in the administration of justice are required? That inquiry focuses on the integrity of the process and not on the allocation of rights or attribution of prerogatives to the individual and to the state acting through its public agencies and agents. The question of what standards of criminal justice administration are required by Islam is in turn dependent on the purposes and goals of that system, which are: l) the ascertainment of the truth; 2) the determination of the responsibility of the accused; 3) the remedy to the victim; and 4) the social remedy. These purposes are not only process-oriented, but goal-oriented. It is that essential distinction with non-Islamic criminal justice systems which make it difficult to translate the role and rights of the individual in the Islamic system in terms that offer a comparable parallel to other systems. Notwithstanding these difficulties, it can be concluded that the nature of the Islamic criminal justice process is oriented towards justice and fairness. Such a system has in the past and is still capable of producing the same quality of justice rendered in non-Islamic systems in terms of general due process and specific guarantees of fair trial, as embodied in provisions of conventions on the international protection of human rights.[79]

To achieve these goals, the *Shari*^{c}*ā* establishes the principle of individual accountability, and therefore rejects impunity. Similarly, the goals of contemporary post-conflict justice are to achieve accountability, thus rejecting impunity for human rights transgressions.[80]

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[79] *See* Bassiouni, 1, 2 AL WATHA'EQ AL-DAWLIĀ AL-MĀ'NEIA BI HUQUQ AL-INSĀN, *supra* note 51. See also for example, the Cairo Declaration on Human Rights in Islam, herein attached as Appendix 2; International Covenant on Civil and Political Rights, *supra* note 65; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (1951); and the American Convention on Human Rights (Article 5(2)), Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

[80] *See supra* note 1. *See also* M. Cherif Bassiouni, *Challenges Facing a Rule-of-Law-Oriented World Order*, 8 SANTA CLARA J. INT'L L. (2010); Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 12; M. Cherif Bassiouni, *The Perennial Conflict between International Criminal Justice and* Realpolitik, 22 GA. ST. U. L. REV. 541-560 (2006), M. Cherif Bassiouni, *Searching for Justice in the World of* Realpolitik, 12 PACE INT'L L. REV. 213 (2000); Diane F. Orentlicher, *Settling Accounts—The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

5. The Islamic Criminal Justice System

5.1 *Introduction*

The Islamic criminal justice system is a complex subject, in part because some of the crimes derive from the *Qur'ān*, and in part because of the relationship between the concept of social justice and criminal justice.[81] There are three categories of crimes, as discussed below, namely, *hudud*, *qesas*, and *ta^c^azir*. Each category has different sources of law with regard to the substantive nature of the crime and its elements, as well as its evidentairy requirements. They all share, but only to some extent, certain general characteristics of criminal responsibility. Their applciation throughout the history of Islam's fourteen centuries and also in different cultures has varied, sometimes demonstrating the greater influence of culture over a centralized legal tradition. Nevertheless, as is discussed below, there are many aspects of the Islamic criminal justice system which are directly applicable to post-conflict justice situations, and more specifically, the three categories of crimes mentioned above. Why Muslim countries have not resorted to the application of any of the three categories of crimes discussed below, is to say the least surprising. This is more significant with respect to *hudud* crimes, whose prosecution is

[81] *See generally* RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE 16TH TO THE 20TH CENTURIES (Cambridge, UK: Cambridge University Press, 2005); CRIMINAL JUSTICE IN ISLAM: JUDICIAL PROCEDURE IN THE SHARIA (Muhammad Abdel Haleem, Adel Omar Sherif, & Kate Daniels eds., London, UK: I.B. Tauris, 2003); ANWARULLAH, THE CRIMINAL LAW OF ISLAM (A.S. Noordeen, Kuala Lumpur Malaysia 2002); ISLAM, CRIME, AND CRIMINAL JUSTICE (Basia Spalek ed., London, UK: Willan Publishing, 2002); ODEH, AL-TASHRI'I AL-JINAI'I AL-ISLAMI, *supra* note 56; MUHAMMAD ABU-ZAHRA, AL-JARIMA WAL-UQUBA FIL ISLAM (1974, reprinted in two volumes by Dar al Fikr al Arabi, Cairo, Egypt, 1998); AMIR ABDEL AZIZ, EL FIQH AL JINAIA FIL ISLAM (Dar As Salam, Cairo, Egypt, 1997); MUHAMMAD ^C^ATA AL-SIDAHMED, ISLAMIC CRIMINAL LAW: THE HUDUD (self published in Malaysia, 1995, reprinted by Eagle Trading, Petaling Jaya, Malaysia, 1995); FARHAD MALEKIAN, THE CONCEPT OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE STUDY (Leiden, The Netherlands: Martinus Nijhoff Publishers, 1994); NAJAT SAYYID AHMAD SANAD, THE THEORY OF CRIME AND CRIMINAL RESPONSIBILITY IN ISLAMIC LAW: SHARI^C^Ā (Chicago, IL; Office of International Criminal Justice, 1991); MATTHEW LIPPMAN, SEAN MCCONVILLE, AND MORDECHAI YERUSHALMI, ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION (Abingdon, UK: Praeger Publishers, 1988); THE ISLAMIC JUSTICE SYSTEM, *supra* note 45; MUHAMMAD SALIM EL-AWA, PUNISHMENT IN ISLAMIC LAW (Indianapolis, IN: American Trust Publication, 1982); ALY ALY MANSOUR, NIZAM AL-TAJRIM WAL ^C^OQUBA FIL ISLAM (2 vols., Medinah, Saudi Arabia: Mowassat Al Zahra, 1976); AHMED FATHI BAHNASSY, AL JARAIM FI AL FIQH AL ISLAMI (Cairo, Egypt: Maktabat al Wa'i al Arabi, 1968).

See also Michael Bohlander & Mohammad M. Hedayati-Kakhi, *Criminal Justice under Shari'ah in the 21st Century – An Inter-Cultural View*, 23 ARAB L.Q. (2009); Mohamed Elewa Badar, *Islamic Criminal Justice in the 21st Century*, 9 INT'L CRIM. L. REV. 591 (2009); Farhad Malekian, *The Homogeneity of the International Criminal Court with Islamic Jurisprudence*, 9 INT'L CRIM. L. REV. 595 (2009); Bassiouni, *A Search for Islamic Criminal Justice: An Emerging Trend in Muslim States*, *supra* note 44; Adel Maged, *Arab and Islamic Shari^c^ā Perspectives on the Current Systems of International Criminal Justice*, 8 INT'L CRIM. L. REV. 477 (2008); M. Cherif Bassiouni, *l'Islam Face à la Déviance, in* LES DIFFÉRENTS ASPECTS DE LA CULTURE ISLAMIQUE, 303 (A. Bouhdiba & M. Ma'ruf al-Dawalibi eds., Paris, France: UNESCO, 1995).

mandatory, and with *qesas* crimes, in which the rights of the victims can never be compromised by the state or anyone else.

What follows reveals that the Islamic system of criminal justice can and should be applied in post-conflict justice situations.

5.2 *Characteristics of the* Shari^{c}ā's *Penal Proscriptions*

Characteristics of the *Shari^{c}ā*'s penal proscriptions derive from the *Qur'ān* and the *Sunnah.* These characteristics are also found in contemporary human rights treaties such as the ICCPR.[82] They can be summarized as follows:

1. That which is not prohibited is permitted.

2. Breadth and scope (which explains the absence of uniformity in form and style of penal proscriptions, since the range is from very broad to very specific statements).

3. Precepts, proscriptions, and even specific prohibitions are frequently based on actual events and not hypothetical suppositions (thus strengthening the possibility of interpretation by analogy).

4. The wording of prohibitions and admonitions allow for policy-oriented interpretation and application, based on sound policy reasoning and social necessity.

5. The use of unequivocal language in specific prohibitions is frequently tempered by other provisions allowing legal excuse of justification and judicial discretion.

6. The imposition of evidentiary requirements (designed to restrict judicial discretion and to make the finding of guilt and imposition of sanctions more difficult with respect to certain crimes) temper the apparent harshness of the penalties.

7. Establishment of procedural safeguards, designed to protect the individual from abuse by others and from abuses of power by the authorities and the judge, protects individual rights.

8. Proscriptions on criminal justice are not concentrated in any one part of the *Qur'ān* or the *Sunnah*, but are interspersed among a variety of other subjects throughout the *Qur'ān* and the *Sunnah*.

9. Matters relating to criminal justice – crimes, penalties, evidentiary requirements, procedures, etc. – are referred to contextually as part of different verses, thus highlighting the social and moral aspects of criminal justice.

[82] *See supra* note 65.

10. Codification and legislation are permissible in all three categories of crimes, with discretionary latitude in *ta^c^azir* crimes.

11. Penalties for each category of crimes differ, thus evidencing a different philosophy and policy of punishment.

12. Penalties are intended essentially as deterrents, although emphasis is also placed on rehabilitation, particularly in defining and punishing *ta^c^azir* crimes, with a strong tendency for compensatory non-penal sanctions in *qesas* crimes.

The Islamic criminal justice system must be understood and interpreted in light of the above characteristics (which are not exhaustive), and of the *Shari^c^ā*'s penal proscriptions.[83] However, these characteristics are dependent on the choice of applicable sources of law, their ranking, and interrelationship, in accordance to the rules of interpretation recognized as *Ūsūl al-Fiqh*.[84]

5.3 *Principles of Legality (Non-Retroactivity, No Crime Without Law, No Punishment Without Law)*

In Islam, only that which is prohibited is not permitted. The *Shari^c^ā*, and other laws made pursuant thereto, constitutes the dividing line between that which is prohibited and that which is not. Thus, there can be no crime without a specific legal provision in the *Shari^c^ā* and other laws made pursuant thereto, and there can be no punishment without law.[85] Since there can be no crime or punishment without law, and nothing is forbidden unless specifically stated by law, it follows that a person is presumed innocent until proven guilty according to the requirements of the law. Furthermore, since no person can be held criminally accountable for conduct not specifically prohibited by law, he cannot be so held for conduct preceding its criminalization. Thus criminal law cannot be retroactive.

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[83] *See, e.g.*, SOBHI MAHMASANI, FALSAFAT AL-TASHARI^c^ FIL ISLAM (__1961).

[84] *See, e.g.*, M. AL-GHAZALI, AL-MUSTAWISSAT MIN ^c^ILM AL-USUL (__1894); IMAM AL-SARAKHSI, AL-MABSUT (11th century CE); ABU BAKR IBN MAS'UD AL-KASANI, BADA'I^c^ AL-SANA'I^c^ FI TARTIB AL SHARI^c^Ā (multi-volume work, 1910); AL-AMIDI, AL-AHKAM FI USUL AL-AHKAM (n.d.).

[85] For the principle of legality in criminal legislation, see A.F. SOROUR, AL-SHARI'A WAL-IJRAAT AL-JINA'IA, *supra* note 3; A. Gamal El-Din, *al-Shariia fil-Shariia al Jina'ia*, 16 No. 2 MEJALAT AL-OULOUM AL-QANOUNIA WAL-IQTISADIA 359-517 (July 1974). Muhammad Salim Al-^c^Awwa, *The Basis of Islamic Penal Legislation*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 45, at 127; Taymour Kamel, *The Principle of Legality and Its Application in Islamic Criminal Justice*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 45, at 149. See also for the *Shi^c^ā* perspective, see Tellenbach, *Aspects of the Iranian Code of Islamic Punishment*, *supra* note 30.

The principles of legality are: 1) presumption of innocence; 2) non-retroactivity of the criminal law, no crime without law, and no punishment without law; and 3) equality before the law and equal application of the law. The principle that punishment shall be applied only by virtue of law and no law shall be applied retroactively are each considered a "basic principle" or *Qa^{c}eda Usulia*, which finds express support in the *Qur'ān*:

> *sūrat al-Isrā'*: (Allāh) said: "Be thou among those who have respite." (17:15) [Ali translation]

This statement means that the accused must first be given the opportunity to know the law, and thus no punishment can be imposed without prior law. Similarly it is stated:

> *sūrat al-Qasas*: Nor was thy Lord the one to destroy a population until He had sent to its centre a messenger, rehearsing to them Our Signs; nor are We going to destroy a population except when its members practice iniquity. (28:59) [Ali translation]

Establishment of the law and its divulgation (notice) must precede its application. The *Qur'ān* also states:

> *sūrat al-Nisā'*: "Messengers who gave good news as well as warning, that mankind, after (the coming) of the messengers, should have no plea against *Allāh*: For *Allāh* is Exalted in Power, Wise." (4:165) [Ali translation]
>
> *sūrat al-An^{c}ām*: Say: "What thing is most weighty in evidence?" Say: "*Allāh* is witness between me and you; This Qur'an hath been revealed to me by inspiration, that I may warn you and all whom it reaches. Can ye possibly bear witness that besides *Allāh* there is another *Allāh*?" Say: "Nay! I cannot bear witness!" Say: "But in truth He is the one *Allāh*, and I truly am innocent of (your blasphemy of) joining others with Him." (6:19) [Ali translation].

And:

> *sūrat al-Mā'idah*: "Know ye that *Allāh* is strict in punishment and that *Allāh* is Oft-forgiving, Most Merciful." (5:98) [Ali translation]

Seldom does one find more unequivocal texts in the *Qur'ān* confirming the principles of prior notice and non-retroactivity so emphatically. Thus no Islamic tribunal or judge *qadi* may apply a law to a person who at the time of the alleged offense was not subject to that law. There is also specific application of this principle in the *Qur'ān* in connection with marriage. Men are prohibited from marrying certain women such as their mothers and sisters, and also from

marrying two sisters at the same time. However, since in pagan pre-Islamic days marrying two sisters was permitted, the *Qur'ān* held that this prohibition would not be retroactive, and it states:

> *sūrat al-Nisā'*: "And marry not women whom your fathers married, - except what is past: It was shameful and odious, - an abominable custom indeed." (4:22) [Ali translation]

Non-retroactivity was also the subject of the Prophet's "Final Pilgrimage" *Hadith*, in which he said:

> (There) is prescription for blood crimes spilled (committed) in the days of ignorance (before Islam was revealed). . . .[86]

The Prophet thereby affirmed the non-retroactivity of laws applicable to crimes and punishment before the promulgation of Islamic law.

5.4 *Presumption of Innocence*

This principle applies equally to criminal legislation and to its application. The Prophet said, "avoid using circumstantial evidence in *hudud*", which are the most serious of all crimes since they are specified in the *Qur'ān*.[87] Aisha, the wife of the Prophet, referring to this *Hadith*, reported that the Prophet also stated:

> Avoid condemning the Muslim to *Hudud* whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favor of innocence [pardon] than in favor of guilt [punishment].[88]

It is also a well-established principle in *qesas* crimes (discussed below) that circumstantial evidence favorable to the accused is to be relied upon, while if unfavorable to him it is to be disregarded.

The presumption of innocence applies to the lesser *ta^c^azir* offenses (discussed below) as well. In his "Final Pilgrimage" *Hadith*, the Prophet said: "Your lives, your property, and your honor are a burden upon you until you meet your Lord on the Day of Resurrection."[89] This

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[86] *See* Aly Aly Mansour, *Hudud Crimes*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 45, at 195.
[87] *See* 1 MANSOUR, NIZAM AL-TAJRIM WAL ^C^OQUBA FIL ISLAM, *supra* note 79; AL-SIDAHMED, ISLAMIC CRIMINAL LAW, *supra* note 79; AHMED FATHI BEHNASSI, AL-HUDUD FIL ISLAM (Cairo, Egypt: Muwasassat al Khalij, 1987).
[88] Al Turmuzy, No. 1424; Al Baihagi, No. 8/338; Al Hakim, No. 4384.
[89] The final speech of the Prophet is contained and commented upon in nearly every book dealing with Prophet Muhammad, for example, AL SIRA AL NABAWIYYA (translated by Trevor Le Gassick as THE LIFE OF THE PROPHET MUHAMMAD, 4 vols., Redding, UK: Garnett Publishing, 1998). *See also e.g.* TARIF KHALIDI, IMAGES OF MUHAMMAD: NARRATIVES OF THE PROPHET IN ISLAM ACROSS THE CENTURIES (New York, NY: Doubleday, 2009); ABDELRAHMAN EL SHARQAWI, MUHAMMAD RASUL AL HURRIYA (Cairo, Egypt: Dar El Shorouq, 2008); TARIQ

passage is interpreted to mean that the duty to protect life, property, and honor cannot be abridged without positive proof of a crime. The Prophet in an earlier *Hadith* stated:

> Had Men been believed only according to their allegations, some persons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof.[90]

It has therefore become a basic rule in Islamic criminal law that:

> The burden of proof is on the proponent, and the oath is incumbent on the one who denies.[91]

Some scholarly interpretations of this principle place the accused (who cannot be falsely accused lest his accuser incur criminal responsibility) in the condition of "collateral innocence."[92]

5.5 *Equality before the Law*

The *Qur'ān* is specific about the equality of all persons before the law.

> *sūrat al-Nisā'*: "O mankind! Reverence your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them twain scattered [like seeds] countless men and women; - reverence Allāh, through whom ye demand your mutual [rights], and [reverence] the wombs [That bore you]: for Allāh ever watches over you." (4:1) [Ali translation]

> *sūrat al-Hujurāt*: "O mankind! We created you from a single [pair] of a male and a female, and made you into nations and tribes, that ye may know each other [not that ye may despise each other]. Verily the most honoured of you in the sight of Allāh is [he who is] the most righteous of you. And Allāh has full knowledge and is well acquainted [with all things]." (49:13) [Ali translation].

Thus crimes and punishment must apply equally. This also extends to criminal proceedings. The principle is not, however, deemed to be violated with respect to the

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RAMADAN, IN THE FOOTSTEPS OF THE PROPHET: LESSONS FROM THE LIFE OF MUHAMMAD (Oxford, UK: Oxford University Press, 2007); ADEL SALAHI MUHAMMAD, MAN AND PROPHET: A COMPLETE STUDY OF THE LIFE OF THE PROPHET OF ISLAM (Leicestershire, UK: Islamic Foundation, 2002); KAREN ARMSTRONG, MUHAMMAD: A BIOGRAPHY OF THE PROPHET (San Francisco, CA: Harper, 1992); MOHAMED HUSAYN HEIKAL, THE LIFE OF MOHAMMED (8th ed., Isma'il Al Farouqi trans., Plainfield, IN: American Trust Publications, 1976); A. GUILLAUME, THE LIFE OF MUHAMMAD (a translation of IBN IS HAQ, SIRAT RASUL ALLAH) (Oxford: Oxford University Press, 1955). For an English version of the final speech, see JAVEED AKHTER, THE SEVEN PHASES OF PROPHET MUHAMMAD'S LIFE 157 (Oak Brook, IL: International Startegy and Policy Institute, 2003).

[90] Al Baihagi, The 40 Hadith of Imam al Nawawi, No. 33.

[91] *See* AHMAD IBN AL-HUSAYN AL-BAYHAQI, KITAB AL-SUNAN AL-KUBRA, 253 (Vol. 10, __1925). For the application of the principle, see IBN ABI AL-DAMM AL-HAMAWI, ADĀB AL-QUDAT (__1975).

[92] Osman Abdel Malek al-Saleh, *The Right of the Individual to Personal Security in Islam*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 45, at 66.

individualization of penalties, particularly *ta^c^azir* offenses where the theories of correction and rehabilitation applies. The principle of equality, however, guarantees that the judge will not abuse his or her discretionary powers. It is a form of control over the disparity of sentences and abuse of power. While that principle appears more procedural in nature, it is also substantive because it precludes legislation which would be unequal in its purposes, scope, and application, subject to those legitimate distinctions made pursuant to the legally valid need to preserve Islam, the integrity of the state, the rights of individuals in society, and the protection of the public interest and welfare under the rule of law. The Prophet also stated: "O mankind! You worship the same God, you have the same father. The Arab is not more worthy than the Persian and the red is not more deserving than the black except in Godliness."[93]

The principle of equality was also manifestly recognized when the Prophet stated that if his own daughter, Fatima, would commit a theft her kinship to him would not save her from the *had* penalty. Similarly, when a number of persons slandered the Prophet's wife, Aisha, he decided that the *had* penalty for such slander would apply to them.[94] Thus exemplifying that closeness or distance from the Prophet does not affect the equality of treatment of individuals before the law.

5.6 *Criminal Responsibility*[95]

Criminal responsibility in Islam is primarily individual, although derivative responsibility or responsibility for the conduct of others, as well as things under one's control, have also developed throughout the history of Islamic jurisprudence and doctrine. The *Qur'ān* contains a number of specific references to the notion of direct, individual responsibility.

> *sūrat al-Najm*: "That man can have nothing but what he strives for" (53:39) [Ali translation]
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> *sūrat Fussilat*: "Whoever works righteousness benefits his own soul; whoever works evil, it is against his own soul: nor is thy Lord ever unjust [in the least] to His Servants." (41:46) [Ali translation]

[93] Musnad Ahmed, No. 22391.
[94] *See supra* note 85.
[95] *See, e.g.*, ODEH, ISLAMIC CRIMINAL JUSTICE, *supra* note 56; ABU-ZAHRA, ISLAMIC CRIMINAL JUSTICE, *supra* note 79; THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 45.

