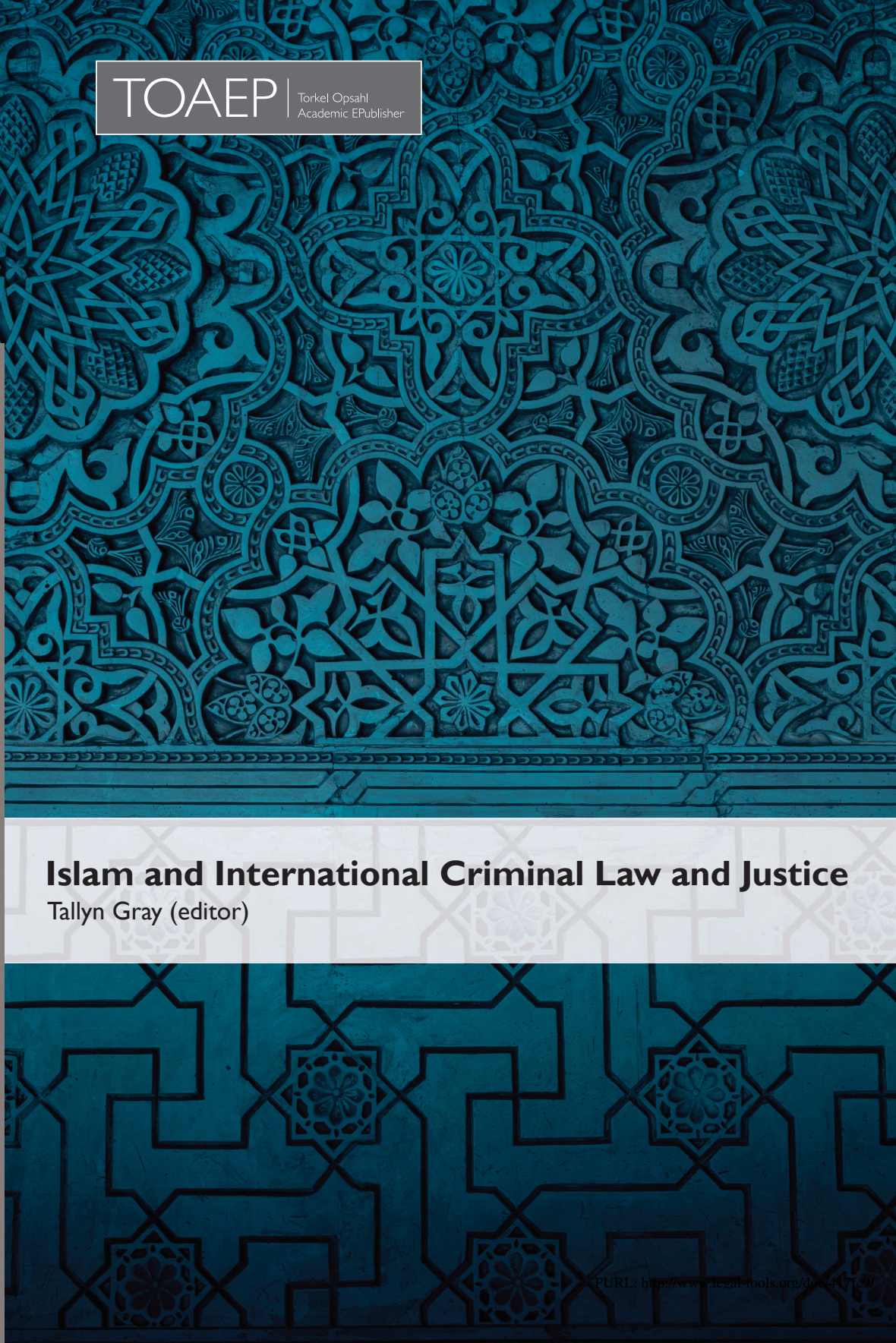

Islam and International Criminal Law and Justice

Tallyn Gray (editor)

E-Offprint:

Mohamed Elewa Badar, "Is There a Place for Islamic Law within the Applicable Law of the International Criminal Court?", in Tallyn Gray (editor), *Islam and International Criminal Law and Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (ISBNs: 978-82-8348-188-4 (print) and 978-82-8348-189-1 (e-book)). This publication was published on 16 November 2018. This and other publications in TOAEP's *Nuremberg Academy Series* may be openly accessed and downloaded through the web site http://www.toaep.org/ which uses Persistent URLs for all publications it makes available. These PURLs will not be changed and can thus be cited. Printed copies may be ordered through online distributors such as www.amazon.co.uk.

This e-offprint is also available in the Legal Tools Database under PURL http://www.legal-tools.org/doc/417fc9/.

Front cover: *Picture selected by the International Nuremberg Principles Academy, courtesy iStock.com/PepeLaguarda.*

Back cover: *Picture selected by the International Nuremberg Principles Academy, courtesy iStock.com/kelvinjay.*

9

Is There a Place for Islamic Law within the Applicable Law of the International Criminal Court?

Mohamed Elewa Badar*

9.1. Introduction[1]

In the *Al Mahdi* case, the International Criminal Court ('ICC') came eye to eye with the question of Islamic injunctions. The Defence in the case sought to present the destruction of ancient shrines in Timbuktu as a reflection of the defendant's interpretation of the divine. It claimed that Mahdi believed he was doing the right thing and was merely "seeking the means to allow his conception of good over evil to prevail".[2] By taking this approach, the Defence sought to frame the Defendant's version of Islam as a worldview fundamentally incompatible with that of the ICC.[3] Numerous scholars have debated and critiqued the formation, functioning and practice of the ICC. One of the most contentious of these debates is on the issue of the general principles of law that can be applied by the Court in various cases. During the Rome negotiations, the participating Muslim-majority states supported the existence of an international crimi-

* **Mohamed Elewa Badar** is a Professor of Comparative and International Criminal Law and Islamic Law at Northumbria University, Newcastle, United Kingdom. He is the author of *The Concept of Mens Rea in International Criminal Law* (Hart, 2013) and *Islamist Militants and their Challenges to Sharia and International Criminal Law* (Hart, 2019 forthcoming), and has published 25 articles in refereed journals as well as 15 chapters in prominent books, such as the *Commentary on the Rome Statute of the International Criminal Court*. He served as senior prosecutor and judge at the Ministry of Justice, Egypt.

1 An earlier and slightly different version of this Chapter appears in *Leiden Journal of International Law*, 2011, vol. 24, pp. 411–33 under the title "Islamic Law (*Sharí'ah*) and the Jurisdiction of the International Criminal Court".

2 ICC, Situation in the Republic of Mali, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Pre-Trial Chamber, Confirmation of Charges, Transcript, ICC-01/12-01/15-T-2-Red-ENG, 3 March 2016, p. 98 (http://www.legal-tools.org/doc/410498/).

3 Mohamed Elewa Badar and Noelle Higgins, "Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law – Prosecutor v. Al Mahdi", in *International Criminal Law Review*, 2017, vol. 17, pp. 486–516.

nal justice institution. However, they also viewed it with suspicion and showed reluctance in ratifying the statute, with only five Arab states to date being States Parties to the Statute of the ICC ('Rome Statute').[4]

There is a tendency for Islamic law to be viewed as a static or non-progressive legal system.[5] However, most Western scholarly debates center on Islamic criminal law on a basic level without an in-depth grasp of the subject. This has been thought to be due to a *lacuna* in the available English literature on Islamic criminal law that "cries to be filled".[6] It has also been argued that it is almost impossible for Islamic law to be compared to the Western legal system, making the path for the creation of a dialogue between Islamic law and international institutions virtually non-progressive.[7]

The aim of this chapter is to find out whether the basic principles of Islamic criminal law are indeed incompatible with the Western legal systems and if not, what can Islamic law bring to the international criminal law table in order to enrich it and make it a true reflection of the legal systems of the world. To enable a basic understanding of Islamic law and its non-monolithic nature, this chapter begins with an examination of the sources of Islamic law, the leading schools of Islamic jurisprudence (*ma<u>dh</u>áhib*) and the application of Islamic law in Muslim-majority states. It then looks at the categories of crimes as found in the Islamic legal tradition to identify potential conflicts and convergence with international

4 See Mohamed Elewa Badar and Noelle Higgins, "General Principles of Law in the Early Jurisprudence of the ICC", in Triestino Mariniello (ed.), *The International Criminal Court in Search of Its Purpose and Identity*, Routledge, Oxford, 2014; Juan Carlos Ochoa, "The Settlement of Disputes Concerning States Arising From the Application of the Statute of the International Criminal Court: Balancing Sovereignty and the Need for an Effective and Independent ICC", in *International Criminal Law Review*, 2007, vol. 7, p. 3.

5 Adel Maged, "Status of Ratification and Implementation of the ICC Statute in the Arab States", in Claus Claus Kreß *et al.* (eds.), *The Rome Statute and Domestic Legal Orders*, vol. 2, Nomos Verlag, Baden-Baden, 2005, pp. 469–78.

6 Mohammad Hashim Kamali, "Legal Maxims and Other Genres of Literature in Islamic Jurisprudence", in *Arab Law Quarterly*, 2006, vol. 20, p. 77; Gamal Moursi Badr, "Islamic Law: Its Relationship to Other Legal Systems", in *American Journal of Comparative Law*, 1978, vol. 26, p. 187.