> *sūrat al-An^{c}ām*: It is He Who hath made you [His] agents, inheritors of the earth: He hath raised you in ranks, some above others: that He may try you in the gifts He hath given you: for thy Lord is quick in punishment: yet He is indeed Oft-forgiving, Most Merciful. (6:165) [Ali translation]

> *sūrat Fātir*: Nor can a bearer of burdens bear another's burdens if one heavily laden should call another to [bear] his load. Not the least portion of it can be carried (by the other). Even though he be nearly related. Thou canst but admonish such as fear their Lord unseen and establish regular Prayer. And whoever purifies himself does so for the benefit of his own soul; and the destination [of all] is to Allāh. (35:18) [Ali translation]

> *sūrat al-Nisā'*: Not your desires, nor those of the People of the Book [can prevail]: whoever works evil, will be requited accordingly. Nor will he find, besides Allāh, any protector or helper. (4:123) [Ali translation]

The Prophet in a *hadith* stated: "A soul is not held responsible for acts committed by his father or by his brother."[96]

The various schools of jurisprudence and doctrine have since the days of the Prophet expounded on the principles of criminal responsibility.[97] The consensus is that criminal responsibility is individual,[98] non-transferable, based on the conscious intentional conduct of a person possessing his mental faculties, who not acting under such exonerating conditions as: intoxication, drugs, coercion, or necessity (self-defense being a justifying condition). The first of the two exonerating factors, namely, an intoxicated and drugged condition, will however become punishable for the commission of those crimes, but not for crimes committed under their effect.

A person may also be responsible for the conduct of another when he has a pre-existing legal duty, such as to oversee children. Similarly, a person is responsible for animals and objects under his control, particularly if they have a potential for danger. The basic principle is the balance between the rights of individual freedom, property, and its enjoyment, and the protection of the rights of others. This balancing of rights is a recurrent theme throughout the *Shari^{c}ā* and

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[96] Abu Daoud, No. 4495.

[97] *See, e.g.*, A.F. Bahnassi, *Criminal Responsibility in Islam*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 45, at 171; A.F. BAHNASSI, AL MAS'ULIAH AL-JINA'IYA FIL-FIQH AL-ISLAMI (Mu'assassa al Halabi, Cairo, Egypt, 1969).

[98] There were a number of schools that argued that there is no free will and therefore no criminal responsibility on earth, but in the hereafter. Among these were the *al-Jabriyah* (fatalism school) and the *Mu'tazilah*. *See, e.g.*, ALI IBN AHMAD IBN HAZIM, KITAB AL-FISAL FIL MILAL WAL AHWA'S WAL-NIHAL (multi-volume, 1899-1903, but see Part II) and ABU MANSUR ABDEL QAHIR AL-BAGHDADI, AL-FARQ BAYNA AL-FIRAQ (__1916).

applies to a variety of non-penal matters. Indeed, it is this very concept which gave rise to the notion of *hisba*, a market control system which in modern times would be equated to consumer protection.

Responsibility of omission also exists when there is a legal duty requiring a person to engage in certain conduct or to prevent a particular occurrence, and there is a conscious disregard of this duty. It must be noted that scholars who differ as to the requirement of intent (for example whether unintentional negligent behavior can be the basis of criminal responsibility) also differ as to intentional and negligent omission as the basis of criminal responsibility. Similarly, these debates extend to responsibility for the conduct of another (when a person aids another or facilitates matters for another in the commission of a crime). Another area of great debate is that of causation, namely, to what extent is a person responsible for the consequences of his actions as well as of others for which he may be responsible. These debates, however, exist in every legal system in history, and most of the theories that have evolved in Islamic legal history are within the purview of the *Shari^{c}ā* which in this respect allows the needed flexibility to the legislative and judicial processes to develop the appropriate legal-social policy for the time and place of its application.[99]

5.7 Crimes and Penalties in the Shari^{c}ā

5.7.1 Introduction

The *Shari^{c}ā* contains three categories of crimes: *hudud*,[100] *qesas*,[101] *and ta^{c}azir*.[102] Their sources of law vary, and frequently multiple sources of law must be combined to complete the definition of a given crime, arrive at its elements, and establish its evidentiary requirements. The *Sunni* and *Shi^{c}ā* jurisprudential schools all differ as to some of the elements of the crimes

[99] For discussions of the issues raised above, see AL-MAWARDI, AL-AHKAM AL-SULTANIYA (circa 1100) (E. Fagan trans., Les Status Governementaux et Règles de Droit Public et Administratif, 1915); M. AL-GHAZALI, AL-MUSTAFSA MIN ILM AL-USUL (1894); AL-SARAKHSI, AL-MABSUT, *supra* note 82; ABU BAKR IBN MASUD AL-KASANI, BADAI AL-SANA'FI TARTIB AL *SHARI'Ā* (multi-volume, 1910); MUWAFFAQ AL-DIN IBN QUDAMAH, AL-MUGHNI (__1921) who reflects the views of Shafe^{c}i, Abu Hanifa, and Ibn Hanbal, while the Maliki view is reflected in Ibn Sahnun's version of MALIK, AL-MUDAWWANAH AL-KUBRA (multi-volume, 1940, but see volume 11); ALI IBN AHMAD IBN HAZM, AL-MUHALLA (multi-volume, 1927-1932, but *see* part II).

[100] *See* Mansour, *Hudud Crimes*, *supra* note 85.

[101] *See* M. Cherif Bassiouni, *Qesas Crimes*, in The ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 45, at 203. *See also* M. Cherif Bassiouni, *Les Crime relevant du prècepte de Qesas*, 4 REVUE INTERNATIONALE DE CRIMINOLOGIE ET DE POLICE TECHNIQUE 485 (1989).

[102] *See* Benmelha, *Ta^{c}azir Crimes*, *supra* note 55; AMER, AL-*TA^{c}AZIR* FIL *SHARI^{c}A* AL-ISLAMI, *supra* note 55.

contained in these three categories and their evidentiary requirements. This makes the study of these crimes more difficult.

The three categories of crimes of the *Shari^{c}ā* address issues of substantive criminal law, criminal procedure, evidence, and aspects relating to the administration of criminal justice, including the role of judges, their selection and qualifications. The description of crimes, penalties, and the types of actions described is intended to show that the proscriptive aspects of the *Shari^{c}ā* apply to crimes committed in violent interactive situations, such as conflicts of an international or non-international character, and purely domestic conflicts. Contemporary international criminal law criminalizes certain forms of harmful conduct[103] which Muslim states are legally bound to enforce as part of their international law obligations,[104] and also under the *Shari^{c}ā*, as explained below.

The fact that the criminal aspects of the *Shari^{c}ā* do not correspond to contemporary international criminal law in the labeling of certain crimes and as to their legal elements, does not mean that the *Shari^{c}ā* is devoid of a counterpart in contemporary international law. In fact, it is no different than domestic criminal laws which have a counterpart to international crimes. The killing of a non-combatant or of a sick or injured combatant is a war crime. The same killing could be part of "genocide" or "crimes against humanity." The domestic law of a given state may not have codified these crimes, but it can prosecute under murder provision of its domestic criminal law. The same applies to the *Shari^{c}ā*, which while allowing states bound by international obligations to prosecute international crimes as *ta^{c}azir*; Muslim states can also proceed on the basis of *hudud* and *qesas*.[105]

5.7.2 *Hudud*

Hudud means limits. It is used to mean the limits drawn by divine prescription because the *Qur'ān* prohibits certain acts. An overarching principle of *hudud* crimes is stated in a *hadith*

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[103] *See* BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 5, at chapter 3.
[104] *See supra* note ___.
[105] This approach is recognized and used in international extradition in the context of the principle of double criminality. When a state seeks the extradition of a person from another state for a given crime, the requested state must find that the crime charged is also a crime under its laws. In so doing, the requested state does not look at the label of the crime charged in the requesting state, but as the facts underlying the crime charged. If the facts would give rise to a crime under the laws of the requested state, irrespective of how the crime is labeled, then the requirement of double criminality is satisfied. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 19, at __.

by the Prophet: "avoid harm and inflict no harm on others."[106] *Hudud* crimes are established in the *Qur'ān* and are supplemented by the *Sunnah.* There are at most seven *hudud* crimes, and according to some scholars, only five.[107] They are:

1) *Haraba* (highway robbery), punishable by mandatory death by beheading, crucifixion, cutting off of the hands or feet, or exile.
2) *Baghi* (disruption of the public good or the spread of corruption in society; treasonous uprising against the legitimate ruler), punishable by death by beheading or by a lesser penalty (as in the case of *haraba*).
3) *Ridda* (apostasy), punishable by death by beheading or by a lesser penalty.
4) *Zena* (adultery), punishable by stoning to death the married party, and lashing for the non-married party.
5) *Sariqa* (stealing), punishable by cutting of the hand.
6) *Shorb al-khamr* (drinking of alcohol), punishable by lashing.
7) *Qadhf* (defamation of a woman's chastity), punishable by lashing.

The harshness of the penalties is intended to achieve general deterrence. With respect to some of these crimes the penalty for it is stated in the *Qur'ān*, while with respect to others it has been developed by the *Sunnah*. Also with respect to some of these crimes the *Qur'ān* provides for specific evidentiary requirements such as the number of witnesses and the admissibility of a confession. With respect to some of the crimes certain procedural matters are also required. However, since *hudud* crimes were applied in the days of the Prophet, the *Sunnah* has provided a wide basis for analysis and application.

Hudud crimes are deemed to be against God, as well as against God's established legal and social orders, and both the penal action and the penalty are deemed mandatory, even when the type of penalty is optional.[108] There is probably no subject that evokes greater controversy outside the Muslim world, and even within the Muslim world, than *hudud* crimes and their penalties. This is due to the fact that the penalties include stoning to death, beheading, cutting off

[106] *Sunan Al-Darkatly*, 3/7 *hadith*; AL-SAHIH AL-BUKHARI, *supra* note 28, No. 288; 2/227 *hadith* No. 83-5.
[107] Muslim scholars disagree as to whether these crimes are seven or only five, by excluding the two crimes established in the *Sunna* and not specifically mentioned in the *Qur'ān*, namely *ridda* and *qadhf*.
[108] In some cases such as in slander, *qadhf*, the action is discretionary with the aggrieved party, and in cases of theft, *sariqa*, the victim may forgive and extinguish the action – the latter being retributive and harsh in order to serve as an effective general deterrent.

limbs, and flogging. While no one argues with the validity of including the *hudud* crimes among those deemed as serious violations against the public and social order, the question invariably arises with respect to their penalties.[109]

Each crime has specific elements to enhance stringent evidentiary requirements that must be proven to an extent that goes beyond a doubt.[110]

The policy goals of these crimes were developed in the days of the Prophet and the first four succeeding *Caliphs* in their interpretation of these crimes' elements and their evidentiary requirements.[111] Subsequently, however these and other enlightened interpretive approaches were narrowed by rigid formalism that precluded progressive interpretation.

The word *hudud* means limits and in the context of the *Shari*^{c}*ā,* it is the limits that God imposes. The concept of *hudud* as God's limits first appeared in the revelations in connection with certain inter-personal and social prohibitions arising in the context of marriage and divorce. The *Qur'ān* states:

> *sūrat al-Baqarah*: A divorce is only permissible twice: after that, the parties should either hold Together on equitable terms, or separate with kindness. It is not lawful for you [men], to take back any of your gifts [from your wives], except when both parties fear that they would be unable to keep the limits (*hudud*) ordained by Allāh. If ye [judges] do indeed fear that they would be unable to keep the limits ordained by Allāh, there is no blame on either of them if she give something for her freedom. These are the limits (*hudud*) ordained by Allāh; so do not transgress them if any do transgress the limits (*hudud*) ordained by Allāh,

[109] The death penalty may be by means of stoning to death as in the case of adultery committed by a person who is or has been married. Corporal punishment may be in the nature of severing the hand of the thief or the infliction of whipping or lashing for such violations as drinking alcohol. It must be noted that in addition to the principal prescribed penalties for each crime, and its various categories, there are secondary penalties, such as, in some cases, the prohibition of inheritance, and of being a witness. In contemporary social values these penalties are deemed harsh, if not cruel and unusual, and questions are frequently raised about them. There is therefore a debate which must be faced, namely: whether or not the provisions of the *Qur'ān* with respect to these *Hudud* offenses can be interpreted in less than a literal manner or in a way that fulfills the spirit of the *Shari*^{c}*ā* as opposed to its earlier literal interpretations. If such an interpretation would be given to the provisions of the *Qur'ān*, then a different outcome would be achieved. In that case however it would require a reconsideration of some of the *Sunnah* as being unequivocally binding in its letter as opposed to being merely binding in its spirit. Alternatively the *Sunnah* could be expanded by analogy (*qiyas*) or even through other methods of *ijtihad*. For example, one interpretation of the penalty for the crime of theft would be to add the requirement that the ideal Islamic society must exist first before the penalty could be carried out. The precedent for that exists. During one of the years of Umar Ibn al-Khattab, the second *Khalifa* of Islam, there was widespread famine in the Hejaz and he suspended the application of the *had* penalty for theft arguing that in a condition of famine there could be no satisfaction of the ideal conditions of peace and prosperity in the Islamic society that would justify the application of the *had*.

[110] Muslim scholars however refer to evidentiary standard in different terms, but they all agree that, in case of doubt, the *had* penalty shall not be applied. The Prophet in a *Hadith* admonished against doubtful evidence. *See* Ma'amoun Salama, *General Principles of Criminal Evidence in Islamic Jurisprudence*, *in* BASSIOUNI, THE ISLAMIC CRIMINAL JUSTICE, *supra* note 45, at 109.

[111] In Arabic, *khulafa* is the plural of *khalifa*.

> such persons wrong [themselves as well as others]. 2:229 (emphasis added) [author's translation]

In another passage it is stated:

> *sūrat al-Talāq*: O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count [accurately], their prescribed periods: And fear Allāh your Lord: and turn them not out of their houses, nor shall they [themselves] leave, except in case they are guilty of some open lewdness, those are limits set by Allāh: and any who transgresses the limits (*hudud*) of Allāh, does verily wrong his [own] soul: thou knowest not if perchance Allāh will bring about thereafter some new situation. 65:1 (emphasis added) [author's translation]

Presumably, a victim cannot forgive the transgressor of a *had* crime because the transgression is against a limit placed by God. However, contrary to the belief of many, this is a theological interpretation which is more a reflection of social policy. That is why there are many questions surrounding these crimes. For example:

1) There is ample support that *ridda*, meaning a change as to one's religious belief, is not a *had* crime, but that a change in belief (abandonment of Islam) and actively joining those who wage war on Islam is the *had* crime. That makes ridda more equivalent to high treason than to apostasy, which nearly all legal systems in the world criminalize, and many punish by the death penalty.
2) *Zena*, or adultery, is referred to in the *Qur'ān* as requiring flogging as a punishment. However, the *Qur'ān* does not contain the penalty of death by flogging, a penalty first imposed by the Prophet during his days in Madinah (622-620 CE), when he also applied Jewish law to the Jewish tribes in and around Madinah, and whose laws required such a penalty.
3) *Qadhf*, which is the defamation of a woman's chastity or an improper accusation of adultery or improper sexual conduct outside the bonds of matrimony came about after the Prophet heard of such rumors against his much younger wife Zeinab. However, the penalty developed by the Prophet was optional; the prosecution for stealing and defamation required the victim to complain.

In conclusion, it should be noted that there are differences in the doctrine and jurisprudence of the *hudud* crimes, as well as their required elements, exonerating conditions, evidentiary requirements, and penalties.

The two *hudud* crimes that apply to contemporary post-conflict justice and the crimes of *haraba* and *baghi*, whose modern counterparts are respectively highway armed robbery and ambushing travelers, and the disruption of public order or the spread of corruption in society. Thus, attacks upon the person in these circumstances can become the *had* of *haraba* or *baghi*. Both crimes require mandatory prosecution, unlike a *qesas* crime where the victim can opt for *diyya* (victim compensation) or forgive the transgressor.

The *Qur'ān* refers to the *had* of *haraba* as follows:

> *sūrat al-Mā'idah:* The punishment of those who wage war against *Allāh* and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter. (5:33) [Ali translation]

This verse of the *Qur'ān* is said to apply to this crime as well as to the crime of *baghi*, however it does not state what the elements of that crime are. Jurisconsults disagree as to what the elements of the crimes of *haraba* and *baghi* are, and as to the nature of the applicable penalties, since there are different categories and gradations of *haraba* and *baghi*.

As stated above, the crime of *haraba* can be referred to as being in the nature of armed robbery or highway robbery, and early authors referred to it as theft with the use of force, or theft accompanied by a killing of the victim or a threat on the victim's life. It must however be noted that the words of the applicable provisions in the *Qur'ān* state "those who wage war against God and His Apostle," which indicates to this writer that it is not enough to consider the act of theft by use of force or robbery or armed robbery, but that one must also look at the added dimension signified by the words "wage war against God and His Apostle".[112] This implies that the individual engaging in the violation is not acting by himself, but, for example, in a group criminal activity with others which constitutes not only a threat to the individual victim's safety and his/her property, but also constitutes a threat to public safety and public order of the *ummah*, established to carry out the dictates of God – Islam.

Traditionally, however, jurisconsults have broken the acts of brigandage into four categories: 1) the victim is confronted by a would-be highwayman or robber, but is neither

[112] *Surat al-Ma'ida*: "The punishment of those who wage war against God and his Apostle and strive with might and main for mischief through the land is execution, or crucifixion, or the cutting off of hands and feet from opposite sides or exile from the land." (5:33)

robbed nor harmed; 2) the victim is confronted by force and property is taken away from him by force; 3) the victim is killed in the context of an attempted robbery, but no property is taken; 4) the victim has been killed in connection with a robbery and property has been taken. This type of classification is also used by different scholars to apply the different types of penalties that are stated in the *Qur'ān* above. The penalties include death, and exile, which has been interpreted as including imprisonment. It applies to non-state actors engaged in some of the many forms of violence occurring during armed conflicts. Thus, it is mandatory to prosecute such crimes.

There is also much disagreement among the schools of jurisprudence on the definition of the crimes *baghi* and its elements. However, as a general rule, this is considered to be, *inter alia*, the equivalent of treasonous uprising against the legitimate ruler (*Khalifa* or *Imam*) by use of force. The *Qur'ān* states:

> *Surat al-Hujurat* If two parties among the believers fall into a quarrel, making peace between them, but if one of them transgress beyond bounds against the other, then fight ye all against him who transgress until he complies, then make peace between them with justice, and be fair. For God loves those who are fair [and just]. (49:9, 10) [author's translation]

The assumption being that disagreements must be resolved peacefully, and that those who resort to force are committing a crime which disrupts public order. Thus, *baghi* is brought into line with *haraba* as a crime of violence, which also disrupts public order or peace. That is why the penalties of *haraba* were extended to *baghi*.[113]

Because of the essentially political nature of the crime of *baghi*, there is a great deal of doctrine concerning the manner in which the uprising takes places and the manner in which the *imam* or *khalifa* can overcome it. It is interesting to note that there is a distinction to be drawn between those combatants who continue to fight as opposed to those who surrender. For the latter, instead of a *had* penalty, a *ta^c^azir* penalty is applied, which depends upon the manner in which the combatants abandon their prior erring ways and pledge allegiance to the *khalifa* or *imam*.

Furthermore, what is also quite interesting in this particular crime is that if the *khalifa* or *imam* himself deviates from Islam, there is a right to rebel against him and to depose him. If such an occurrence arises, there can be no crime of transgression or *baghi*. Furthermore, if the *khalifa* or *imam* deviates from Islam and the claims of those who rise up against him are justified and the

[113] *See supra* note 79.

uprising is terminated, then the *had* penalty is not applicable. What is noteworthy in this case is that while doctrine addresses what is a deviation by the *khalifa* or *imam* from Islam and what claims may be justified as a last resort, for an uprising, it does not address the question of who is to judge the merits of the opposing contentions, thus enhancing the parties' chances to use force. In the opinion of this writer, the doctrine on the subject leaves much to be desired. It is essentially a political doctrine and should not be used in the context of a criminal activity except in a very narrow way, namely: an uprising in the nature of an armed rebellion of a treasonous nature against the legitimate ruler which seriously threatens the security of the people. This would not be applicable in the absence of appropriate political processes by which *ijma*^{c} or consensus could be expressed through peaceful political means for achieving either peaceful political change, or the airing of appropriate grievances for which satisfaction or solutions could be found.

For the reasons stated above, *haraba* and *baghi* could be interpreted to include many of the international crimes committed by non-state actors in the context of armed conflicts.[114] Thus, they can be prosecuted under the *Shari*^{c}*ā* and fulfill one of the requirements of post-conflict justice.

5.7.3 *Qesas*

Qesas crimes essentially cover attacks upon the life and the physical integrity of a person. The word *qesas* means equivalence. It implies that a person who has committed a given violation will be punished in the same way and by the same means that he used in harming another person. Many western writers refer to *qesas* as retaliation, which connotes redress of a wrong by equalizing the harm.[115] Because the *qesas* penalty is intended to bring redress to the victim, the latter (or his/her heirs) have the right to waive the equivalent harm from being inflicted on the perpetrator, and instead to obtain compensation. The latter is encouraged over the former as a

[114] *See* M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711 (2008).

[115] In the *Qur'ān*, "We ordained for them, a life for a life, and an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and a [similar] retribution for wounds; but he who shall forgo it out of charity will atone thereby for some of his past sins." *Surah* 5:45, THE MESSAGE OF THE QUR'AN 177 (Muhammad Asad trans., Watsonville, CA: The Book Foundation, 2003). Talion Law punishment is also presumed to assuage the revenge impulses of individuals and groups who were victimized, though one can hardly point to any evidence that revenge prevents future conflicts—the contrary is more often the case. *See also* supra note 57 for comparable verses from the Old Testament.

way of breaking the cycle of violence, and of bringing about reconciliation between the victim and the perpetrator. This is why compensation is always accompanied by admission of guilt or assumption of responsibility, apology, and request of forgiveness. *Qesas*, as a *Shari^c^ā* crime, can be applied to post-conflict justice situations.