7 Mahdi Zahrá, "Characteristic Features of Islamic Law: Perceptions and Misconceptions", in *Arab Law Quarterly*, 2000, vol. 15, p. 168. See also David Westbrook, "Islamic International Law and Public International Law: Separate Expressions of World Order", in *Virginia Journal of International Law*, 1993, vol. 33, p. 819.

criminal law. The chapter then turns to legal maxims and conducts a comparative study between Islamic law and Western legal systems on some of the fundamental principles of criminal law such as the principle of legality, the presumption of innocence, the concept of *mens rea*, and the standards used by Muslim jurists for determining intention in murder cases as well as other general defences such as duress and superior orders. It concludes that the Islamic legal system is not fundamentally in conflict with Western legal traditions and that the flexibility of Islamic law and especially the abstract nature of its legal maxims put it in a position where it could play an important role in the potential codification of new crimes at the ICC.

9.2. Introduction to Islamic Law (*Sharíʿah*)

Islamic law (*Sharíʿah*) has its roots deeply embedded in the political, legal and social aspects of all Islamic states and it is the governing factor of all Islamic nations.[8] It is often described by both Muslims and Orientalists as the most typical manifestation of the Islamic way of life – the core and kernel of Islam itself.[9] Other commentators deem this an exaggeration and do not believe Islam was meant to be as much of a law-based religion as it has often been made out to be.[10] In any case, Islamic law (*Sharíʿah*), one of the recognised legal systems of the world,[11] is a particularly instructive example of a 'sacred law' and differs from other systems so significantly that its study is indispensable in order to appreciate adequately its full range of possible legal phenomena.[12]

Islamic law, like Roman law, used to be a 'jurist law', in the sense that it was a product neither of legislative authority nor case law, but a

8 Hamid Enayat, *Modern Islamic Political Thought*, University of Texas Press, Austin, 1982; Albert Hourani, *Arabic Thought in the Liberal Age: 1798–1939*, Cambridge, University Press, Cambridge 1983; Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul Al-Fiqh*, Cambridge University Press, Cambridge, 1997.

9 Joseph Schacht, *An Introduction to Islamic Law*, Oxford University Press, Oxford, 1964, p. 1.

10 Mohammad Hashim Kamali, *Shariʿah Law: An Introduction*, Oneworld Publication, Oxford, 2008, p. 1.

11 See Rene David and John Brierly, *Major Legal Systems in the World Today*, Stevens & Sons, London, 1978, p. 421.

12 Schacht, 1964, p. 2, see *supra* note 9.

creation of the classical jurists, who elaborated on the sacred texts.[13] However, with the first formal codifications in the mid-nineteenth century, Islamic law became 'statutory law', promulgated by a national territorial legislature.[14]

It is no secret that most Islamic nations are viewed as being non-progressive, especially with respect to their national legal systems and implementation of criminal laws.[15] On the other hand, the Islamic states view the West and East as being unethical, immoral and unduly biased towards the religious, cultural and political aspects of Islam itself.[16]

9.2.1. The Application of Islamic Law in Muslim-Majority States Today

The modern Muslim world is divided into sovereign nation-states. Today there are 57 Member States of the Organisation of Islamic Cooperation ('OIC'), which is considered the second largest inter-governmental organisation after the United Nations ('UN').[17] The OIC claims to be the collective voice of the Muslim world and aims to safeguard and protect its interests.[18] Most states who joined the OIC are predominantly *Sunní*, with

[13] Aharon Layish, "The Transformation of the Shariah from Jurists Law to Statutory Law", in *Die Welt des Islams*, 2004, p. 86. See also Farooq Hassan, "The Sources of Islamic Law", in *American Society of International Law Proceedings*, 1982, vol. 76, p. 65.

[14] *Ibid*.

[15] John Esposito, "The Islamic Threat: Myth or Reality?", in Javaid Rehman *et al*. (eds.), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices*, Martinus Nijhoff Publishers, Leiden, 2007, p. 5. See also Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order*, Hart Publishing, Oxford, 2005.

[16] James Gathii, "The Contribution of Research and Scholarship on Developing Countries to International Legal Theory", in *Harvard International Law Journal*, 2000, no. 41, p. 263; Shaheen Sardar Ali and Javaid Rehman, "The Concept of Jihad in Islamic International Law", in *Journal of Conflict & Security Law*, 2005, no. 10, pp. 321–43; Marcel A. Boisard, "On the Probable Influence of Islam on Western Public and International Law", in *International Journal of Middle East Studies*, 1980, vol. 11, p. 429.