There are five categories of *qesas* crimes, all of which exist in conflict situations for which post-conflict justice measures are required. These requirements can be satisfied by *qesas*. The five categories of *qesas* crimes are: murder, voluntary killing (similar to intentional killing or voluntary manslaughter), involuntary killing, intentional physical injury or maiming, and unintentional physical injury or maiming. These crimes are defined both in the *Qur'ān* and the *Sunnah*, and both establish two types of sanctions: equal harm or *diyya*, compensation.[116] The *Qur'ān* states in the concept of *qesas* in two chapters:

> *sūrat al-Baqarah*: *"*O ye who believe! The law of equivalence 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 [compensation] is made by the brother of the slain, then grant any reasonable demand, and compensate him [the heir to the victim] with generosity, this is a concession and mercy from your Lord. After this whoever exceeds the limits shall be subject to serious penalty. (178) In the law of equivalence there is [saving of] life to you, O ye men of understanding; that ye may restrain yourselves." (2:178-179) [author's translation]
>
> And in *sūrat al-Mā'idah*: "We ordained therein for them: Life for life, eye for eye, nose or nose, ear for ear, tooth for tooth, and wounds equal for equal. But if any one remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by [the light of] what *Allāh* hath revealed, they are [no better than] wrong-doers." (5:45) [Ali translation]

For all practical purposes, crimes of *qesas* fall into two categories, the first being homicide, and the second is corporal harm. Both intentional and unintentional homicides are jointly included, but the sanctions are different. The term killing includes unjustifiable and inexcusable homicides in which there is either an element of intention or recklessness. In contemporary non-Muslim criminal law these crimes would be considered murder, voluntary and involuntary homicides, or manslaughter.

The second category includes the infliction of intentional and unintentional bodily harm which result in serious or permanent injury to the person, and thus is more than the technical physical contact of battery in contemporary positive legislation. It also includes maiming and

[116] *See Surat al-Nisa^c^* 4:92.

other forms of physical disfigurement. This means that acts of individual violence against a person in the context of any form of violent interpersonal and group action which produces the harm encompassed within the meaning of *qesas*, is a crime. The state cannot waive the rights and remedies of the victim, except as in the case of the majority of Muslim states, when the state substitutes itself to the victim and proceeds criminally against the perpetrator on the equivalent basis of *ta^{c}azir*. This is done by the enactment of criminal codes or laws that define crimes, much as non-Muslim states do. In some of these states, however, in order to preserve the rights of victims under the *Shari^{c}ā*'s *qesas*, the initiation or dropping of the criminal action before the secular criminal court is reserved to the victims. Thus, the victim seeking *diyya*, which is his/her right in *qesas*, can pursue it and not initiate or pursue prosecution. The latter will then be dropped by the secular prosecutor. The same can apply in post-conflict justice situations.

There are provisions in the *Qur'ān* concerning other penalties for the crimes of *qesas*. These include, for example, exile, prohibition from inheritance and prohibition from the right to dispose of one's property by testamentary disposition. This means that alternative forms of sanctions can be applied in post-conflict justice situations, which in addition to their application under *qesas*, can also by applied under *ta^{c}azir*. The latter allows for penalties to be applied by analogy.

There is no statutory limitation on the right to *qesas*, nor can the state deprive a victim of that right, unless the state provides for an equivalent remedy. All forms of violence against the person which occur in conflicts are subject to *qesas*, except with respect to combatants and when the law of armed conflict is respected. The transgression of these norms is subject to both *qesas* and *ta^{c}azir* crimes and penalties.

As stated above, a Muslim state has the option to apply *Shari^{c}ā*'s *qesas* (in addition to the *hudud* crimes as discussed above in 5.7.2), or to apply international norms on the basis that they are binding on Muslim states and on Muslims because they are part of treaty obligations.

5.7.4 *Ta^{c}azir*

In addition to the crimes of *hudud* and *qesas*, the *Shari^{c}ā* also provides for a third category of crimes applicable to post-conflict justice situations, namely, *ta^{c}azīr* crimes. The word *ta^{c}azīr* means to chastise or to correct. While it has a punitive connotation, its implication is to reform the person to be chastised.

There are several factors which characterize *ta^{c}azir* crimes. They are: 1) the nature of this category of offenses; 2) the crimes encompassed within it; 3) the penalties applicable to it; 4) the application or execution of the penalties meted out to individual offenders; 5) the evidentiary requirements for proving such crimes; 6) the procedures applicable in the conduct of a trial for such offense; and 7) the application of the principle of analogy (which is prohibited in *hudud* and qualified in *qesas*).

Neither the *Qur'ān* nor the *Sunnah* provide for any definitive rule on any of the above questions. And none have been conclusively decided upon in the history of Islamic legal doctrine and jurisprudence. The differences of opinions among the four *Sunni* schools and the various *Shi^{c}ā* schools are significant.

The range in opinions among the four major *Sunni* schools and the *Shi^{c}ā* schools are as follows: 1) *ta^{c}azir* offenses can be any conduct analogous to that which is prohibited or admonished against in the *Qur'ān* or in the *Sunnah* (provided it does not constitute a *had* or *qesas* crime); 2) anything that may be deemed a violation of public order, public safety, public welfare, or the protected rights of an individual as may be determined by the *khalifa* or judge, *qadi* could be deemed *ta^{c}azir*; 3) any acts penalized by laws promulgated by the *khalifa,* or decided upon by the judge by analogy, *qiyas,* to existing crimes on a case-by-case basis, and which constitute violations of public order, public welfare, public safety, can be subject to *ta^{c}azir*.

Some jurisconsults' views provide very broad discretionary powers to the *khalifa* and to the *qadi*. However, under no circumstances can these discretionary powers constitute an abuse of power or result in an injustice to others. The unarticulated premise in granting the ruler and the *qadi* such discretionary power is that in order for them to hold such positions, they have to fulfill all of the necessary conditions that Islam establishes for such positions. Consequently, the judgments of the *khalifa* and the *qadi* will be both wise and just. A *qadi*'s decision is, however, subject to review by the *khalifa*.

The various schools of thought in Islamic legal doctrine and jurisprudence vary with respect to the types of penalties, their application and the extent of judicial discretion.[117] These distinctions are wide ranging with respect to the types of crimes that can be included in the

[117] *See* ABU-ZAHRA, AL-JARIMA WAL-UQUBA FIL ISLAM, *supra* note 79.

category of *ta^{c}azir*, and how these crimes are to be established (i.e., by legislative process or decree, or simply the *ad hoc* discretion of the ruler or the judge).

The divergent views can be summarized as follows:

1. There are no limits on the penalties to be applicable in *ta^{c}azir* crimes; the choice is left exclusively with the ruler or the judge. The modality of execution is also left to their discretion, the ruler having a final decision over the judge's.

2. The penalties must be established on the basis of analogy (*qiyas*) with regard to *hudud* and *qesas* crimes. In the case where there is no direct analogy, the judge will tailor his discretion to similar instances as are provided for in *hudud* and *qesas*, but he cannot exceed these limits.

3. The penalties should be less than those for *hudud* crimes and the discretion of the judge should be limited by specific (established) penalties for specific crimes. In the event that there is no such specificity, the judge would be required to consult with knowledgable persons (as in the case of a jury of experts).

The penalties, depending upon the various schools, encompass the death penalty, corporal punishment, deprivation of liberty, pecuniary fines, compensation of victims, and any other type of rehabilitative or corrective formula that the judge may devise including simple admonishment of the person found guilty of that crime.[118]

It must be emphasized that in every school of thought the unarticulated premise which is almost constantly reaffirmed is that the judge possesses the qualities of impartiality, fairness (justness), wisdom, knowledge, experience, and piety. Thus, the assumption is that a person possessed of such qualities will not abuse his power or discretion, and act justly, fairly, and wisely.[119]

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[118] The *Hanafi* position considers that the death penalty may be inflicted for *ta^{c}azir* offenses as a necessary measure only in case the violation constitutes a serious threat to the establishment of the political order. However, it must be applied only with great restraint whereas some of the followers of the Shafe^{c}i school do not consider that the death penalty could be applied with respect to *ta^{c}azir* crimes. The debate goes on with respect to what may be deemed a serious threat to the preservation of public order such as espionage, see Bassiouni, *The Protection of Diplomats under Islamic Law*, *supra* note 13.

[119] Probably the greatest guarantee in the area of *ta^{c}azir* is both the selection of the judge and what is expected of the judge in the decision making process and the application of the penalty. For example, the judge is to sometimes give plain advice to the offender, sometimes to counsel the offender, sometimes to make sure that the offender is not going to be unduly harmed by the penalty or ostracized from his immediate social surrounding or loss of his employment and personal integrity and ability to sustain his family, etc. The judge must also be careful of not affecting the honor of the individual, the honor of his family and his ability to function in society as well. The ideal model in Islam is that which is embodied in the message of Umar ibn-el-Khattab, the Second Khalifa of Islam, to the learned Judge Abu-Musa el-Ash'ary on this appointment as Judge over a vast region of Muslims. *See* Bassiouni, *Sources of Islamic Law and the Protection of Human Rights*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note

It is obvious from the above that the existence of a category of crimes in which the offense is not established or defined by law, nor the penalty which provides such unrestricted and undefined discretionary power with the ruler or the judge, violates the principles of legality[120] and the principles of criminal responsibility.[121] It is surprising, however, that in the course of the history of Islamic legal doctrine and jurisprudence that question has never been directly raised or specifically confronted, except perhaps in recent times.[122] Contemporary authors have indeed gone to great lengths to explain and justify why these principles have not been applied in their entire scope to crimes of *ta^{c}azir*. This however begs the question. No crime and no punishment can be exempt from the overriding basic principles of the *Shari^{c}ā*. In *ūsūl al-fiqh* it is clear that there exists a hierarchy in the sources of law. There is also a science of interpretation of the *Qur'ān* establishing a hierarchy in the specific prescriptions of the *Qur'ān*. Thus, general principles of a broad scope and nature are to be applicable throughout a particular area for which they were designed. It is inconceivable to think that certain principles of legality and principles of criminal responsibility which have been stated in both in general terms as well as in specific terms with respect to certain types of crimes would be excludable from their application to other types of crimes.

In light of the above, it is the conclusion of this writer that *ta^{c}azir* crimes have not been subjected to the narrow scrutiny of intellectual and doctrinal analysis, save for Al-Shafe^{c}i's doctrine.[123] There is nothing that would exempt *ta^{c}azir* crimes from the principles of legality and other general principles of criminal law.[124] Nothing in the *Qur'ān* or the *Sunnah* would provide for a conclusion contrary to the application of these principles to *ta^{c}azir*. It is, therefore, the conclusion of this writer that *ta^{c}azir* crimes were intended to be the type of offenses for which the legislative process would be allowed the greatest degree of latitude, but subject to the principles of legality and principles of criminal responsibility because the legislative process would have to be based on *ijma^c* (consensus) and the specific crimes would have to be developed through the principles of *qiyas* (analogy) or on the basis of other alternative sources such as

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45, at 31-32. *See also* EMILE TYAN, HISTOIRE DE L'ORGANISTATION JUDICIAIRE EN PAYS DE L'ISLAM, (Leiden, The Netherlands, 1960).
[120] *See supra* section 5.3.
[121] *See supra* section 5.6.
[122] *See* Kamel, *The Principle of Legality and Its Application in Islamic Criminal Justice*, *supra* note 83, and Abdel Malek al-Saleh, *The Right of the Individual to Personal Security in Islam*, *supra* note 89.
[123] *See* RISALAT AL-SHAFE^{c}I, *supra* note 26.
[124] *See supra* sections 5.1 to 5.6 inclusive.

istishsan, *istishlah*, or other methods of *ijtihad.*[125] This is particularly relevant with respect to the needs of modern societies in their criminalization of certain types of conducts, particularly those that derive from modern technology and which would have no precedent in the earlier Islamic social society (e.g., cybercrime). Similarly, there would be nothing to prevent a Muslim state's legislature from providing guidelines and criteria for judicial discretion in the formulation of certain penalties and their application.

Under this view, the wide latitude which is implied from the *Qur'ān* and the *Sunnah* would be fully realized through this appropriate legislative process and that would ensure the satisfaction of the various elements of the principles of legality which are required by the *Shari*^{c}*ā*, and the principles of criminal responsibility which are either stated or derived from the *Shari*^{c}*ā*. In addition, it would preserve the discretion of the judge while establishing appropriate guidelines for that discretion in order to avoid potential abuses of power and lack of uniformity in the application of punishment.

Historically, *ta*^{c}*azir* offenses were not given the same guarantees and protections as with *hudud*, and to a lesser degree *qesas* crimes. The discretionary powers of the judge were so broad that few of the specific rights and guarantees of the accused afforded in *hudud* crimes were applicable to *ta*^{c}*azir* offenses.[126]

In modern Muslim states, *ta*^{c}*azīr* crimes are legislated crimes which a state enacts either by analogy to *hudud* or *qesas* crimes or on the basis of the needs for public order. Consequently, a state may legislate *ta*^{c}*azīr* crimes which would apply to violations occurring in the context of conflicts and prosecute such crimes in post-conflict justice situations.

5.7.5 Evidentiary Questions

The major four *Sunni* and their sub-schools as well as the *Shi*^{c}*ā* schools differ with respect to the modes of evidence, as well as the specifically-required evidence of each of the

[125] *See supra* section 3.3.

[126] It must also be stated that the unarticulated premise on which the major four *Sunni* schools and the *Shi*^{c}*ā* schools developed their concept of broad and unreviewable discretion to the ruler and the *qadi* are questionable in light of Islam's fundamental principles of justice and fairness. *See supra* section 4, and in particular, sections 5.1 to 5.6 inclusive. The assumption was that both the ruler and the judge fulfilled all the ideal conditions of integrity, knowledge, and piety, and were therefore in a position to judge fairly. In any event, even if such extraordinary individuals would be found in our times, they could certainly not be found in the large number that would be required to administer criminal justice in the contemporary expanded societies, and therefore a system must be put into place to ensure against abuses and terrors.

three categories of crimes. The majority of views rely principally on testimony of witnesses (*shehada*). This emphasis on testimony finds support in certain verses of the *Qur'ān* which specifically refer to oral testimony. There are, however, a number of other provisions in the *Qur'ān* which speak about evidence, in particular *bayyina* (evidence), which goes beyond the oral testimony of witnesses. It is surprising, therefore, to see that the entire basis of Islamic legal doctrine and jurisprudence on evidentiary questions to be based on oral testimonial evidence leading to the consideration of other sources of evidence as secondary to testimonial evidence.[127]

The *Qur'ān* states: "Nor did the People of the Book make schisms, until after there came to them Clear Evidence."[128] Not surprisingly, this verse is in a chapter which is called *Sūrat al-Bayyinah*. Finally, another two provisions of the *Qur'ān* are relevant here:

> *sūrat al-An^{c}ām*: Say: For me, I [work] on a clear sign from my Lord, but ye reject Him. What ye would see hastened, is not in my power. The command rests with none but Allāh: He declares the truth, and He is the best of judges. (6:57) [Ali translation]

6. The Binding Nature of Treaty Obligations[129]

6.1 Introduction and the Principle of Pacta Sunt Servanda *in the* Shari^{c}ā

A treaty is a source of law in the *Shari^{c}ā*, provided that the treaty's purposes and terms are in compliance with the *Shari^{c}ā*. Historical controversies existed on these questions, but they

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[127] This is all the more surprising that the *Qur'ān* itself in *Sūrat al-Baqarah* 2: 282-83 requires written evidence in contractual matters.

> O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as *Allah* Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord *Allah*, and not diminish aught of what he owes. If they party liable is mentally deficient, or weak, or unable Himself to dictate, Let his guardian dictate faithfully, and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on [for evidence]. Disdain not to reduce to writing [your contract] for a future period, whether it be small or big: it is juster in the sight of *Allah*, More suitable as evidence, and more convenient to prevent doubts among yourselves but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witness whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do [such harm], it would be wickedness in you. So fear *Allah*; For it is Good that teaches you. And *Allah* is well acquainted with all things. If ye are on a journey, and cannot find a scribe, a pledge with possession [may serve the purpose]. And if one of you deposits a thing on trust with another, let the trustee [faithfully] discharge his trust, and let him Fear his Lord conceal not evidence; for whoever conceals it, - his heart is tainted with sin. And *Allah* knoweth all that ye do.

[Ali translation]

[128] *Sūrat al Bayyinah* 98:4. [Ali translation]

[129] *See* Muhammad Munir, *Public International Law and Islamic International Law: Identical Expressions of World Order*, 1 ISLAMABAD L. REV. 369 (2003), at 425.

were resolved in favor of the treaty's binding nature, even when it was apparently contrary to some principle of Islam.[130] The early history of Islam shows that treaties were probably the most important practice in the fledgling nation. The Prophet relied on treaties to gain recognition for the *ummah* of Islam, and that was as important then as it is now for a new state in search of recognition. Treaties are indeed the best evidence of statehood recognition because it presupposes that a state has the capactiy to carry out its international obligations.

The early Muslim treaties were about peace and peaceful coexistence, and these treaties with non-Muslim states were deemed to be compatible with Islam and its goals of peaceful coexistence with other nations and peoples. Some of these treaties, however (as described below), contained concessions by the Muslim *ummah*, and were not questioned as to their legality because of the principle *pacta sunt servanda*, which the *Shari*^{c}*ā* fully recognizes.[131]

All contemporary Muslim states are members of the United Nations, and parties to the 1949 Geneva Conventions.[132] Several are parties to the Genocide Convention,[133] as well as to a number of conventions restricting or prohibiting the use of certain weapons in time of war.[134]

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[130] This question arose with respect to the Treaty of Hudaibiyya, when the Prophet consented to the return to Quraish of those of its tribe who converted to Islam and went to Madinah to join the Muslims there. The same treaty forfeited the right of Muslims to perform the hajj (without Quraish's authorization), even though the pilgrimage to Makkah is one of the five requirements of Islam. There were other treaties ceding land occupied by the Muslim nation to Christian and non-Christian nations, as described below in this section. This question has contemporary applications, as Muslim theologians and many Muslim believers deem any agreement with Israel or any other body ceding the Muslim holy sites in Jerusalem as unenforceable, because no treaty can compromise or affect something deemed fundamental to Islam.

In the same vein, many Muslim states have placed reservations on their signing and/or ratification of human rights treaties with language to the effect that "providing that nothing in this treaty is deemed contrary to Islamic law." For example, Egypt submitted the following reservation to the United Nations upon its signature in 1967 of the International Covenant on Economic, Social, and Cultural Rights: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratifiy it ... ." *See supra* note 66.

[131] Among the many contemporary authorities, see generally RAMADAN, ISLAMIC LAW; AL-GHUNAYME, THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH; HAMIDULLAH, MUSLIM CONDUCT OF STATE; ARMANAZI, L'ISLAM ET LE DROIT INTERNATIONAL; Reshid, *L'Islam et le droit des gens*; Draz, *Le Droit international public de l'Islam*; *Majid, The Moslem International Law*; RABBATH, *Pour une theorie du droit International Musulman*; all cited at *supra* note 4.

[132] See the four Geneva Conventions of 1949, *supra* note 15.

[133] Convention on the Prevention and Punishment of Genocide, 78 U.N.T.S. 277 (12 January 1951). Muslim state parties include: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Comoros, Côte d'Ivoire, Egypt, Gabon, Gambia, Guinea, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, Maldives, Morocco, Mozambique, Nigeria, Pakistan, Saudi Arabia, Senegal, Sudan, Syria, Togo, Tunisia, Turkey, Uganda, Uzbekistan, United Arab Emirates, and Yemen.

[134] *See* A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS (M. Cherif Bassiouni ed., Ardsley Park, NY: Transnational Publishers, 2000).

Most are parties to the International Convention on Civil and Political Rights (ICCPR).[135] In accordance with these and other conventions to which Muslim states are parties thereto, a number of obligations arise in times of conflict and in times of peace. In times of conflict, it includes the protection of: civilian non-combatants; certain targets from destruction; damage or theft of cultural and religious structures and objects; and certain categories of persons (medical personnel under the Red Cross and Red Crescent emblems). These treaties often include the duty to prosecute or extradite persons who commit these and other violations of treaty obligations.[136] In times of peace, the protection of fundamental human rights described *inter alia* in the ICCPR cover a variety of subjects, and prohibit a vareity of conduct harmful to these internationally protected human rights.

These and other obligations arising under the United Nations Charter (and other treaties) are binding on Muslim states, and that includes prosecution or extradition of those who violate these obligations, without limitation as to rank or status under international humanitarian law.[137] The conclusion is that certain PCJ mechanisms are binding upon Muslim states. The following verses of the *Qur'ān* are applicable to the proposition of the binding nature of treaty obligations as contractual ones, and that they are the law of the parties.

Islamic law recognizes the binding nature of treaties in accordance with the maxim *pacta sunt servanda*, as stated above. Nothing is clearer than the following verses of the *Qur'ān*:

> *sūrat al-Israa*: And perform your Covenant [promises]; verily the Covenant shall be enquired of [you shall be responsible for it]. (17:34)
>
> *sūrat al-Israa*: You who believe fulfill all obligations.
>
> *sūrat al-Ma'idah*: Fulfill the contracts you have made, . . . such are the people of truth who fear God. (5:1)
>
> *sūrat al-Baqara*: denounces the breach of covenants and observes at 3:100: "Every time they make a Covenant, some party among them throws it aside. Why, most of them are faithless." (2:177)

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[135] International Covenant on Civil and Political Rights, *supra* note 66. Muslim state parties include: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Burkina-Faso, Cameroon, Chad, Comoros, Côte d'Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bassau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Pakistan, Senegal, Sierra Leone, Somalia, Sudan, Suriname, Syria, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Uzbekistan, and Yemen.

[136] *See infra* section 7 on the *Shari^{c}ā* and international humanitarian law.

[137] *See* BASSIOUNI & WISE, *AUT DEDERE AUT JUDICARE*: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW, *supra* note 15.

The Prophet also said in that respect in a hadith: "The Muslims are bound by their obligations, except an obligation that renders the lawful unlawful, and the unlawful lawful."[138] The Prophet applied that principle in his international relations when he entered into the treaties discussed above.

While a treaty may not derogate from the *Shari^c^a*, it can and does have precedence over all laws except the *Qur'ān* and the *Sunnah*. Treaties concerning the protection of diplomats are therefore within the *Shari^c^a*. Thus, the *Shari^c^a* makes these treaties binding and they become applicable in themselves (self-executing).

Making treaties with non-Muslim states is not only permitted, but encouraged in order to prevent conflicts.[139] The *Shari^c^a* requires respect for the letter and the spirit of treaties once concluded.[140] The *Qur'ān* thus views respect for and observance of agreements as a religious duty and not just as an act of political necessity.[141] The *Shari^c^a* also draws on precedents from the Prophet's practice as well as the first four wise caliphs. These agreements became models for others which were made in subsequent periods. Classical Muslim jurists collected these treaties, which can be found in general works on *fiqh* and in works devoted to the conduct of the Islamic state, as part of the *siyyar*. Certain jurists, however, showed a particular interest in the study of diplomacy and international law, and wrote on it under a variety of subject headings.[142] Their comments on the *Ummah*'s treaties, particularly the treaty of Hudaibiya, concluded by the Prophet in June 628, and the agreements made by the four Righteous Caliphs with non-Muslims states are the foundation of Islamic international law.

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[138] "Hadrat Abu Bakr was later on joined by Hadrat Ali in order to make a sure declaration on behalf of the Holy Prophet (may peace be upon him) which concerned the freedom from obligation in regard to those idolatrous tribes who had shown no respect for the treaties which they had entered into with the Holy Prophet (May peace be upon him)." AL-SAHIH MUSLIM, *supra* note 28, Book 7, no. 2802

[139] *See* KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM, *supra* note 4, at 202; Hanse Kruse, *al-Shaybani on International Instruments, in* 1 J. PAKISTAN HISTORICAL SOCIETY 90 (1953).

[140] *sūrat al-Nahl*: "Fulfil the Covenant of *Allah* when ye have entered into it, and break not your oaths after ye have confirmed them; indeed ye have made *Allah* your surety; for Allah knoweth all that ye do. And be not like a woman who breaks into untwisted strands the yarn which she has spun, after it has become strong. Nor take your oaths to practise deception between yourselves, lest one party should be more numerous than another: for *Allah* will test you by this; and on the Day of Judgment He will certainly make clear to you (the truth of) that wherein ye disagree." (16:91-92) [Ali translation].

[141] *See* verses 2:281, 8:72, 9:4, 16:7, 16:91, and 17:34.

[142] Among the chief works in this discipline are Malik ibn Anas (d. 179/796) *al-Muwaitia'*; Abu Yusuf (d. 182/798) *Kitab al-Kharaj;* al-Shaybani (d.189/804) *al Siyyar*; Al-Shafe^c^i (d. 204/820) *al-Umm;* Abu ^c^Ubayd (d. 224/837), Ibn Wayyim al-Jawziyya (d. 751/1350-1) and al-Tabari (d. 310/922).

The duty to prosecute and to provide victim compensation is among these binding or obligations arising out of post-conflict justice mechanisms described above in section 2. Muslim states are also bound by international law's *jus cogens* peremptory norms. Thus, contemporary obligations of post-conflict justice, particularly those arising out of treaty obligations, are binding on Muslim states under the *Shari*^{c}*ā*. Muslim states' failure to carry out certain international obligations is not only a violation of international law, but also of the *Shari*^{c}*ā*'s specific criminal law provisions, as described in section 5.

Under the Umayyads (41/661–132/750), ^{c}Abbasids (132/750-657/1258), Ayyubids (564/1635-1169/1238), and Ottomans (680/1281-1342/1924), jurists framed treaties to a greater or lesser extent on earlier patterns, and debated whether they fit Islamic legal criteria or not. Four landmark treaties were entered into by the Muslim state and non-Muslims. However, in the Caliphate of ^{c}Umar ibn el-Khattab, a unilateral declaration was made concerning Jerusalem.[143]

The first treaty in the era following the first Four Wise Caliphs was made by the fifth Umayyad caliph, ^{c}Abd al-Malik ibn Marwan (d. 86/705), concluded in 70/689 with the Byzantine emperor Justinian II. In it, ^{c}Abd al-Malik agreed to pay a tribute in exchange for cessation of hostilities. At the time, ^{c}Abd al-Malik was faced with a strong insurgency in Iraq and riots in his capital. Arriving at an understanding with the Byzantine emperor allowed him to secure his northern flank while consolidating his power over the center of the Empire. The second treaty was signed in the second century of the ^{c}Abbasid period by Caliph Harun al-Rashid (d. 193/809) and the Empress Irene of the Byzantines (d. 187/802) in 182/798. In this treaty, the Byzantines were the weaker party and were forced to pay annual tribute to Baghdad and to desist from border encroachments on the territory of the Muslim state.[144] The third treaty was concluded between al-Malik al-Kamil (d. 636/1238), the fourth Ayyubid sultan, and Fredrick II of Germany in 1229 CE. This treaty ceded control of Jerusalem and several other Palestinian towns to the Christians. Al-Kamil faced a military predicament similar to that of ^{c}Abd al-

[143] For the text in Arabic, see BASSIOUNI, AL WATHA'EQ AL-DAWLIĀ AL-MĀ'NEIA BI HUQUQ AL-INSAAN, *supra* note 51. For a commentary on it in English, see CHARLES S. RHYNE, INTERNATIONAL LAW (Kensington, MD: CLB Publishers, 1971).

[144] Harun al-Rashid also concluded several *fidia* (ransom) treaties with the Byzantines to secure the release of prisoners of war by mutual exchange and the payment of an agreed upon sum of money. *See* KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM, *supra* note 16, AT 217; regarding the legal and linguistic meaning of the term *fidia*, see AL-SARAKHSI, Al-MABSUT, *supra* note 82; AL KASANI, BADAE' AL-SANAE', 9: 4349-4350 (___); SHARH AL-SIYAR AL-KABIR, 4: 1592; ABU YUSUF, KHARAJ, 212; SHAFI'I, UMM, 4:170; RAGHIB AL-ISFAHANI, MUFRADAT AL-QUR'AN, 374; MUTARRIZI, AL-MUGHRIB, 2: 127; FAYYUMI, AL-MISBAH AL-MUNIR, 2: 465.

Malik's, and chose to placate the Christian Crusaders, thus enabling him to turn his attention to this brother's rebellion in Syria. This treaty offers an insight into the legitimating concessions made by Muslims to non-Muslims by jurists of the time,[145] because it ceded sovereignty over the holy city of Jerusalem, against the public sentiments of Muslims and contrary to the prevailing doctrine against ceding sovereignty over Muslim territory (particularly such a holy place as Jerusalem). Once again, the hard realities of the prevailing political climate and a realistic assessment of the strengths and weaknesses of both parties allowed jurists to give legitimacy to this treaty.[146]

The fourth treaty was concluded between the Ottoman Sultan Suleiman The Magnificent (d. 974/1566) and Francis I, King of France, in 1535 CE. This treaty differed from those mentioned above in terms of mutual recognition and emphasis on the permanent nature of the agreement. At the time of the conclusion of this treaty, Ottoman power was at its zenith, and historians have justified it on the basis of magnanimity.[147] It received full support from *Shaykh al-Islam*, Abu Su'ud (d. 982/1574) Grand Mufti of the Ottoman Empire.[148] However, this treaty was to prove a landmark in Ottoman-European relations. Once Ottoman power declines, other treaties of this nature allowed the European powers a greater degree of control over Ottoman lands through treaties referred to as "capitulations."[149]

Muslim states may carry out these obligations either by directly applying international law or by applying parallel provisions of the *Shari*^{c}*ā*'s criminal justice system as discussed above in section 5.

6.2 Foundational Precedents of the Binding Nature of Treaty Obligations in the Shari^{c}ā

[145] MUHAMMAD SALLAM MADKUR, MADKHAL AL-FIQH AL-ISLAMI (Cairo, ___1964) 93-111; SUBHI MAHMASANI, FALSAFAT AL-TASHRI'FI AL-ISLAM (___1961) 198-219; Elie Salem, *Arab Reformers and the Reinterpretation of Islam* THE MUSLIM WORLD 55 (___1965) 311-320.

[146] *See* R. STEPHEN HUMPHREYS, FROM SALADIN TO THE MONGOLS: THE AYYUBIDS OF DAMASCUS, 1193-1260. (Albany, NY: State University of New York Press, 1977); Claude Cahen, *1 Ayyubids, in* ENCYCLOPEDIA OF ISLAM, 796-807 (2D ED.); MALCOLM C. LYONS & D.E.P. JACKSON, SALADIN: THE POLITICS OF THE HOLY WAR (Cambridge, UK: Cambridge University Press, 1982).

[147] *See for example*, BERNARD LEWIS, THE MIDDLE EAST: 2000 YEARS OF HISTORY FROM THE RISE OF CHRISTIANITY TO THE PRESENT DAY (New York, NY: Simon & Schuster, 1995); URIEL HEYD, OTTOMAN DOCUMENT ON PALESTINE: 1552-1615 (Oxford, UK: Clarendon Press, 1960).

[148] *See* HEYD, OTTOMAN DOCUMENTS, *id*. at 59-61. *See also* SCHACHT, AN INTRODUCTION TO ISLAMIC LAW, *supra* note 3; J. Schact, *Abu Su'ud*, in 1 THE ENCYCLOPAEDIA OF ISLAM 152 (1960);. For further information regarding the life, work and conduct of Abu Su'ud please see the work of IMBER, ABU SU'UD, *supra* note 3.

[149] G. Veinstein, *Suleyman*, 9 THE ENCYCLOPEDIA OF ISLAM 832-42 (Clifford Bosworth ed., Leiden, The Netherlands: Brill Academic Publishers, 1997); ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 258-59 (Cambridge, MA: Harvard University Press, 1991).

The following four treaties are referred to as seminal precedents. They also reflect different political realities, which attests to the breadth of recognition given to treaties in Muslim legal practice.

The Treaty of Hudaibiya was signed between Prophet Muhammad and the Quraish tribe of Mecca in 628 CE. In the course of the negotiations, the Prophet used two emissaries who went to Mecca on successive occasions to establish a basis for the treaty. One of them was Othman ibn Affan, who later became the third Khalifa (after the Prophet), succeeding Omar ibn al-Khattab. When word reached the Prophet that Othman had been killed, notwithstanding the fact that as an emissary he should have been secure in all respects, the negotiations were deemed broken and the Muslim forces readied to attack. It was deemed a *causus belli*. The Quraishis made it known that Othman was safe and that his person as an emissary was inviolate. This news resulted in the reopening of the negotiations. The Quraishis then sent to the Prophet their negotiator, Suhayl, who was treated as an inviolate ambassador. The Treaty of Hudaibiya was signed by the Prophet and Suhayl. It is noteworthy that Ali ibn Abi-Taleb, who was the author of the treaty, also signed it as a witness. Ali became the fourth Khalifa after the Prophet and is the person the *Shi*^{c}*ā* most revere and believe to be the legitimate heir to the Prophet.[150]

The Treaty of Hudaibiya and its negotiating history demonstrate the sanctity of emissaries, that a violation of an ambassador's immunity is a *causus belli*, and that no ambassador may be detained or harmed.[151] That these events were witnessed by Ali ibn Abi-Taleb makes them of greater significance to the *Shi*^{c}*ā*. The treaty and its negotiated history also establish that in Islam the principle of *pacta sunt servanda* is recognized and has been faithfully adhered to in practice.[152]

Subsequent to the Treaty of Hudaibiya, when the Prophet went to war against the Quraishis in Makkah, the Islamic precedent of sanctuary, similar to that of modern embassies, was established. Before attacking Makkah, the Prophet announced:

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[150] *See supra* note 27.
[151] *See* Bassiouni, *The Protection of Diplomats Under Islamic Law*, *supra* note 13.
[152] See also the earlier treaty of the Prophet with the Jewish tribes of Yathrib-Medina of 625 CE, in IBN-KHALDUN, MUQUADDIMAT, *supra* note 40; and see IBN KHALDUN, KITAB AL-IBAR WA-DIWAN AL-MUBTADA WA-IKHBAR, *supra* note 40. Ibn Khaldun's approach to the philosophy of law is discussed in MAHDI, IBN KHALDUN'S PHILOSOPHY OF HISTORY, *supra* note 40. *See further* W. MONTGOMERY WATT, MUHAMMAD AT MEDINA 221-25 (Oxford, UK: Oxford University Press, 1956).

> O Quraish! This is Muhammad, who has come to you with a force you cannot resist. He who enters Abu-Sufyan's house is safe and he who locks himself up is safe and he who enters the Mosque is safe.[153]

The Prophet then declared amnesty for all Makkans who had fought and opposed him.

After the taking of Makkah, many emissaries and deputations went to the city, and others were sent by the Prophet and his successors to non-Muslim rulers. The deputations received by the Prophet between 630 and 631 CE enjoyed not only immunity but preferred treatment, which applied to the envoys and to their staff and servants.[154] They were not to be molested, mistreated, imprisoned, or killed. Al-Tabari, in his encyclopedic study History (*Tarikh*), recounts that only under extraordinary circumstances may envoys be detained and imprisoned, and that would be in the form of specific reprisals in kind.[155] In fact, so great was the Prophet's belief in the immunity of envoys, that during that period when Abu-Ra'fi, the emissary of Quraish, wanted to convert to Islam, the Prophet admonished him:

> I do not go back on my word and I do not detain envoys [you are an ambassador]. You must, therefore, go back, and if you still feel in your heart as strongly about Islam as you do now, come back [as a Muslim].[156]

These practices were followed by the Prophet at a time when inviolability of envoys was ill recognized in the Arabian Peninsula. The Prophet also followed these practices in the case of Wahshi, the Abyssinian Ambassador who had previously killed one of the Prophet's uncles. When Wahshi presented his credentials, the Prophet made it known that non-Muslims would judge Islam by its treatment of foreign envoys, and consequently foreign envoys should be accorded the same treatment as Muslim envoys.

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[153] Author's translation. *See* BASSIOUNI, AL WATHA'EQ AL-DAWLIĀ AL-MĀ'NEIA BI HUQUQ AL-INSAAN, *supra* note 51, at __.

[154] For a history of the privileges of envoys, see SARAKHSI, AL-MABSUT, *supra* note 82 and SIRAT AL-RASUL (The Annals of the Prophet) (n.d.); ABDUL-RAHMAN AL-TABARI, TARIKH (History or Annals) (n.d.); AFZAL IQBAL, DIPLOMACY IN ISLAM (reprinted by International Islamic Publishers, India, 2002)(1961); YASIN ISTANBULI, DIPLOMACY AND DIPLOMATIC PRACTICE IN THE EARLY ISLAMIC ERA (Oxford, UK: Oxford University Press, 2001); MUHAMMAD HAMIDULLAH, CORPUS DES TRAITES ET LETTRES DIPLOMATIQUES D'ISLAM A L'EPOQUE DU PROPHETE ET DES CALIFES ORTHODOXES (Paris, France: Librairie Oriental et Americane, 1935); Bassiouni, *The Protection of Diplomats Under Islamic Law*, *supra* note 13.

[155] AL-TABARI, *supra* note 40. *See also* Bassiouni, *The Protection of Diplomats Under Islamic Law*, *supra* note 13. The case in point is the Prophet's detention, but without physical harm, of the envoys of Makkah during the negotiations on the Treaty of Hudaibiyya because the Makkans had detained his emissaries. He did so only to secure the release of the detained emissaries, and when they were released, the Makkans were also released.

[156] SIRAT AL-RASUL, *supra* note 153.

Diplomatic immunity is also exemplified by the Prophet's reception and treatment of the Taif delegation in 631 CE. In earlier times, when he had gone there to propagate Islam, the Prophet had been ill treated by the people of Taif, but his treatment of their delegation was a further affirmation that envoys were to be received in accordance with their privileged status. Irrespective of the sending country or past relations with its people, envoys remained inviolate, even in the case of a people and its leaders who had earlier wronged Islam and the Prophet himself.

Other examples are the delegations from the non-Muslim tribes of the Bani-Saad, Bani-Tayyi, and Bani-Tamim. The latter, notwithstanding their paganism and frivolity during the negotiations, were treated with deference and courtesy, and remained inviolate.

The deputation from Bani-Hanifa is another landmark case. Its leader was Musailima bin Habib, a notorious liar nicknamed al-Kadhab (the Liar), but the Prophet ordered that he be treated as an equal. During the negotiations, Musailima sent the Prophet a message through two emissaries to the effect that he, Musailima, and not Muhammad, was the true Prophet of God. Upon its receipt, the Prophet asked the emissaries whether they agreed with the content. They replied that they did and the Prophet responded: "By God, were it not that messengers are not to be killed, I would behead the both of you."[157] This response clearly establishes the inviolability of even those envoys who commit transgressions.

Two more deputations deserve note, that of the Kings of Himyar, who were polytheists, and that of Kinda, which is reported to have come with eighty armed riders to the Prophet while he was in the mosque in Makkah; they were treated with regard despite having come in such an offensive manner.

The Prophet's sayings and practices clearly establish the principle of diplomatic immunity and do not in any way place a limit on it, which is in keeping with the *Qur'ān*. Probably the most telling statement of the Prophet on the importance attached by Islamic law to the immunity of diplomats is one in which he characterized the seizure of a diplomat as a *causus belli*. In that *hadith*, which contains the Prophet's message to the people of Asqof Aylah, he said:

[157] SIRAT AL-RASUL, *supra* note 153, at 649.

> If you want the land and the sea to believe, then obey God and His Prophets, and if you reject them [the emissaries sent] but do not return them, I will not accept anything from you until I fight you [emphasis added].[158]

The writings of many noted scholars indicate that envoys, ambassadors, deputations, delegations, and emissaries to and from the world of Islam have been numerous throughout its history. These diplomats enjoyed immunity for themselves, and for their families, staff, and servants. Hamidullah states: "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."[159]

That practice has been continued by Muslim states in their contemporary international relations, and certainly without exception since their acceptance of the two Vienna Conventions of 1961 and 1963 on diplomatic and consular relations.[160]

6.3 Conclusions

The first application of human rights in Islam came about in what is commonly called the Treaty of Madinah in the first year of the *hejira*.[161] In this agreement between the Prophet and those who followed him in migration from Makkah to Madinah, as well as the different tribes belonging to different religions including Christians and Jews who lived in and around Madinah, a covenant was established providing for equality of all citizens before the law, supremacy of the law for each religious community, non-discrimination between persons of different tribes and religions, and guaranteed freedom of religion for Muslims, Christians and Jews. This was followed in the year 6 AH by the Treaty of Hudaibiya between Muslims and their enemies in Makkah.[162] It provided for non-aggression, protection of life and property, and prisoner exchange. The most noteworthy Muslim text applicable to the law of armed conflict is the Admonition of Abu Bakr, the first *khalifa* of Islam after the death of the Prophet, to the Muslim

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[158] For a contemporary position relying on traditional precedents, see G. Abdel-Salam in 2 AL-WASIT FI AL-QANUN AL-DAWLI AL-AM 18 (____1979). *See also, e.g.*, M. HAMIDULLAH, *CORPUS*, *supra* note 153, and MUSLIM CONDUCT OF STATE, *supra* note 4.

[159] HAMIDULLAH, MUSLIM CONDUCT OF STATE, *supra* note 4, at 139. A major historical source is TABARI, *supra* note 40. *See generally* IBN AL-FARRA, KITAB RUSUL AL-MULUK (The Book of the Envoys of the Kings) (Salah el-din al-Munajjid ed., n.d.); ABOUL-FEDA'S HISTORY: TARIKH ABOUL-FEDA (I. Washington trans., ___1965).

[160] Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95 (1961), entered into force 25 April 1964; Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (1963), *entered into force* 19 March 1967.

[161] *See* 2 BASSIOUNI, AL WATHA'EQ AL-DAWLIĀ AL-MĀ'NEIA BI HUQUQ AL-INSAAN, *supra* note 51.

[162] *Id*. at 30.

troops before engaging in the Syrian campaign, 637 CE – 12 AH.[163] This text is probably the closest to contemporary international humanitarian law, but in view of the time of its promulgation it is also the precursor of contemporary international humanitarian law (see Section 7 below).

Lastly, the Jerusalem Pledge of ᶜUmar ibn al-Khatab, second *khalifa*, 15 AH, followed the defeat of the Romans at the Battle of Yarmouk in 638 CE which preceded the Muslim army's entry into Jerusalem.[164] ᶜUmar ibn al-Khatab made a pledge on behalf of all Muslims and for all times to protect the religious places of worship of Jews and Christians, and to allow freedom of access to them by their respective co-religionists. Subsequent practices have not always evidenced the application of these early commandments. However, one positive example shines through in history, and that is the behavior of the Muslim army under Salah Al Din el-Ayyoubi during the Fourth Crusade, which treated the Christian crusaders with fairness and humanity – something which the Crusaders had not afforded the Muslims.[165]

Since World War II, there have been a number of conflicts in which impermissible violence was used by state and non-state actors.[166] The latter, because of the military imbalance and power asymmetry between non-state actors and the occupying power or the established regimes, have resorted to unlawful use of violence as a means of redressing that imbalance. In conflicts of a non-international character, which include de-colonization, regime-change and wars of national liberation, the opposing sides have always advanced the legitimacy of their causes through labels which connote legitimacy. Thus, what is *jihad* to some is terrorism to others, and what is self-defense to some is terrorism to others.[167] Self-characterization of

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[163] *Id*. at 34.
[164] *Id*. at 37.
[165] *See* AMIN MAALOUF, THE CRUSADES THROUGH ARAB EYES (New York, NY: Schocken Books, 1989).
[166] *See* Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, *supra* note 112. What is seldom addressed is the use of terror-violence by governments, particularly extensive aerial bombardment such as the bombing of the city of Dresden, Germany in 1945 resulting in the death of 35,000 civilians, and the bombings of Hiroshima and Nagasaki in August 1945, resulting in the estimated death of 200,000 people. Both events by far supersede all of the terrorism bombings that have occurred since WWII. *See, e.g.*, ROBERT A. PAPE, BOMBING TO WIN: AIR POWER AND COERCION IN WAR (Ithaca, NY: Cornell University Press, 1996).
[167] *See, e.g.*, Bassiouni, *Legal Controls of International Terrorism*, *supra* note 5, at 83; Bassiouni, *Terrorism: The Persistent Dilemma of Legitimacy*, *supra* note 91, at 299; M. Cherif Bassiouni, *Perspectives on International Terrorism*, *in* INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 1937-2001 1 (M. Cherif Bassiouni ed., Ardsley, NY: Transnational Publishers, 2001); HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES (Dobbs Ferry, NY: Oceana Publications, 1993); WALTER LAQUEUR, THE AGE OF TERRORISM (New York, NY: Little, Brown & Co., 1988).

legitimate violence is not enough to justify the unlawful use of violence by any party to a conflict, no matter how legitimate the cause may be.[168]

7. The *Shari^{c}ā* and International Humanitarian Law

The *Shari^{c}ā* is one of the earliest legal systems to have included within its scope that which has come to be called the law of armed conflict or international humanitarian law.[169] This was first developed in the days of the Prophet, more particularly on the occasion of the seizure of Makkah in 630 CE, when the Prophet ordered that no harm befall anyone who was in his or her home (in other words, non-combatants), and that no looting was permitted.[170] Then came the groundbreaking instructions of Abu-Bakr, (the first *Khalifa* to the Prophet) given in 637 CE to the Muslim troops about to leave for war against the Roman Empire in Syria.[171] These instructions state:

> I give you ten commandments which you must observe: Never kill a woman, nor a child, nor an elderly person; never cut a fruit-bearing tree; never destroy an inhabited place, never slaughter a sheep nor a camel except only for food; never burn nor inundate a palm-tree; and neither be revengeful nor cowardly."[172]

Abu-Bakr's instructions are probably the closest one can find in history to the contemporary prohibitions embodied in modern international humanitarian law. This historical foundational document as well as the practices of Muslims (though not always consistent) throughout a period of time ranging from the 7th to the 13th century CE (including the last Crusade, which lasted from 1199 to 1204), has on occasion been used as a basis for punishing a Muslim combatant who has transgressed it. ^{c}Umar ibn al-Khatab, the second successor to the Prophet, in response to the exceptionally large number of enemy soldiers killed in battle that was led by a most renowned commander, Khalid Ibn al-Waleed, ordered him to surrender his command and replaced him on the spot with another commander. ^{c}Umar's reasoning was that large-scale killing in battle was unnecessary because it caused disproportionate harm to the enemy when it could have been avoided.

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[168] Protagonists to a given conflict tend to self-define their conduct and that of their opponents to characterize one or the other as lawful or unlawful instead of relying on objective legal standards.
[169] *See supra* note 4.
[170] *See* 2 BASSIOUNI, AL WATHA'EQ AL-DAWLIĀ AL-MĀ'NEIA BI HUQUQ AL-INSAAN, *supra* note 51.
[171] *Id*. at __.
[172] *Id*. at __.

Limitations on the means and methods of warfare have been part of the *Shari^{c}ā* since then, and were codified in the 12th century CE by al-Shaybani in his famous book *Siyyar.*[173] That aspect of the *Shari^{c}ā* was the most advanced development in international humanitarian law until the 20th century CE, when the foundations of modern customary and conventional international humanitarian laws were established.[174]

The *Shari^{c}ā*'s prohibitions on certain ways and means of warfare have, in modern times, become known as war crimes, which in turn gave rise to other international crimes, namely: crimes against humanity[175] and genocide.[176] They are reflected in the *Shari^{c}ā* as crimes under *hudud*, *qesas,* and *ta^{c}azir*.[177] Among the *hudud* crimes, *haraba* and *baghi* are the applicable crime under which genocide, crimes against humanity and war crimes could be prosecuted.[178] They could also be pursued by the victims and their survivors as *qesas.*[179] And, they could be prosecuted as *ta^{c}azir,* either by analogy to the crimes of *haraba* and *baghi* (as a *had*) or under positive national criminal law, and under international criminal law.[180] As *ta^{c}azir* crimes,[181] *Hudud* crimes and the rights of victims under *qesas* are not extinguishable by a state-action. A Muslim state's failure to enforce *qesas* or to develop a counterpart for it, as have many Muslim states that have enacted secular criminal codes,[182] is in violation of the *Shari^{c}ā.* The *Shari^{c}ā*-based victims' rights include their inalienability by states as is reflected in contemporary

[173] Translated by Majid Khadduri, *supra* note 4.
[174] *See* BASSIOUNI, A MANUAL ON INTERNATIONAL HUMANITARIAN LAW, *supra* note 4.
[175] *See* BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 10; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 2d ed., 1999); LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT (Cambridge, UK: Cambridge University Press, 2005); GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE REFORM (New York, NY: New Press, 2000).
[176] WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES (Cambridge, UK: Cambridge University Press, 2d ed. 2009); Matthew Lippman**,** *Genocide* 1 INTERNATIONAL CRIMINAL LAW: SOURCES SUBJECTS, AND CONTENTS 403 (M. Cherif Bassiouni ed., Leiden, Netherlands: Martinus Nijhoff Publishers, 3d ed., 2008).
[177] *See supra* note 79.
[178] *See infra* section 5.7.2.
[179] *See infra* section 5.7.3.
[180] *See infra* section 5.7.4.
[181] For a comparison of *Shari^{c}ā* crimes and positive criminal law deriving from non-Muslim secular tradition see ODEH, AL-TASHRI^{c} AL-JINAI' AL-ISLAMI, *supra* note 56. *See e.g.,* THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 22; and ABU ZAHRA, AL-JARIMA WAL ^{c}UQUBA FIL ISLAM, *supra* note 79.
[182] This includes Egypt, Iraq, Jordan, Lebanon, Morocco, Syria, and Tunisia.

international law, human rights law, and international criminal law doctrine that no state can grant amnesty for certain international crimes because it is the victims' right.[183]

The *Shari^c^ā* provides, as a general principle, that every individual and every nation are entitled to self-defense.[184] However, aggression against others, whether individual or collective, is prohibited. With respect to collective aggression, the *Qur'ān* states: "...there shall be no hostility except against the aggressors." (2:193). In other words, self-defense is permitted and aggression is prohibited.[185] Again, from the *Qur'ān*: "And fight in the way of Allah those who fight you and do not transgress limits; for God likes not the transgressors." (2:190) This is in keeping with the dictates of contemporary international law. Moreover, the *Shari^c^ā* supports the principles of proportionality and limiting harm, which only found its way into international humanitarian law in the 1949 Geneva Conventions, based on the 1907 Hague Convention.[186] The following verses of the *Qur'ān* address these principles:

> *sūrat al-Baqarah:* And fight in the way of Allah those who fight you, but do not transgress the limits. Truly, Allah likes not the transgressors. (2:190)
>
> *sūrat al-shura:* ...the recompense of a sin is a sin like thereof; but whoever forgives and makes reconciliation, God will reward him. Verily God likes not the oppressors. (42:40)

Another relevant verse limiting harm whose contents are part of international humanitarian law and which provides for protecting certain places during conflicts. It states:

> *sūrat al-Anbiya':* Permission is given to those against whom war is made, because they have been wronged; - and verily, God is most capable to render them victorious; those who have been expelled from their homes [unjustly], only because they said 'our Lord is *Allah*.' For had it not been that *Allah* checks one group of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of God is

[183] This is a consequence of deeming an international to be part of *jus cogens. See* M. Cherif Bassiouni, *Sources, Subjects and Contents, in* 1 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni, ed., 3d ed., Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 2008). *See also* LOUISE MALLINDER, AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS: BRIDGING THE PEACE AND JUSTICE DIVIDE (London, UK: Hart Publishing, 2008).

[184] MCB to complete

[185] *See* M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence in* JIHAD: CHALLENGES TO INTERNATIONAL AND DOMESTIC LAW (M. Cherif Bassiouni & Amna Guellali eds., forthcoming 2010). *See also infra* section 8.

[186] See the four Geneva Conventions, *supra* note 15; Convention Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, r*eprinted in* 2 AM. J. INT'L L. 90 (Supp. 1908). *See also*, JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Geneva, Switzerland: International Committee of the Red Cross, 2005); A BASSIOUNI, A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS, *supra* note 4.

> much commemorated. God will certainly aid those who aid His [cause]; Truly, *Allah* is All-Strong, All-Mighty." (22:39-40) [author's translation].

Lastly, the *Shari^{c}ā* promotes reconciliation which is the foundational in contemporary post-conflict justice.

> *sūrat al-shura:* ...if you punish, then punish with the like of that with which you were afflicted. But if you endure patiently, verily, it is better for those who remain patient. (42:__)

A number of conflicts have occurred in Muslim states since World War II.[187] Some of these conflicts are legally characterized under international humanitarian law as conflicts of an international, non-international character, or purely internal conflicts and different international legal norms apply to these types of conflicts. Conversely, however, the *Shari^{c}ā*'s norms apply to all contexts. In this respect, the *Shari^{c}ā* has not only long preceded international humanitarian law, but it has avoided one of its weaknesses, namely, the characterization of conflicts by type. This approach reveals that international humanitarian law distinguishes between the protection of victims on the basis of the type of conflict. The *Shari^{c}ā* instead focuses on the type of transgression and on the victim, making no distinction as to the context.[188] All three categories of crimes, *hudud*, *qesas*, and *ta^{c}azir*, apply in time of war and in time of peace.[189] These crimes, which cover transgressions occurring in time of war, are supplemented by other *Shari^{c}ā* norms applicable to the Muslims' conduct in war, as well as relevant international law norms binding upon Muslim states.[190]

Conflicts which have occurred in Muslim states since WWII have produced a high level of victimization among Muslims by Muslim state-actors and non-state actors alike. In fact, throughout Islam's fourteen century history more Muslims have been more often victimized by Muslims than by non-Muslims, and Muslims have caused more victimization of their fellow Muslims than that which non-Muslims have caused.[191] Yet, over that period of time, there have only been rare instances where the *Shari^{c}ā* was applied in post-conflict situations using the

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[187] *See* Appendix 1.
[188] The victimological approach of *qesas* is quite evident. *See* Bassiouni, *Les Crimes Relevant du Precepte de Qesas*, *supra* note 99.
[189] *See supra* section 5.7.
[190] See *infra* note _
[191] *See* Christopher Mullins, *Survey of Conflict Victimization and Post-Conflict Justice 1945-2008, in* THE PURSUIT OF INTERNATIONAL CRIMINAL Justice, s*upra* note 1, at 67.

justice mechanisms identified below.[192] Surprising as it may be, the *Shari^{c}ā* provisions on *hudud*, *qesas*, and *ta^{c}azir* crimes have not been applied in these conflicts, irrespective of whether Muslims have been victimized by Muslims or non-Muslims. This includes post-WWII conflicts in several of the 53 states who are members of the Organization of the Islamic Conference. The same observation applies to the non-applicability of other post-conflict justice modalities.

It should be noted that in most states (not only Muslim) where conflicts have occurred since WWII (whether of an international or non-international character or purely internal character, identified above), have not pursued any of the internationally recognized modalities of post-conflict justice.[193] Muslim states' failure to provide for post-conflict justice is not only a violation of specific normative requirements applicable to the three categories of crimes, but it is also a violation of Islam's overarching duty to provide justice for all.[194] This failure acquires a greater significance under the *Shari^{c}ā* which mandates prosecution for certain crimes and requires victim compensation. These and other *Shari^{c}ā* obligations are particularly relevant with respect to states who proclaim the applicability of the *Shari^{c}ā*, and where the victims are Muslims – particularly when Muslims have been victimized by Muslims. There is a glaring discrepancy between such Muslim states' proclamation of their adherence to the *Shari^{c}ā,* and their application thereof in post-conflict situations. Suffice it to recall the situations described in Appendix 1 in which there has been no post-conflict justice. Among them:

- Bangladesh's war of independence, during which an estimated one million persons were killed by Muslim troops from Pakistan in 1971.
- The conflict in Algeria between Muslims belonging to the FIS (a Muslim political group) and the forces of the secular government, also Muslims. Over a decade, this civil war killed 800,000 between 1999 and 2009.
- The internal conflict in Afghanistan caused the death of an estimated 300,000 persons between 1989 and 2003.

[192] *See generally* THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 1. *See also Regional Report on the Arab World, in* 2 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 1, for more information on Morocco's Truth Commission.
[193] *See* THE CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE, *supra* note 1.
[194] For discussion of justice see *infra* section 4.3.

- The *Ba^{c}ath* regime victimization in Iraq produced estimated an 500,000 deaths between 1969 and 2003,[195] and the ongoing internal conflict in that country is estimated to have caused at a minimum 300,000 and perhaps as many as 600,000 deaths, as well as an estimated three to four million refugees and internally displaced persons between 2003 and 2009.[196]
- The internal conflict in Darfur, Sudan, where there has been an estimated 250,000 deaths and estimated two million refugees in the last decade.

Not only is there a high level of victimization of Muslims by Muslims in these and many other conflicts and in other manifestations of state abuse of power, but there is little indication that Muslim governments and the general population in these countries are taking due notice of these human tragedies, let alone responding to them. Considering the overarching values of Islam which include the pursuit of justice, truth, and peace, it is hard to explain these tragic realities.

A *hadith* of the Prophet states: "If any one of you sees a wrong he must right it. With his hand (meaning action), and if he cannot, then with his tongue (meaning to speak out), and if he cannot, then in his heart – but that is the weakest of all faith."[197] This *hadith* is sufficient authority for the duty of Muslim states to provide for post-conflict justice whether by direct application of the *Shari^{c}ā*, including the incorporation into *ta^{c}azir* laws which would criminalize international legal norms, since the *Shari^{c}ā* permits the application of such international legal obligations provided that these are not in contravention to the *Shari^{c}ā.*

8. *Jihad* and Non-Aggression

8.1 Introduction

Contemporary advocates of Islamic *jihad* as indiscriminate or targeted violence for political goals argue that if a given conflict or use of force is within what they deem to be *jihad*,

[195] M. Cherif Bassiouni & Michael Hanna, *Ceding the High Ground: The Iraqi High Criminal Court and the Trial of Saddam Hussein*, 39 CASE W. RES. J. INT'L L. 21-97 (2007). *See Regional Report on the Arab World, in* 2 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 1.
[196] *Regional Report on the Arab World, id*.
[197] AL-SAHIH MUSLIM, *supra* note 28, No. 49.

then no limitations on the use of force exist.[198] This is, however, wrong as it contravenes the *Shari^{c}ā* on two levels. The first is that *jihad* is subject to certain political interpretations that go against its legal foundation in the *Shari^{c}ā*. The second is that the legal justification for resort to war (what international law calls the *jus ad bellum*) in no way removes the limitations on the means and methods of war as discussed above in Section 7 (which international law calls the *jus in bello*). If this was not the case, then contemporary violent jihadists would argue that no post-conflict justice mechanism or *Shari^{c}ā* provision would apply to *jihad*.

8.2 The Nature of Jihad

The nature of *jihad* – its scope and means – has evolved since the days of the Prophet, often reflecting political realities. During the Prophet's days, *jihad* was a call to put everything a person could into the service of Islam. The range was from personal sacrifice and hardship to service in wars of self-defense.[199] During Islam's first twelve years, with few exceptions, the spiritual dimension was the predominant aspect of *jihad*'s meaning. Later, *jihad* became an obligation to bear arms in self-defense of the *ummah*, and subsequently, state doctrine legitimized preemptive self-defense and justified conquest. In time, the political legitimization of force evolved into a doctrine supporting the use of force in the attainment of political goals. Throughout the centuries, competing claimants to the *khilafa* resorted to it in their struggles for

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[198] *See generally*, JIHAD: CHALLENGES TO INTERNATIONAL AND DOMESTIC LAW (M. Cherif Bassiouni & Amna Guellali eds., T.M.C. Asser Press, forthcoming 2010); FAWAZ A. GERGES, THE FAR ENEMY: WHY JIHAD WENT GLOBAL (2d ed., Cambridge, UK: Cambridge University Press, 2009); David Cook, Understanding Jihad (Berkeley, CA: University of California Press, 2005); GILLES KEPEL, JIHAD: THE TRAIL OF POLITICAL ISLAM (2d ed., Cambridge, MA: Belknap Press, 2003); REUVEN FIRESTONE, JIHAD: THE ORIGIN OF HOLY WAR IN ISLAM (rev. ed. Oxford, UK: Oxford University Press, 2002); AHMED RASHID, JIHAD: THE RISE OF MILITANT ISLAM IN CENTRAL ASIA (New York, NY: Penguin Books, 2002); HILMI ZAWATI, IS JIHAD A JUST WAR? WAR, PEACE AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW (New York, NY: Edwin Mellen Press, 2001); MARY ANNE WEAVER, A PORTRAIT OF EGYPT: A JOURNEY THROUGH THE WORLD OF MILITANT ISLAM (rev. ed., New York, NY: Farrar, Strauss & Giroux, 2000); MARK HUBAND, WARRIORS OF THE PROPHET: THE STRUGGLE FOR ISLAM (New York, NY: Basic Books, 1999); BENJAMIN R. BARBER, JIHAD VS. MCWORLD: TERRORISM'S CHALLENGE TO DEMOCRACY (New York, NY: Ballantine, 1996); RUDOLPH PETERS, JIHAD IN CLASSICAL AND MODERN ISLAM (rev. ed. Princeton, NJ: Markus Wiener Publishers, 2005); KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM, *supra* note 4; AL-TABARI, KITAB AL-JIHAD 14-15 (J. Schacht ed., 1933).

Mohamed Abdel Dayem & Fatima Ayoub, *In the Path of Allah: Evolving Interpretations of Jihad and its Modern Challenges*, in 7 UCLA J. ISLAMIC & NEAR EASTERN L. 67 (2008); Sherman Jackson, *Jihad and the Modern World*, J. ISLAMIC L. & CULTURE (2002); Bassiouni, *Evolving Approaches to Jihad*, *supra* note 185.

[199] It should be noted that the Prophet's attack on the Madinah-based Jewish tribe of Qurayza cannot be considered self-defense. This tribe had agreed to peaceful co-existence with the Muslims of Madinah, though they were not supportive of them or their new religion, or of the Prophet himself. However, their openly verbal disapprovals did not warrant the Prophet-led Muslim attack on them, which killed all the male population (estimated at six hundred to eight hundred), and resulted in the enslavement of all women and children. *See* HECTOR AVALOS, FIGHTING WORDS: THE ORIGINS OF RELIGIOUS VIOLENCE (Amherst, NY: Prometheus Books, 2005).

power. This doctrinal extension of *jihad* to political goals has reached an entirely new level since the 19th century, when it became a justification for political regime change, or as a valid means of political opposition to rulers.[200] Thereafter, groups seeking to accomplish regime change advanced it as moral justification for their violent means. *Jihad* was thus transformed into a revolutionary doctrine which sought its justification in theology.

Revolutionaries, whether Muslims or non-Muslims, tend to overlook limitations on the use of violence. Such limitations exist in the *Shari*^{c}*ā* and prohibit, *inter alia*, harm to non-combatants.[201] Over time, manipulation of *jihad*'s meaning has distorted that aspect of the *Shari*^{c}*ā*. This was possible because of religious doctrine which was manipulated by those seeking to advance political goals by using violence in a way that would be unlawful. Complacent clergy establishments throughout the Muslim world and timid Muslim governments abetted the practice which became rampant.[202] This situation enhanced public acceptance of jihadist violence as a means to achieve what these groups perceive to be politically legitimate ends by unrestrained violent means.[203] Thus, as in all revolutionary doctrines, the end is deemed to justify the means.

Admittedly, the historic record of *jihad* is far from clear, and Muslim religious establishments have not contributed much to clarify its doctrinal bases, applications and limits, particularly the limitations and constraints on the means and methods of violence, even though the *Shari*^{c}*ā* is quite explicit on this subject.[204] Therefore, contemporary politicization of *jihad* is due in part to the absence of a coherent and authoritative doctrinal body of interpretation on the subject. Credible secular Muslim scholars have also failed to counterbalance the views of

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[200] This is a distortion of the hadith that calls the faithful to speak truth to power, particularly in confronting a corrupt or deviant ruler.

[201] *See infra* note 16.

[202] For example, some modern political leaders sought to reinforce their undemocratic regimes by obtaining the support of politically active fundamentalist groups against secular democrat efforts. Anwar el-Sadat in 1979, after signing the peace treaty with Israel, used the Muslim Brotherhood and al-Azhar clergy to fight off secular democracy proponents who challenged his regime. Today the Muslim Brotherhood has 88 members of parliament and is probably the group with the most political credibility in Egypt. Pakistan's General Zia-ul-Haq, who led a military coup against the elected civilian president Bhutto, used Muslim fundamentalists to support his military regime. In exchange, he allowed these movements to develop their private *madrassa* (schools) which produced generations of think-alike Muslims, among whom are many fundamentalists who believe in political jihad. These groups provided support to the Afghani Taliban. More significantly, the leeway given by these dictatorial regimes to these Islamic groups gave them a hold on the uneducated and downtrodden masses of their respective countries. The temporary political gains of these regimes in thwarting secular pro-democracy movements and political parties has led to an almost irreversible trend favoring the theocratic movements and parties. *See supra* note 199.

[203] For a general discussion on the issue of legitimacy in terrorism, see M. Cherif Bassiouni, *Legal Controls of International Terrorism: A-Policy-Oriented Assessment,* 43 HARV. INT'L L.J. 83 (2002); Thomas Franck & Scott C. Senecal, *Potfiry's Proposition: Legitimacy and Terrorism,* 20 VAND. J. TRANSNAT'L L. 195 (1987).

[204] *See infra* note 16.

politically motivated jihadist doctrine. However, there also are clerics who support jihadist violence, whether for ideological purposes or personal gain.

In the last forty years, *jihad* as political violence has become nothing more than a revolutionary doctrine to justify those who engage in it by appealing to the legitimacy of their self-proclaimed ends.[205] The theological technique used to achieve this end is to cherry pick among verses of the *Qur'ān,* the *hadith*, historical events and practices, fatwa(s), and theological pronouncements. This technique, which is contrary to the accepted techniques of *ᶜilm usūl al-fiqh*, and also contrary to *fiqh* (doctrine), has permitted all sorts of self-serving interpretations, which are essentially distortions of the *Shariᶜā.* Those who engage in this method use a discourse of political rhetoric couched in theological terms that blurs the distinction between the lawful and the unlawful. The rhetoric, however, becomes powerful in its popular effect.

There is a debate among Western academics as to whether violence is endemic to Islam or whether Islam is a peaceful religion. Proponents of these views are largely influenced by their own political persuasions, but mostly by their perceptions as outside observers of the Muslim world. The most plausible conclusions are advanced by those who simply see Muslim societies as any other society wrestling with social, economic, cultural, and political issues, and where at different times ideology is resorted to as a way of justifying political transformation. In some cases, Islamic doctrine is used as a legitimizing basis for political violence, and in these cases, it simply becomes the equivalent of any other revolutionary philosophy.[206]

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[205] Of note is that contemporary jihad has never been advocated in the Muslim world to advance democracy and the rule of law, or to fulfill the inherent goodness and tolerance of Islam. Instead, it has always been advanced to rationalize unlawful violence, pushing the outer-limits of theological interpretation to absurdity. Thus, for example, several attacks by Egyptian Islamic jihadists in the 80s and 90s, including the assassination of President Anwar Sadat, during which many other civilians were killed and injured on the proposition that Sadat had strayed from the right path as a leader. Similarly, attacks on tourists in Egypt were rationalized as a way of curtailing tourism and thus having an impact on the Mubarak Regime, also deemed to be corrupt. *See* Jackson, *Jihad and the Modern World, supra* note 199.

[206] *See* DAVID MARTIN, DOES CHRISTIANITY CAUSE WAR? (Vancouver, BC: Regent College Publishing, 2004), in which the author takes the position that religion, irrespective of which religion, does not necessarily cause violence. *See also* AVALOS, FIGHTING WORDS, *supra* note 200. Bruce Lawrence challenges the notion that Islam is a religion of violence in his books SHATTERING THE MYTH: ISLAM BEYOND VIOLENCE (Princeton, NJ: Princeton University Press, 1998) and NEW FAITHS, OLD FEARS: MUSLIMS AND OTHER ASIAN IMMIGRANTS IN AMERICAN RELIGIOUS LIFE (New York, NY: Columbia University Press, 2004). In this writer's view, religions and ideologies are either motivators of resort to violence as a way of achieving the goals they deem to be divinely ordained or legitimate. To argue whether these sources are the original cause of violence or whether people use them for certain ends is irrelevant, as history reveals how many wars have been fought on religious grounds or for ostensibly religious purposes. It should be noted that the documentation on terror violence since the 1960s does not show that religiously-motivated terror violence is any more significant than its ideologically-motivated counterpart. For example, in the last four years, there have been many suicide bombings by the Tamil Tigers against the government

8.3 Evolving Meaning

The Arabic word *jihad* means striving, endeavoring, and struggling. The person who engages in jihad is a *jahada. Jihad* is the noun of the verb *jahada. Jahada* is commonly understood as someone who is diligent, industrious, or laborious in the pursuit of a praiseworthy objective. These terms apply equally to spiritual, intellectual, and physical endeavors,[207] but reflect a higher purpose in the pursuit of the undertaking. Thus, the value-oriented goal of the undertaking is its moral content.

The verb *ijtihad* means the process of engaging in a diligent, industrious, and laborious endeavor. However, since the days of early Islam it has acquired an essentially theological significance because it applies to the intellectual process of developing an interpretation concerning a particular problem for which the *Shari*^{c}*ā* does not have an explicit answer.[208] As to the *mujtahid*, it is a person who engages in intellectual *ijtihad.*

In the pre-Islamic period of the *jahiliyya*, the words jihad, *mujahid* (the one who actively struggles), and *mujtahid* were commonly used for physical and intellectual endeavors not necessarily associated with war-making, though in time the former became just that. For the *jahiliyya* Arabs, war was permissible as an extension of political and other tribal goals except when war was a breach of treaty or other tribal and customary obligations.[209] However, *jahiliyya* Arabs had a customary code of conduct in war much like what was developed over a millennium later in Europe's middle ages, the codes of chivalry.[210] Arab warriors were prohibited from killing non-combatants, which included women, children, and the aged, as well as the wounded

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of Sri Lanka which is not religiously-based, and the number of casualties in the Irish and Basque conflicts by far supersede those inflicted by the Palestinians against Israelis. For a recent statistical study, see ROBERT A. PAPE, DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM (New York, NY: Random House, 2006). For an annual survey divided by countries, types and acts of terror-violence, see U.S. Department of State, *Patterns of Global Terrorism, available at* http://www.state.gov/s/ct/rls/ (last visited Jan. 21, 2010).

[207] For the various meanings of jihad, see LISAN AL-ARAB LIL-IMAM AL-^{c}ALĀMA IBN MANDHUR (Cairo: Dar Al-Hadith, 2d ed. 2003), an Arabic language dictionary and encyclopedia. The original work was published in twenty volumes between 1305-07 AH.

[208] The linguistic meaning is discussed in the preceding text of this section. For the legal meaning, see Bassiouni & Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making, supra* note 3; HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES, *supra* note 3.

[209] Centuries later, Carl Von Clausewitz described war as a continuation of politics by other means. CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret trans., Princeton, NJ: Princeton University Press, 1989). It was not until 1928 that 54 states signed the Kellogg-Briand Pact on Renunciation of War (1928) 94 LNTS 57. Thus, the position of the *jahiliyya* Arabs reflected the customary practice of states up to 1928 CE.

[210] *See* MAURICE KEEN, THE LAW OF WAR IN THE LATE MIDDLE AGES 2-3, 19-22 (reprint, London, UK: Ashgate Publishing, 1993)(1965).

and the sick if they asked to be spared death. The custom that Arab Muslims of the Peninsula inherited from *jahiliyya* Arabs became part of the Islamic law of conduct in warfare.[211]

The common usage meaning of words relating to jihad started to change after the early Revelations of 611-622 CE, and particularly during the Prophet's lifetime as he was confronted by the enemies of Islam while seeking to establish a Muslim state. The earlier period of Islam in Makkah (611-622 CE), before the Prophet and his followers' migration to Madinah (622 CE), was essentially a period in which Muslim converts stoically withstood the Makkans' pressures and persecutions. Thus, the term jihad essentially connoted the steadfast spiritual struggle in upholding the newly-acquired faith. The *Qur'ān*, which was revealed between 611 and 632 CE in Makkah and Madinah (with a few exceptions in locations between these two cities), contains several references to jihad (quoted below) – some of which have the distinct meaning of war-like activities in defense of the faith. During the first 22 years of Islam, the military dimension of jihad essentially meant resistance to aggression, in other words, self-defense.[212] Nevertheless, the spiritual aspects of jihad were prevalent, particularly as practiced by the early Makkan Muslims between 611 and 622 CE. This spiritual dimension was reflected in a *hadith* of the Prophet who, after returning from the battle of Badr,[213] referred to war as the smaller jihad, in contrast to the struggle against oneself for goodness and piety, referred to as jihad *ul-nafs* – the greater jihad.[214] The most meaningful *hadith* on the subject, which underscores the *Qur'ān's* social justice message, states: "The best of jihad is the word of truth in facing an unjust ruler."[215] This *hadith* echoes an often-heard expression to "speak truth to power."[216]

During the last 14 centuries, *fiqh* has not elaborated much on these *hadith*. The reason may well be that this spiritual aspect of jihad (which the Prophet considered the greater one) is

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[211] *See supra* note 16.

[212] *See* ZAWATI, IS JIHAD A JUST WAR?, *supra* note 199, at 29-30.

[213] It should be noted that during the Madinah era, on instructions of the Prophet, Muslim troops disrupted East/West caravans going to and from Makkah. The purpose was to cause the Makkans to heed the demands of Muhammad as the leader of the new Muslim community. This can be considered a form of provocation, which undermines the validity of the self-defense claim against the attack of the Makkans.

[214] This *hadith* is found in many sources but it is considered "weak" by many scholars because of its questionable chain of transmission to the Prophet. However, it is frequently referred to in several scholarly works in Arabic, including Ibn Taymiyya, *Majmou al-Fatawa;* Al-Zayla'i, *Takhrij al-Kashafi;* and Ibn Hagar al-Askalani, *Al-Kafi al-Shaf.*

[215] Abu Daoud & Al Turmuzy, Sahih Al Jamiaa', No. 1100; Sahih Ibn Magaa, No. 3240.

[216] Although many believe it to be biblical in origin, this phrase apparently originated with the Quakers in the 18th century. The phrase was used in the early part of the civil rights movement in America by Bayard Rustin in the 40s. It was then used by the American Friends Service Committee as the title for a pamphlet published March 2, 1955, by Milton Mayer (amongst others) which proposed a new approach to the Cold War. *See* http://www.quaker.org/sttp.html (last visited Oct. 28, 2009).

self-evident, and thus needed no elaboration. Indeed, much of the *Qur'ān* and the *hadith* deal with how to reach a higher spiritual plane through *iman* (faith), *ᶜaqida* (belief), and *taqwa* (piety). Conversely, the struggle against non-believers in the early days of Islam, who either wanted to crush Islam (as the Makkans) or simply oppose it, needed a doctrinal basis for the armed struggle facing the Muslims. Various doctrines developed as to when resort to the use of force could be considered *jihad* and when it could not, and also against whom it is permitted.[217] Doctrine also discussed how to deal with apostates, polytheists, and others who opposed Islam, as well as those who undermined Islam from within, whom the *Qur'ān* refers to as the hypocrites *(al-munafiqun)*.[218] It is significant to note that all doctrinal discussions of *jihad* distinguish its meaning as a struggle in the military sense from its meaning as a personal, spiritual, and moral struggle.[219] This may have been due to the strong revisionist doctrinal interpretation given to jihad after the Prophet's death in 632 CE.

During the Prophet's time, the *Qur'ān's* revelations mentioning *jihad* were essentially found in 24 verses which urge a more spiritual and non-violent interpretation.[220] Most of the *Qur'ān*'s exhortations are to being steadfast in the faith, to sacrifice for the faith, to migrate from Makkah to Madinah, and to peacefully propagate the faith. Several verses specifically refer to personal and financial sacrifices. In comparison to the above-mentioned spiritual exhortations, a few verses specifically address *jihad* as armed resistance to the enemies of Islam. Resort to use of force as part of *jihad*, however, was always contemplated as self-defense.[221]

The verses quoted below in their entirety are intended to give the reader a better feeling of the Divine message than what this writer may convey. The reader will also note a change in tone and content between the Makaah-revealed verses and the subsequent Madinah-revealed ones. The chapters revealed earlier in Makkah are more conciliatory and less directive toward violent action.[222]

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[217] For a synthetic, comprehensive survey, see PETERS, JIHAD IN CLASSICAL AND MODERN ISLAM, *supra* note 199.
[218] *Surat al-Munafiqun* urges not only caution but strong opposition to the hypocrites. *See also Surat al-Tahrim,* 66:9, "O Prophet! Strive hard against the Unbelievers and the Hypocrites, and be firm against them. Their abode is Hell, an evil refuge [indeed]." [Ali translation].
[219] *See* Dayem & Ayoub, *In the Path of Allah: Evolving Interpretations of Jihad and its Modern Challenges, supra* note 199.
[220] *See* Bassiouni, *Evolving Approaches to Jihad, supra* note 185.
[221] *See* SHAH, SELF-DEFENSE IN ISLAMIC AND INTERNATIONAL LAW, *supra* note 4. *See also* Maged, *Arab and Islamic Shariᶜā Perspectives on the Current Systems of International Criminal Justice, supra* note 79.
[222] *Surat al-Furqan:* Therefore listen not to the Unbelievers, but strive against them with the utmost strenuousness, with the [*Qur'ān*]. 25:52

The verses revealed in Madinah were less conciliatory because that was a critical time in the early days of Islam which could have easily been defeated by its enemies. During the Makkan period, Muslims were persecuted and needed to migrate from Makkah to Madinah, leaving behind tribal affiliation, family, work, house, and fortune. The inhabitants of Madinah shared their property with those who migrated from Makkah and other places, and Muslims shared what they had with new converts, proselytized, and set good examples. However, in Madinah, the Muslims had to fight in self-defense for their survival. Later, exegetes deemed the Madinah verses as superseding the earlier Makkan ones.[223]

The *Qur'ān* in connection with jihad refers to *qital* (fighting) against the unbelievers, and also commands the believers to abide by the limitations on the means and methods of war.[224] The *Qur'ān* states:

> *Surat al-Baqarah:* Fight in the cause of *Allah* those who fight you, but do not transgress limits; for *Allah* loveth not transgressors ...[225] And fight them on until there is no more Tumult or oppression, and there prevail justice and faith in *Allah*; but if they cease, Let there be no hostility except to those who practice oppression. 2:193[226]

Surat al-Ankabut: And if any [of you] strive, they do so for their own souls: for *Allah* is free of all needs from all creation ... And those who strive in Our [cause], We will certainly guide them to our Paths: For verily *Allah* is with those who do right. 29:6, 69

Surat al-Saff: That ye believe in *Allah* and His Messenger, and that ye strive [your utmost] in the Cause of Allah, with your property and your persons: That will be best for you, if ye but knew! 69:11.

[223] There is a substantial debate among *Shari^{c}ā* scholars as to a doctrine called *naskh* (repudiation). Essentially, it argues that certain verses were revealed for a given purpose and that they are linked to their intended purpose. Thus, they conclude, that revelations subsequent in time implicitly abrogate the former ones. Some scholars, with whom this writer agrees, reject the doctrine of abrogation because God, given His unique characteristics, cannot be deemed by humans to have implicitly abrogated what He has revealed. Instead, only superseding revelations can explicitly do that. Concerning abrogation, it is important to note that the *Qur'ān* is specific as to when a revelation abrogates a prior revelation. *Qur'ān* 2:106 (Madinah) ('None of Our revelations do We abrogate or cause to be forgotten, but We substitute something better or similar: Knowest thou not that *Allah* Hath power over all things?'). Some exegetes view this as referring mostly to prior revelations made in connection with Judaism and Christianity, but it also applies to *Qur'ānic* revelations. A better approach to the problem of *naskh* is to consider subsequent revelations as superseding. This leaves the preceding revelations as having historic relevance and also as bearing on interpretation with respect to subsequent revelations.

[224] *Qur'ān* 22:39 (Madinah) ("To those against whom war is made, permission is given (to fight), because they are wronged; and verily, Allah is most powerful for their aid."). *See also id*. at 3:157-158, 169-172 (Madinah), 9:81-82 (Madinah), and 48:16 (Madinah). The verses apply to jihad with practical specificity. *See id.* at 9:91 (Madinah) (exempting certain persons from military action); *id.* at 2:217 (Madinah) (prohibiting war during the holy month of Ramadan); *id*. at 2:191 (Madinah) (prohibiting war in the holy territory of Makkah); *id*. at 47:4 (Madinah) (addressing prisoners of war who are to be treated humanely); *id*. at 9:6 (Madinah) (urging respect for safe-conduct); and *id*. at 8:61 (respecting a truce).

[225] *Id*. at 2:190 (Madinah).

[226] *See also*:

Surat al-Anfal: And fight them on until there is no more tumult or oppression, and there prevail justice and faith in Allah altogether and everywhere; but if they cease, verily *Allah* doth see all that they do. 8:39

The more warlike interpretations of *jihad* in the Makkan revelations are more consonant with the *a'tab al-jahiliyya* custom of war described above than with the spirit of peace, tolerance, and goodness reflected elsewhere in the *Qur'ān*. It is also these interpretations that are relied upon by contemporary political jihadist groups.[227] However, as stated above, the distinctive characteristic of armed jihad at the Prophet's time was self-defense as the *jus ad bellum*, but subject to the *jus in bello*. This was particularly evident in the battles of Badr (624 CE) and Uhud (625 CE), where the Muslims were attacked by superior forces, as well as in other battles.[228] However, when the Muslims under the Prophet attacked Makkah in 630 CE, it was not for self-defense but to take control of the *kaaba*.[229] Justified as this may have been, it was not self-defense.[230] Thereafter, *jihad* was used as a basis for conquest.[231]

The following orders were given by the Prophet to the commanders of any armies and are applicable to any expedition:

> When you meet your heathen enemies, summon them to three things. Accept whatsoever they agree to, and refrain then from fighting them. Summon them to become Muslims. If they agree, accept their conversion. In that case, summon them to move from their territory to the abode of the immigrants [Madinah]. If they refuse that, let them know that then they are like the Muslim Bedouins, and

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Surat al-Tawbah: But when the forbidden months are past, then fight and slay the Pagans wherever ye find them, and seize them, beleaguer them, and lie in wait for them in every stratagem (of war); but if they repent, and establish regular prayers and practice regular charity, then open the way for them: for *Allah* is Oft-forgiving, Most Merciful ... (9:5); But if they violate their oaths after their covenant, and taunt you for your Faith, fight ye the chiefs of Unfaith: for their oaths are nothing to them: that thus they may be restrained ... (9:12); Fight those who believe not in Allah nor the Last Day, nor hold that forbidden which hath been forbidden by *Allah* and His Messenger, nor acknowledge the religion of Truth, (even if they are) of the People of the Book, until they pay the Jizya with willing submission, and feel themselves subdued. (9:29).

[227] *See supra* note 55. These sources describe the contemporary approaches to Islamic-based political doctrines – some of them rely on interpretation of *jihad* in a way that makes it closer to the *jahiliyya* concept of war than to the just war/self-defense of early Islam.

[228] There were other battles such as: al-Ahzab (626 CE); Khaibar (628 CE); Tabuk (630 CE); Mu'tha (629 CE); Hunain (630 CE); Quraizah (627 CE); and al-Mutaliq (627 CE). The Battles of Badr, Uhud, al-Ahzab, and Hunain are mentioned in the Qur'an. *See*, for example, *Surat al-Nisa* 4:88 (Madinah), *Surat al-Imran* 3:122, 137-141 (Madinah); *Surat al-Ahzab* 33:23 (Madinah); *Surat al-Tin* 95:26, 26 (Makkah); *Surat al-Nasr* 110:1-3 (Madinah). *See also supra* note 18.

[229] The *Kaaba* is Islam's holiest place. It is where Abraham built the first house of worship of the One and Only God, and where Abraham was ready to sacrifice his son, Ismail (Ishmael) which God redeemed with a ram (or sheep). *See* REUVEN FIRESTONE, JOURNEYS IN HOLY HANDS: THE EVOLUTION OF THE ABRAHAM-ISHMAEL LEGENDS IN ISLAMIC EXEGESIS (Albany, NY: State University of New York Press, 1990).

[230] For background information on the conquest of Makkah, see *Conquest of Makkah, available at* http://www.usc.edu/dept/MSA/fundamentals/pillars/fasting/tajuddin/fast_76.html (last visited Apr 21, 2007).

[231] *See generally* GERGES, THE FAR ENEMY, *supra* note 199; ISLAM IN TRANSITION: MUSLIM PERSPECTIVES (John J. Donohue & John L. Esposito eds., 2d. ed., Oxford, UK: Oxford University Press, 2006); KEPEL, JIHAD: THE TRAIL OF POLITICAL ISLAM, *supra* note 199.

> that they share only in the booty, when they fight together with the [other] Muslims. If they refuse conversion, then ask them to pay *jizya*. If they agree, accept their submission. But if they refuse, then ask God for assistance and fight them ....[232]

Later, Abu al-Walid Muhammad ibn Muhammad ibn Rushd (d 1198), known in the West as Averroes, reminded Muslims of the spirituality of *jihad* as expressed by the Prophet and argued that Islam's expansion was intended to be by peaceful means.[233]

Assuming that jihad is the legitimate basis for what is referred to as the *jus ad bellum*, it is still subject to the *jus in bello* which, as stated above, was part of the *Shari*^{c}*ā* long before it was part of Western international law.[234] As said above, nothing in the *Shari*^{c}*ā* or in *jihad* allows a breach of certain limits of the use of force. Moreover, in addition to the *Shari*^{c}*ā*, armed conflicts are regulated by positive law,[235] which is permissible under the *Shari*^{c}*ā*.

9. The Historical Gap

The history of Islam throughout its fourteen centuries has witnessed political turmoil and upheavals and also periods of peace and stability, during which the sciences and the arts have made extraordinary strides and contributed significantly to other civilizations. Political violence has existed in every civilization, and while this is not the place to discuss comparative

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[232] AL-SAHIH MUSLIM, *supra* note 28, Book 19, No. 4294.

[233] For Ibn Rushd's views on this and other matters, see FATAIVA IBN RUSHD (Mukhtar ibn Tahir ed., Dar al-Gharb al-Islami, 1987). However, political doctrines that derived from the *Salafi* movement argued that Muslims had to fulfill their duty by jihad. They interpreted the exhortations of the *Qur'ān* and the *hadith* as a sacred and permanent duty that is to be carried out by the collective as well as by every person able to carry it out. Thus it became a dual obligation: a sacred permanent duty that is non-derogable, though postponable for reasons of practicality; and a collective as well as an individual duty that did not need to be sanctioned by those in power. The sacred, permanent, and non-derogable duty derives from the belief that every Muslim must struggle, including by violent means if peaceful means are not sufficient, to establish Islam on Earth. In contemporary times, the proponents of this view believe that the duty to establish Islam on earth extends to: stopping the decline of Islam within the Muslim *ummah* (whose meaning includes smaller communities of Muslims); opposing corrupt or deviant Muslim leaders and regimes; confronting the imperialistic/hegemonistic anti-Muslim forces; reconstituting the ideal Muslim *ummah* and restoring it to its earlier greatness; and separating Muslim values, governance, and economic system from Western values and systems. It is this doctrinal view that contemporary violent jihadists rely upon to advance what modern political scientists call revolutionary doctrine.

[234] *See supra* note 11. *See* also BASSIOUNI, A MANUAL ON INTERNATIONAL HUMANITARIAN LAW, *supra* note 4.

[235] For example, reprisals that constitute violations of international humanitarian law are prohibited. *See* FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 104 (Geneva, Switzerland: International Committee of the Red Cross, 2001). Similar rules, however, clearly existed under the Islamic law of armed conflict, but not the limitations on reprisals. For the Islamic law application, see *War and Peace*, *supra* note 16.

manifestations of political and cultural violence, the Muslim world has, in the last two hundred years, suffered at the hands of Western imperial powers. Recently the Muslim world has started to selectively strike back against the Western world, represented by the U.S. responding in kind, thus fueling predictions of a "clash of civilizations."[236] The mutual escalation of violations may well lead proponents of the proposition that there is a conflict of civilizations between the Muslim world and the Judeo-Christian Western civilization to a self-fulfilling prophecy. Against the backdrop of an anti-Islam and anti-Muslim campaign since September 11, 2001 by some segments of the neo-conservatives, the Protestant Christian right, and others among American pro-Israel supporters, Muslim masses have become more willing to accept the new anti-American and anti-Western approach to political *jihad*. As stated above, *jihad* has become a revolutionary doctrine painted over with a broad-brush of theological color to give it the appearance of legitimacy. This revolutionary doctrine can be explained by historic, social, political, and economic events that have impacted the Muslim masses.

As of the 16th century CE, the power and influence of Muslims waned and they became the ruled instead of the rulers. Since the 18th century CE, Muslims have become the dominated instead of the dominant. The post-colonial era of the 20th century was even more painful. It brought about independent Muslim states administered by corrupt and inefficient national regimes, frequently caught between Cold War politics.[237] To have been oppressed and exploited by foreign powers was bad enough for the Muslim masses, but to continue being subjected to these conditions, and even worse, subjected to these conditions by their own leaders, is not only painful but demeaning. As popular anger and frustration boils over throughout the Muslim world, inevitably individuals and small groups of Muslims find new popular leaders who claim that violent *jihad* is a justified course of conduct.

To some among the downtrodden Muslim masses, violence is seen as the only means of expression left to them, and the only means by which to redress wrongs.[238] Non-state actor

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[236] For a general discussion, see SAMUEL HUNTINGTON, CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (New York, NY: Simon & Schuster, 1998).

[237] *See* CHALMERS JOHNSON, THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC (New York, NY: Metropolitan Books, 2004).

[238] It should not be overlooked that as reward for death in jihad, the *mujahid* is to receive a place in heaven. Thus, the *mujahid* in the path of Allah does not die, but lives eternally in heaven. There cannot be a greater inducement for jihad than that. In addition, some interpreters of the Qur'an suggest that a martyr in *jihad* shall have a number of *hur al 'ain,* beautiful virgins, as part of his enjoyment. There is even an absurd debate as to whether there will be 72 or 74 in number, their physical description, the repeated development of their virginity, and the male's ability to ensure ongoing and permanent sexual satisfaction. Surely if heaven alone was not sufficient, then this additional

violence is part of assymmetric warfare, and limitations on the means and methods of warfare become nearly impossible to enforce.[239] From there, it is only a small logical step for those who feel oppressed to take their violence internationally. Their aim is particularly at the U.S. because they perceive it as the source of the contemporary evils that befall the Muslims. They see American policies as supporting corrupt and inefficient regimes in the Muslim world, and blindly supporting Israel even against the Palestinians' most elementary rights. To many in the Muslim world, violent *jihad* is the answer to their various predicaments irrespective of who the victims may be. Their legitimacy of purpose trumps all else – the ends justifying the means. In time, proponents of the strategy of terror-violence against the U.S. and the West have acquired credibility, not to say popular legitimacy, even though their strategies include resorting to unlawful indiscriminate violence against innocent civilians, which is in violation of Islamic precepts. Unjustifiable as these tactics are, their proponents see them as the only way to balance the asymmetry of the forces they face. It is also perceived as the only way left to redress injustices for which no other remedies seem forthcoming.

This manifestation of religious-based violence is a reflection of the new wars which have been a feature of the post-WWII period. Non-state actors who fight state actors find themselves in an asymmetrical war.[240] State actors are part of duly constituted armies where a command and control structure exists, and whose military equipment and capabilities are far superior to that of non-state actors. In addition, the resources of states are usually greater than those of non-state actors. The latter thus resort to unlawful means of warfare to counter-balance this asymmetry. Muslim jihadists are, in this respect, no different than other non-state actors groups engaged in conflict against a given state.[241] Moreover, non-state actor groups among Muslim jihadists argue that state actors' exceptionalism and double-standards justify their resort to similar unlawful means, even though the modern law of armed conflicts prohibits reprisals.[242]

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inducement should motivate some youth among the downtrodden masses of the 1.4 billion estimated Muslims. However, contrary to popular belief, fanned by Muslim detractors, there have been fewer Muslim suicide bombers (under 100 during 2003-06) than Tamil ones. *See* PAPE, DYING TO WIN, *supra* note 208.

[239] *See* Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, *supra* note 112.

[240] *Id.*

[241] *See* THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 1.

[242] *See* FRITS KALSHOVEN, BELLIGERENT REPRISALS (2d ed., Leiden, The Netherlands: Brill Academic Publishers, 2005). *See also* Report of the United Nations Fact Finding Mission on the Gaza Conflict, United Nations Human Rights Council, A/HRC/12/48 (15 September 2009) ("The Goldstone Report").

As manifestations of violence by Muslims increase in different parts of the world, so do anti-Islam sentiments, particularly in the Western world. In turn, this generates anti-Western reactions among Muslim masses. The invasions of Afghanistan and Iraq and the use of torture by the U.S. during the occupation of these countries and in Guantanamo have contributed to negative Muslim reactions.[243] Reciprocal negative perceptions between the Western and Muslim worlds continue to escalate, threatening peace and security in Muslim countries and elsewhere in the world.

The language of political violence has never been seriously studied in the Muslim world, even by governments who have an extensive state security apparatus to combat religious extremism, such as in Egypt, Palestine, Syria, and Jordan. There are no centers that study the language of violence, and more particularly the relationship between the terminology of violence and its public resonance and impact. The term *jihad* is a powerful one in the Muslim psyche. It evokes the legitimate self-defense struggle of the Prophet and his followers in the glorious days of early Islam. What can be more powerful and more moving to contemporary downtrodden who see in this era of global communications what the modern world has to offer and of what they are deprived? However, if these masses could also see how frequently, how improvidently, and how dubiously the term *jihad* has been used by unqualified political violence proponents, their reactions could well be different.

Surely mathematical formulas can be used to measure, for example, the frequency of use of the term *jihad* and its connection to the echo of legitimate *jihad*. Social psychologists and psychologists can also contribute to the understanding of the trigger-recall psychological mechanism in response to certain words and also, how word usage has been transformed to suit political purposes. Until these socio-psychological responses are decrypted for the general Muslim public, the new meanings of *jihad* will remain appealing. What is more self-empowering and uplifting than the one word slogan of *jihad* to rally Muslims around the holy war against their historic and contemporary oppressors?[244] For the last two decades in Egypt, the Muslim

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[243] *See* M. CHERIF BASSIOUNI, THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION: IS ANYONE RESPONSIBLE? (Mortsel, Belgium: Intersentia Publishers, forthcoming 2010); M. Cherif Bassiouni, *The Institutionalization of Torture under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389 (2006). It should be noted that Muslim culture is permeated with a strong sense of pride. Offenses to pride often lead to violence as justified revenge-taking. That is part of popular cultural perception.

[244] From December 2006 through February 2007, WorldPublicOpinion.org conducted surveys in Egypt, Morocco, Pakistan, and Indonesia with the assistance of the START Consortium at the University of Maryland, which reveal that in all four countries, large majorities believe that the U.S. seeks to "weaken and divide the Islamic world."

Brotherhood has successfully used a similar formula to frame its political opposition to the Mubarak Regime, namely, the slogan "Islam is the answer." How can anyone argue to a Muslim that Islam does not provide an answer to good governance, the elimination of corruption and the establishment of social justice? But jurists have long known it is how a question or issue is framed that determines its outcome. The best example of that is found in the Bible when Jesus frames his answers to those who asked him about the legitimacy of stoning an adulteress to death, "Let he among you who is without sin cast the first stone."[245] Jesus did not take a position on the biblical punishment, instead, he framed the issue in a way that was outcome-determinative.

What needs to be emphasized is that the resort to force as part of jihad in the early days of Islam was justified on the basis of self-defense and on the fact that there was no freedom to propagate Islam or for Muslims to practice it freely in non-Muslim controlled areas. However, it must also be said that the history of Islam is characterized by recurring violence claimed to be justified by jihad, even when it was not. To argue otherwise is revisionist history. That is also the history of almost all societies throughout all 40 recorded civilizations.[246] Thomas Hobbes in the 17th Century noted that war characterizes the history of human society interrupted by periods of peace.[247] During these wars, many of which were total wars against societies, including civilians, innumerable innocent casualties have occurred.[248] Islamic jihadists are part of the variety of non-state actor violence in non-international and internal conflicts. Their links to Islam as a religion should not there be viewed as a reflection of Islam. What is, however, of concern to many in the western world is their popularity among the Muslim masses. That popularity, however, reflect

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Muslims Believe U.S. Seeks to Undermine Islam (Worldpublicopinion.org, April 27, 2007). The editor of WorldPublicOpinion.org, Steven Kull noted that, "While U.S. leaders may frame the conflict as a war on terrorism, people in the Islamic world clearly perceive the U.S. as being at war with Islam." A high percentage of people in these countries believe this: 73% in Indonesia and Pakistan, and 92% in Egypt. Similarly large numbers believe that the U.S. is trying to keep "control over the oil resources of the Middle East (average of 79%), as well as trying to "spread Christianity in the region" (average 64%). However, despite these numbers, the people do not want to be isolated from the world; for example, an average of 75 percent say it is good that "the world is becoming more connected through great economic trade and faster communication" and 57% agree that "a democratic political system" is a good way to govern. 82% also agree that in their country "people of any religion should be free to worship according to their own beliefs."

[245] King James Bible, John 8:7. "So when they continued asking him, he lifted up himself, and said unto them, 'He that is without sin among you, let him first cast a stone at her.'"

[246] *See* TOYNBEE, A STUDY OF HISTORY, *supra* note 10; H.G. WELLS, THE OUTLINE OF HISTORY, *supra* note 10.

[247] THOMAS HOBBES, LEVIATHAN ([1651] M. Oakeshott ed., 1957).

[248] In a worldwide study directed by this writer, it is estimated that between 1945 and 2008 there were 313 conflicts which generated an estimated 92 to 101 million persons killed, excluding other human and material harm. *See* Mullins, *Survey of Conflict Victimization and Post-Conflict Justice 1945-2008*, *supra* note 196.

the social and economic conditions of Muslim societies and the status of their human development.[249]

Whatever justifications may have existed throughout the history of Islam, jihad unencumbered by international humanitarian law is carried out by non-state actors in the name of the propagation of the faith can no longer be sustained in an era where freedom of religion, practice, thought, and speech are internationally guaranteed human rights.[250] Thus, conflicts such as those between Palestinians and Israelis and between Chechnyans and Russians cannot be characterized as *jihad*, since they do not involve the religion of Islam. These conflicts are controlled by other aspects of Islamic law, which also recognizes in these cases the applicability of positive law, namely, international humanitarian law.[251]

Jihad in the history of Islam has a mixed record. Quite clearly, however, it is subject to interpretation, and has been subject to manipulations, essentially for political reasons or in order to achieve a political goal. It is also the subject of different interpretations in the four traditional *Sunni* schools, as well as in the different *Shi*^{c}*ā* doctrines. Precisely because of that mixed record, there is nothing that prevents the development of a contemporary doctrinal approach to *jihad* which would be equivalent to the contemporary international law of self-defense subject to the limitations on the methods and means of warfare in accordance with contemporary international humanitarian law.[252]

Freedom of religion is a basic human right universally recognized. No state, irrespective of its majority population's religion, can violate the religious freedoms of others.[253] This applies to Muslim states as well as to others. The *Qur'ān* states:

> *surat al-Hujurat* "O Mankind, We have created you male and female, and made you into tribes and nations, that you may know one another (not that you may despise each other). Surely, the noblest among you in the sight of God is the most righteous of you. God is All-knowing, All-aware." 49:13 (author's translation)

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[249] *See Arab Human Development Report: Challenges to Human Security in the Arab Countries* (United Nations Development Programme, 2009).
[250] *See supra* note 57.
[251] *See* M. Cherif Bassiouni, *Evolution of International Humanitarian Law and Arms Control Agreements, in* A MANUAL ON INTERNATIONAL HUMANITARIAN LAW, *supra* note 4, at 21-31.
[252] *See* BASSIOUNI, A MANUAL ON INTERNATIONAL HUMANITARIAN LAW, *supra* note 4.
[253] Paradoxically, countries that profess to be Islamic are the ones which most restrict freedom of religion, whether by People of the Book in such countries as Afghanistan and Saudi Arabia, or by others, such as the Baha'i's faith which is repressed in Iran, Afghanistan, and Saudi Arabia and openly opposed in Egypt. *See* M. Cherif Bassiouni, *Freedom of Religion in Egypt: The Baha'is' Case, in* CRIMINOLOGIA Y DERECHO PENAL AL SERVICIO DE LA PERSONA (Jose Luis de la Cuesta, Inaki Dendaluze, & Enrique Echebunia eds., San Sebastian, 1989).

This verse and others evidence the universality of humankind, notwithstanding its diversity. Other verses of the *Qur'ān* reveal that man was created with the spirit of the Creator. How then can a believer in Islam engage in killing, torturing, and humiliating another human being created by God and infused with God's Divine Spirit? No political doctrine of *jihad* can override this higher religious value. And yet tragically, this higher religious and humanistic value is violated with scant reaction from the Muslim religious establishment and from knowledgeable secular Muslims intellectuals. *Jihad*, like many other aspects of Islam, has its theoretical and practical aspects – both being frequently quite apart from one another. In fact, both dimensions are fragmented as they reflect a much greater diversity in Islam than its proponents, including myself, tend to reflect in their words. Perhaps all concerned should heed to a *hadith* by the Prophet: "if you see a wrong: you must right it with your hand, if you can or your words or with your stare, or in your heart, but that is the weakest of faith."[254]

The tendency to expand the scope and the sphere of the *Shari^{c}ā* may have historically been the fruit of power relation and interests on the part of legal scholars. In contemporary times the success of legalism is incompatible with modern legislative process which, as described below, in some Muslim countries like Egypt and Iraq, can subject both, legislative enactment and judicial decision to what would be equivalent to review by Constitutional Court. This would mean that the fundamental values and purposes of the *Shari^{c}ā* would be respected through modern mechanism. Moreover, this type of mechanism would be better suited to achieving what is well established in the traditional approach to the *Shari^{c}ā* since the second century (9 C.E.), namely, *Maqāsid al-Shari^{c}ā* which is intended to ensure that the value-oriented goals of the *Shari^{c}ā* are achieved through legislation and jurisprudence. Greater consideration for the *Maqāsid* would out way the rigidity of strict legalism, which had manifested itself in the past twelve centuries of Islam history.

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[254] *See* AL-SAHIH MUSLIM, *supra* note 28, No. 79. It is narrated on the authority of Tariq b. Shihab:

> It was Marwan who initiated (the practice) of delivering khutbah (address) before the prayer on the ^{c}Id day. A man stood up and said: Prayer should precede khutbah. He (Marwan) remarked, This (practice) has been done away with. Upon this Abu Sa^{c}id remarked: This man has performed (his duty) laid on him. I heard the Messenger of Allah as saying: He who amongst you *See*s something abominable should modify it with the help of his hand; and if he has not strength enough to do it, then he should do it with his tongue, and if he has not strength enough to do it, (even) then he should (abhor it) from his heart, but that is the least of faith.

The technique of using *Maqāsid al-Shari^{c}ā* as an overarching principle would definitely ensure the compatibility of legislative enactments and jurisprudential decisions to the value-oriented goals of the *Shari^{c}ā.* It should be noted that in addition to *Maqāsid al-Shari^{c}ā* there is also the *Siyāsah al-Shari^{c}ā*. The word *Siyāsah* literally means 'policy', but its historic application has always been focused on issues of governance. To some extent the *Maqāsid* and the *Siyāsah* can be combined with regard to post-conflict justice. As discussed below, there are specific *Shari^{c}ā* norms which extend to post-conflict contexts and which should apply irrespective of either *Maqāsid* or *Siyāsah.* This means that strict interpretation of the *Shari^{c}ā* norms would conform to some of the contemporary post-conflict justice modalities, such as prosecution and victim compensation. It is evident that the *Shari^{c}ā* requires not only prosecutions, but also other modalities of post-conflict justice. Both the *Maqāsid* as well as specific norms of the *Shari^{c}ā* require upholding justice, human dignity and the rule of law in addition to an implicit general obligation to prevent harm.

In the context of the latter the concept of *Siyāsah al-Shari^{c}ā* can be relied upon to show that good governance requires the prevention of harm to individuals and to the society. The combination of specific *Shari^{c}ā* norms, the *Maqāsid al-Shari^{c}ā*, and *Siyāsat al-Shari^{c}ā* constitute a foundation for the application of contemporary PCJ modalities. However, it should be noted that the *Shari^{c}ā* does not allow for much of the discretion which is reflected in post-conflict justice.[255]

10. Conclusion

For all practical purposes, Islam and the *Shari^{c}ā*'s contributions to global civilization were arrested in the 12th century. Since then, for a variety of reasons, Islam and Muslim societies have not only receded in their world power positions, but they have also been on the decline internally. States with a majority population of Muslims emerged from colonialism in the 19th and 20th centuries, only to find themselves governed by various types of oppressive regimes which have continued to subjugate Muslim populations in a manner reminiscent of past foreign abuses. From the latter part of the 20th century to the present, most of the 53 states that consider themselves Muslim states have been characterized by a significant deficit in human development in contrast to similarly-situated societies. Some, on the other hand, have developed

[255] See the *Chicago Principles*, and THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 1.

at a higher pace and have achieved higher standards of living for their populations, democratic governance, and sustainable social and economic development. These exceptions are all characterized by secular, democratic forms of government which are based on the rule of law. That there exists a demonstrable linkage between the rule of law, democracy, good governance, and social and economic development is well established in the experiences of many states among the world community's 198 states.

More important is another world experience which has not been shared in by Muslim states, namely, the use of the various post-conflict justice modalities mentioned above. Since the end of WWII, many Muslim societies have gone from decolonization struggles, which produced significant victimization to tyrannical regimes, which have also produced significant victimization, including internal conflicts (whether they are sectarian, ethnic or political) which have produced an even higher estimated level of victimization.

Throughout a period of over sixty years since the end of WWII, and in diverse areas of the world involving an estimated 1.4 billion Muslims, violent experiences that led to large-scale victimization have seldom been followed by post-conflict justice. The only recent historic example is that of Iraq, albeit with some flaws.[256] Relatively recent conflicts such as in Afghanistan, where a high level of victimization occurred over a period of over thirty years have yet to experience any post-conflict justice modality. The same is true of an even more recent internal conflict in Algeria. The number of Muslim states in which various forms of international and internal conflicts and regime victimization have taken place and in which no post-conflict justice mechanism was put into effect include: Algeria, Bangladesh, Chechnya, Egypt, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Nigeria, Palestine, Somalia, Sudan, Syria, and Yemen. The estimated number of victims in these and other countries varies significantly and goes from 15,000 victims to over one million in a given situation.

Admittedly, in some of these conflicts it is impossible for the victimized society to do this on its own, as in the case of the Palestinians or the Chechnyans; the fact remains, however, that where it has been possible and still remains possible to establish all or some of their modalities, virtually nothing has been done. This raises the question of whether this failure to act is due to political factors or others. While some have argued that perhaps the *Shari*^{c}*ā* is an obstacle, the

[256] *See* Bassiouni & Hanna, *Ceding the High Ground: The Iraqi High Criminal Court and the Trial of Saddam Hussein*, *supra* note 191.

evidence herein advances the proposition that the *Shari^{c}ā* requires post-conflict justice and is not a hindrance to it.

In accordance with the *Shari^{c}ā*, since the days of the Prophet, there has been an obligation to observe and enforce international legal obligations as reflected in treaties. Thus, international treaties to which Muslim states are a party are binding, including the provisions of the Four Geneva Conventions of August 12, 1949.[257] These and other principles of international humanitarian law are found in the *Qur'ān* and the *Sunnah*. Why post-conflict justice has not materialized in Muslim states has more to do with political and cultural considerations than with the dictates of the *Shari^{c}ā.*

[257] See the four Geneva Conventions of 1949, *supra* note 15.

APPENDIX I
ARMED CONFLICTS INVOLVING MUSLIM STATES

These three charts were prepared by Dr. Christopher Mullins, Assistant Professor, Southern Illinois University. They are excerpted from a recently-published study under the direction of Professor M. Cherif Bassiouni.[258] The Project was undertaken by the International Institute of Higher Studies in Criminal Sciences (ISISC) (Siracusa, Italy) and was funded by the European Union.

[258] THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A STUDY ON WORLD CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed. 2010).

A. ARMED CONFLICTS OF AN INTERNATIONAL CHARACTER

DATE	CONFLICT	VICTIMIZATION	PCJ
1950-1962	Afghanistan - Pakistan	100+	No
October 2001 – cont'd.	Afghanistan (US/UK + Northern Alliance - Taliban + al-Qaeda)	14, 282[1]	Yes: i
1991-1999	Armenia – Azerbaijan	15,200-15,600	Yes: i
1945-1947	Azerbaijan -- USSR[2]	2,000	No
1994-1996-2006[3]-cont'd.	Cameroon – Nigeria	1,000	Yes[4]: a
2004-cont'd.[5]	Chad – Sudan	5500+	No
1974	Cyprus – Turkey	1,500-5,000	No
1967-1970	Egypt – Israel	6554[6]	No
1973	Egypt – Iraq – Syria – Jordan – Israel[7]	11,184-17,656	Yes: i[8]
1998-2000/2006	Eritrea v Ethiopia	70,000	Yes: a
1964-1967	Ethiopia v Somalia v Kenya	5000	No
1977-1978	Ethiopia v. Somalia	38,000	No
1962-1966	Indonesia - Malaysia	675-1000	No
1972-1975	Iran – Iraq	100-1,000	Yes[9]: h
1979-1988	Iraq - Iran (Persian Gulf War)	1,000,000-1,750,000	No[10]

1 As Afghanistan is an active war zone, getting accurate counts is nearly impossible.

2 Soviet occupation of Iranian Occupied Azerbaijan.

3 Greentree Accord signed by both states on 12th June 2006 ending the border conflict.

4 International Court of Justice Rulings: *Land and Maritime Boundary between Cameroon and Nigeria, Judgment*, 1998 ICJ Rep. 275, 11 June 1998; and Request for Interpretation of the Judgment of 11 June 1998 in the *Case Concerning the Land and Maritime Boundaries Between Cameroon and Nigeria (Cameroon v Nigeria)* 1999 ICJ Rep. 31, 25 March 1999.

5 A joint EU/UN peacekeeping force has been sent to Chad since early 2008.

6 This is a highly contested figure. Small, M and Singer D. 1982. Resort to Arms: International and Civil Wars, 1816-1980. Gives a figure of 5,368. Eckhardt estimates up to 75,000 deaths, but his estimations on civilian casualties are guess work. He also includes the six day war in this number. See Eckhardt, W. (1983). 'Wars and Related Deaths' in Sivard, R World Military and Social Expenditures. Washington DC World Priorities.

7 The Yom Kippur War.

8 Amnesty granted by Jordan, see Thematic Report on Prosecutions for details.

9 Iraqi government accepted majority of border claims of Iran.

10 United Nations representatives helped bring about a cease-fire August 1988.

August 1990-February 1991	Iraq - Kuwait - USA (Gulf War)	20,358-200,000+	Yes: h[11]
1967	Iraq-Kuwait	Unknown	No
1973-5	Iraq-Kuwait	Unknown	No
March 2003 – cont'd	Iraq – USA & Coalition	650,000 - 1,000,000+	Yes: g, mm[12]
1956	Israel - Egypt	1913	No
1948-1949	Israel - Egypt - Iraq- Lebanon - Syria – Jordan-Saudi Arabia-Yemen-Palistine	16,373-21,373	Yes:h
June 1967	Israel - Egypt - Jordan - Syria – Iraq	21,779	No
July 1967-1970	Israel - Egypt - PLO - Jordan – Syria	3000	No
1978, 1982-2000	Israel - Lebanon	7,500-50,000	No
July-August 2006	Israel – Hezbollah (in Lebanon)	821	No
1948-cont'd	Israel (OPT)	15,000-20,000	Yes: i
1956-1960	Kingdom of Yemen (Aden)	1000	No
1972	Libya-Sudan	31	No
1962-1966	Malaysia - Indonesia	100	No
1989-1991	Mauritania-Senegal	100s	No
1952-1958	Morocco	3,000	Yes: d[13]
1963-4	Morocco-Algeria	1,000	No
1962-1975	Mozambique	40,000	No
1962-1967	North-South Yemen	100,000	No
1971-1972	North - South Yemen	200	No
1979-1980	North-South Yemen	150	No
1964-1965	Pakistan - India (Kashmir)	6,800	Yes: a, i[14]
1947-1949	Pakistan - India (Kashmir)	2,000-10,000	Yes:i
1989-cont'd[15]	Pakistan - India (Kashmir)	15,000-30,000	Yes: i
Dec 1994-Jan 1995; 1998	Saudi Arabia – Yemen	50	No
July 1977-March 1978, 1992-cont'd	Somalia - Ethiopia (Ogaden)	38,000	Yes: i

[11] United Nations Security Council Resolution 687, S/Res/687 (1991), para. 18, establishes the United Nations Compensations Commission.

[12] The Iraqi High Tribunal, which will try crimes committed between July 17th 1968 and May 1st 2003. For early casualty statistics see Carl Conetta, *Appendix 2 - The Wages of War: Iraqi Combatant and Non-Combatant Fatalities in the 2003 Conflict*, Project on Defense Alternative Research Monograph #8, 20 October 2003.

[13] The Moroccan Equity and Reconciliation Commission (IER) was established in 2004 to investigate violations of human rights between 1956 and 1999.

[14] There was a case taken to the International Court of Justice in 1973, for the release of Pakistani prisoners of war from Indian custody. For further discussion on this, see (X-ref) Regional Report on Asia pg 228 of 348 and see Thematic Report on Amnesties.

[15] India and Pakistan agreed to maintain a ceasefire along the undisputed international border in 2003, however conflict continues to the present day.

1961	Syria - United Arab Republic	Unknown	No
1952-1954	Tunisia	2,000-3,000	No
1979-1989	USSR - Afghanistan	495,000	Yes: i
1975-1991[16]	Western Sahara - Morocco – Mauritania	10,000+	Yes[17]: a, i

B. ARMED CONFLICTS NOT OF AN INTERNATIONAL CHARACTER

DATE	CONFLICT	TYPE	VICTIMIZATION	PCJ
1989-2001	Afghanistan	ER	56,377	Yes: i, g
1991-2002	Algeria	P	150,000-200,000	Yes[18]:d, h. i, g
October 1954-1962	Algeria	DC	1,000,000+	Yes[19]: b, i
8 May 1954	Algeria (Setif)	DC	1,500-50,000	No[20]
1975-1992	Bangladesh	NR, P	3,000-200,000	Yes: i
May 1992-1994	Bosnia-Herzegovina: break-up of Yugoslavia	ER, RG, N	60,000-250,000	Yes: a, b, d, h, i, g
1948-cont'd.	Burma/Myanmar	S, E, R, P	20,000-60,000	Yes: i
1965	Chad	P	500	No
1969-1970	Chad	ER, DC	1,500-2,000	No
1977-1987	Chad	P	24,000	Yes: d, i
1989-cont'd	Chad	S, E	40,000	Yes[21]: d, i, g
1991-1996; 1999-cont'd.	CIS (Chechnya)	S, P	10,000-72,000	Yes[22]: a, i
1991-1994	CIS (Nagorno-Karabakh) - Azerbaijan	P	10,000	Yes: i

[16] Active hostilities ceased in 1991 and since that year a UN Peacekeeping mission has been on-site (MINURSO). Talks continued until 2005 when they were abandoned by all sides. No final resolution has been accepted or implemented.

[17] Note that the International Court of Justice ruling 1975 (Western Sahara, Advisory Opinion, 1975 ICJ Rep. 12) not recognized by Morocco and Mauritania. General amnesties were provided for political crimes on the 2nd of September 2005.

[18] Government amnesty aimed at national reconciliation began in the 4th of March 2006. Up to 300 rebel soldiers surrendered under the terms of this Amnesty, though 800 or more remain at large and conflict continues to the present despite this.

[19] National prosecution of General Salan (head of OAS). Pursuant to the Evian Agreement, France and Algeria did not prosecute further.

[20] Note that the military tribunals were established by the French: 4,500 Muslim Algerians arrested, 2,000 sentenced, 151 received death sentences and 28 were executed.

[21] Government initiated three investigative commissions, each focused on a different region/ethnicity.

[22] Note that on the first visit to Chechnya North Council as secretary of the Security Council in October 1996, Ivan Rybkin handed to the Chechen draft proposals for the State Duma decrees on an amnesty for participants in armed conflict in the North Caucasus and on such implementation procedures, this decree of amnesty for Chechen rebels (for all crimes except those of murder, rape and terrorism) was extended in 2006. From 2006, the European Court in Human Rights have issued quite a number of decisions concerning the Chechen situation: it condemned Russia for the disappearance in 2000 of Khadzhi-Murat Yandiyev (Bazorkina v Russia, 69481/01 ECHR 27 July 2006); it has also ordered, in several rulings, Russia to pay compensation to certain individual victims whose families have 'disappeared'. This order of compensation has also been given regarding the 2002-2003 raid victims; it has ruled that Russian military forces have been guilty of using torture. There have also, in this regard, been discussions of reparations and compensation schemes, but nothing of this sort has been concretely or seriously developed.

1992-continued	CIS (North Ossetia)	E	>100	Yes[23]: d, i
1991/2-continued	CIS (Tajikistan)	P	20,000-50,000	Yes: i[24]
1994-1995	CIS (Uzbekistan)	P	100-1,000	Yes: i
1963-1973	Cyprus	E, P	1,000+	Yes: i, g
1991-1999	Djibouti	P	325	Yes: i
1953-1954, 1956	Egypt	P	3,230-10,000	No
1980-1998	Egypt	P, RG	1,200	Yes: c, i
1961-1991	Ethiopia (Eritrea, Tigre)	S	500,000	Yes:[25] b, g, i
1950-1960	Indonesia	DC	5,000-10,000	No
1946	Iran	C	25-100	No
1978-1979	Iran	P	5,000-100,000	Yes: i
July 1958-March 1959	Iraq	P	2,000	No
1961-1970	Iraq (Kurds)	S, P	15,000-100,000	Yes: mm[26]
1974	Iraq(Kurds)	S,P	Unknown	Yes: mm[27]
1978-1979	Iraq (Kurds)	S,P	Unknown	Yes:mm[28]
1991-1993, 1995-2002[29]	Iraq (Kurds)	ER, N	6000+[30]	Yes: i, mm[31]
1979	Iraq (Shiites)	ER, N	Unknown	Yes:mm[32]
1988-1993-2002[33]	Iraq (Kurds, Shiites)	ER, N	100,000	Yes: i, mm[34]
1958-1959	Jordan	P	Unknown	No
1970-1971	Jordan	P	10,000	Yes: i
1958	Lebanon	P	1,300-2,000	No
1975-1990	Lebanon	ER, P	131,000	Yes: i, g
2007 – cont'd	Lebanon	P, ER	472	No
1946-1987	Malaysia	P	12,500-13,000	Yes: i[35]
1952-1958	Morocco	NL	3,000	Yes: d[36]
1989-1995	Niger	S, P	1,000	No[37]
2007 – cont'd	Niger	NR, P	81-155	No
2004	Nigeria	E	72-100	Yes: i

[23] Establishment of the 'Unified Investigative-Operative Group' in February 1993 to establish the causes of conflict and criminal responsibility: unsuccessful.

[24] However, Tajikistan has ratified the Rome Statute of the International Criminal Court, so legal redress may be possible for crimes committed from the date of ratification onwards on.

[25] National prosecutions initiated in 1992: Special Prosecutor's Office began work in 1993. Lustration legislation was enacted.

[26] The Iraqi High Tribunal, which will try crimes committed between July 17th 1968 and May 1st 2003.

[27] The Iraqi High Tribunal, which will try crimes committed between July 17th 1968 and May 1st 2003.

[28] The Iraqi High Tribunal, which will try crimes committed between July 17th 1968 and May 1st 2003.

[29] With the fall of the Baathist government in 2002, this conflict is considered ceased as the party being struggled against is non-extant.

[30] This count represents Uppsala's count since 1980. Before there were deaths in the 1000s, though no accurate number is attainable.

[31] The Iraqi High Tribunal, which will try crimes committed between July 17th 1968 and May 1st 2003.

[32] The Iraqi High Tribunal, which will try crimes committed between July 17th 1968 and May 1st 2003.

[33] With the fall of the Baathist government in 2002, this conflict is considered ceased as the party being struggled against is non-extant.

[34] The Iraqi High Tribunal, which will try crimes committed between July 17th 1968 and May 1st 2003.

[35] Note offer of amnesty by Thai government to CPM members.

[36] The Moroccan Equity and Reconciliation Commission (IER) was established in 2004 to investigate violations of human rights between 1956 and 1999.

[37] Note that the April 1995 Peace Accord gave greater autonomy and economic development to the Tuareg region in the north.

1995	Nigeria	P, E	100-1,000	Yes: d, i[38]
1999 – cont'd	Nigeria	P, E, R, S	11,000 – 51,000	Yes: i
May-October 1966	Nigeria	P	30,000	Yes: d[39]
1967-1970	Nigeria (Biafra)	P, E, S	600,000-1,000,000	Yes: d[40]
1957-1959/1960	Oman	P	100-1,000	No
1969-1979	Oman	P	1,000-3,000	No
1973-1977	Pakistan	S, P	9,000	Yes: i
1986-1996	Pakistan	P	14,000	No
2007--continued	Pakistan	P	578	No
March 1971-December 1971	Pakistan (Bangladesh)	P	1,500,000	Yes[41]: b, i
May-July 1994	Republic of Yemen	P3	1,500-7,000	No
2000 – cont'd	Saudi Arabia	ER, P, T	600	No
1989-2005	Senegal	NR, S	1,400	Yes: i
1991-2002	Sierra Leone	P	50,000-75,000	Yes[42]: b, e, i
1981--cont'd	Somalia	E, P, S	300,000-400,000	Yes: i[43]
1955-1972	Sudan	E, DC, P	170,000[44]	Yes: i[45]
1983-cont'd[46]	Sudan	R, P	1,900,000	Yes: i
February 2003-cont'd	Sudan (Darfur)	E, NR, P	200,000-300,000[47]	Yes: a,c[48]
1975-1980	Turkey	P	2,000	No
1984-cont'd	Turkey	P, S, E	31,158	Yes[49]: b,
1962-1970	Yemen Arab Republic	P	102,000-150,000	No
1994	Yemen	P	1000+	Yes: i

[38] The Human Rights Violations Investigation Commission (HRVIC) was established in 1999 to investigate violations of human rights in Nigeria that took place from January 1966 until May 1999.

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[41] Special national tribunals established to try Bangladeshi citizens who had collaborated with the Pakistani armed forces. National prosecutions Jan 1972. 2,850 people tried, 2,100 acquitted, 750 convicted. Nov 1973, general amnesty declared. International Court of Justice case (brought by India and Bangladesh to try under the Bangladesh Act, Pakistani prisoners of war in India, *Trial of Pakistani Prisoners of War (Pakistan v . India)*) – agreement between India, Bangladesh and Pakistan, case dropped. 1975, Presidential Order issued abolishing the collaborators law and restoring the civil rights of former collaborators.

[42] Both the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone were established in 2002; after the Lomé Peace Accord in 1999, the Government of Sierra Leone granted sweeping general amnesties, however these grants were stripped of their legal effect by the Report of the Secretary General on the Establishment of a Special Court for Sierra Leone.

[43] Note that in May 1991, de facto independence of Isaak people in northern Somalia: the Republic of Somaliland. Sovereignty not recognized by the international community. Note too that in 1993, the UN rescinded Aideed's arrest warrant.

[44] This figure is intensely debated. Balint (2007) gives the figure as 500,000-1,000,000.

[45] Note government Commission of Inquiry into the mutiny of Southern Soldiers and the 'disorders' in the Southern Sudan during August 1955. Report issued.

[46] Cease-fire agreement signed and abandoned in 2005 with a resurgence of violence; January 2008, the government formally withdraw from the ceasefire.

[47] Plus more than 2 million displaced.

[48] The ICC has issued arrest warrants for Ali Muhammad Ali Abd-Rahman and Ahmad Muhammad Harun. Neither are in custody. Their investigation is on-going. The government of Sudan has also conducted domestic trials.

[49] Abdullah Ocalan, founder and leader of the Kurdistan Workers Party (PKK), who launched and maintained the armed conflict against Turkey from 1984 was tried in 1999 and continues to serve a commuted death sentence on Imrali Island.

2004-cont'd	Yemen	RG, P	1,385-1,825+	Yes: i
1963-1964	Zanzibar	ER, RG	4,000	No

C. STATE TERROR/STATE REPRESSION AND VICTIMIZATION 1945 – 2008

DATE	CONFLICT	VICTIMIZATION	VICTIMS	PCJ
1945-1985-1989	Albania	2,500-150,000	I	Yes[50]: b, d, g, h, i
1978-1987	Afghanistan	6,200-70,300	I	No
1993-cont'd	Central African Republic	10,000	P	Yes[51]: a, b, c, d, i
1966-1979	Central African Republic	2,000	I	No
1945-1970	Egypt	500	P	No
Oct 1965-1966	Indonesia	509,000-1,000,000	P, I	Yes[52]: d, g, h
1999 – cont'd	Indonesia[53]	8,100	P, N, ER, RG	Yes: i[54]
Dec 1975-cont'd	Indonesia (East Timor)	100,000-200,000	ER, N	Yes: c, mm, i[55]
1989-1991	Indonesia (Northern Sumatra)	1000+	I	Yes[56]: a, b, e
1969-1996	(Sumatra)	500,000	P, I	No
Nov 1960-1984	Indonesia (West Irian)	10,000-30,000	I	No
1979-cont'd	Iran (Kurds, Baha'I, Mujahedeen)	10,000-20,000	ER, RG, P	Yes: i
1968-2002	Iraq (Kurds, Shi'ites)	1,000,000+	RG, ER	Yes: mm,g,h i

[50] National prosecutions. Government-appointed commission to review files of communist-era secret police, lustration legislation. Property compensation.

[51] The Permanent Military Tribunal and the CAR's civil courts have attempted to prosecute those responsible. However, the Court of Appeals recommended referring the situation to the ICC in mid-2004. Currently the ICC is prosecuting crimes committed in the CAR since 2002. A brief Truth and Reconciliation Commission was established in 2002 as part of a broader scheme of Translationitional governance.

[52] After the November 1991 Dili massacre, a 'National Commission of Inquiry' was established by executive order. Composed of seven public officials, most of whom were members of the military. The Timor-Leste Commission for Reception, Truth and Reconciliation was established in 2001 to "inquire into human rights violations committed on all sides, between April 1974 and October 1999, and facilitate community reconciliation with justice for those who committed less serious offenses." The Commission delivered its report to the President in 2005 and to the UN in 2006. Indonesia prosecuted its own security forces before specially constituted human rights courts in Jakarta; in East Timor, the UN operated hybrid tribunals with both international and domestic judges, situated within the local judicial system.

[53] The roots of the conflict lie in Indonesia's decentralisation programme.

[54] Although plans for an Indonesian Truth and Reconciliation Commission were discussed in August 2007, no substantial support or progress has been made in this regard so far.

[55] The Commission for Reception, Truth and Reconciliation in East Timor (CAVR) was established jointly by the Governments of Indonesia and Timor l'Este in August 2005 and it delivered its final report on January 30th 2006.

[56] After the November 1991 Dili massacre, a 'National Commission of Inquiry' was established by executive order. Composed of seven public officials, most of whom were members of the military. The Timor-Leste Commission for Reception, Truth and Reconciliation was established in 2001 to "inquire into human rights violations committed on all sides, between April 1974 and October 1999, and facilitate community reconciliation with justice for those who committed less serious offenses." The Commission delivered its report to the President in 2005 and to the UN in 2006. Indonesia prosecuted its own security forces before specially constituted human rights courts in Jakarta; in East Timor, the UN operated hybrid tribunals with both international and domestic judges, situated within the local judicial system.

1961 – 1999	Morocco	600,106	P	Yes[57]: f, i
1976-1981/82	Syria	25,000-40,000	P, RG	No
1948	Yemen	4,000	P	No

[57] Though the Moroccan Association for Human Rights (AMDH) have estimated the victimisation number to be as high as 3,000. The l'Instance Equité et Réconciliation, which concluded in 2006. Non-governmental national investigation into the 1969 killings at Tlatelolco.

APPENDIX II

The Cairo Declaration on Human Rights in Islam

Adopted and Issued at the Nineteenth Islamic Conference
of Foreign Ministers in Cairo
on 5 August 1990

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*^{c}*ā.*

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:

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^{c}āh*-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^{c}ā*.
(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^{c}āh* -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^{c}āh*.

(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*^{c}*āh*.

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*^{c}*āh*, 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*^{c}*āh* 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 therefrom, provided that such production is not contrary to the principles of *Shari*^{c}*āh*.

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^{c}āh*.
(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^{c}ā*.
(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^{c}ā*.
(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^{c}āh*.

Article 24
All the rights and freedoms stipulated in this Declaration are subject to the Islamic *Shari^{c}āh*.

Article 25
The Islamic *Shari^{c}āh* 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