[17] This number includes the State of Palestine. For more information, see the web site of the OIC.

[18] In 2004, the OIC has made submissions on behalf of Muslim states regarding proposed reforms of the UN Security Council to the effect that "any reform proposal, which neglects the adequate representation of the Islamic *ummah* in any category of members in an expanded Security Council will not be acceptable to the Islamic countries". See UN Doc. A/59/425/S/2004/808 (11 October 2004), para. 56, quoted in Mashood A. Baderin (ed.), *International Law and Islamic Law*, Ashgate Publishing, Aldershot, 2008, p. xv.

only Iran, Iraq, Azerbaijan, Bahrain, and Lebanon having a predominantly *Shí'ah* population. Apart from Lebanon and Syria, all Arab states consider Islam as the state religion and source of law constitutionally.[19]

Bassiouni divides Muslim-majority states into three categories. The first category comprises secular states, like Turkey or Tunisia, who despite their moral or cultural connection with Islam do not directly subject their laws to the *Sharíʿah*. Countries from the second category such as Iraq and Egypt, expressly state in their constitutions that their laws are to be subject to the *Sharíʿah*, therefore, their constitutional courts decide on whether or not a given law is in conformity with the *Sharíʿah* and can also review the manner in which other national courts interpret and apply the laws to ensure conformity.[20] The third category of states comprises Saudi Arabia and Iran as they proclaim the direct applicability of the *Sharíʿah* to civil, commercial, family, criminal, and all legal matters. According to one commentator, a significant number of Muslim-majority states fall between the two poles of 'purist' Saudi Arabia and 'secular' Turkey.[21] Most states have been selective in determining which *Sharíʿah* rules apply to their national legislations.[22] As a consequence of colonialism and the adoption of Western codes, *Sharíʿah* was abolished in the criminal law of some Muslim-majority countries in the nineteenth and twentieth centuries, but has made a comeback in recent years with countries like Iran, Libya, Pakistan, Sudan, and Muslim-dominated northern states of Nigeria reintroducing it in place of, or operating side by side with, Western criminal codes.[23]

---

19 Clark. B. Lombardi, "Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharíah in a Modern Arab State", in *Columbia Journal of Transnational Law*, 1998, vol. 37, p. 81.

20 M. Cherif Bassiouni, *The Shariʿa and Post-Conflict Justice*, 2010 (on file with the author). See also M. Cherif Bassiouni, *The Shariʿa and Islamic Criminal Justice in Time of War and Peace*, Cambridge University Press, Cambridge, 2014.

21 John L. Esposito, "Contemporary Islam: Reformation or Revolution?", in John L. Esposito (ed.), *The Oxford History of Islam*, Oxford University Press, Oxford, 1999, p. 643.

22 Haider Hamoudi, "The Death of Islamic Law", in *Georgia Journal of International and Comparative Law*, 2009, vol. 38, p. 325.

23 Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, Cambridge University Press, Cambridge, 2005, p. 124.

9.2.2. Sources of Islamic Law: *Sharíʿah* and *Fiqh*

Islam is a way of life akin to a system that regulates the believer's life and thoughts in line with a certain set of rules.[24] The term 'Islamic law' covers the entire system of law and jurisprudence associated with the religion of Islam. It can be divided into two parts, namely, the primary sources of law (*Sharíʿah* in the strict legal sense) and the subordinate sources of law with the methodology used to deduce and apply the law (Islamic jurisprudence or *fiqh*).[25]

Sharíʿah is derived directly from the *Qur'án* and the *Sunnah*, which are considered by Muslims to be of divine revelation and thus create the immutable part of Islamic law, while *fiqh* is mainly the product of human reason.

9.2.2.1. The *Qur'án* and *Sunnah*

The *Qur'án* is considered by Muslims to be the embodiment of the words of God as revealed to the Prophet Muḥammad through the Angel Gabriel. It is the chief source of Islamic law and the root of all other sources. However, it is far from being a textbook of jurisprudence and is rather a book of guidance on all aspects of the life of every Muslim.[26] The *Qur'án* consists of more than 6,000 verses (*áyát*).[27] Jurists differ on the number of verses, which are of legal subject matter, as they use different methods of classification for determining what constitutes a legal verse – estimates range from eighty up to eight hundred verses.[28]

---

[24] Majid Khadduri, "The Modern Law of Nations", in *American Journal of International Law*, 1956, vol. 50, p. 358.

[25] Mashood A. Baderin, *International Human Rights and Islamic Law*, Oxford University Press, Oxford, 2005, pp. 32–34. Some scholars use the terms Islamic law, *Sharíʿah* and *fiqh* interchangeably. For example, Kamali consideres *Sharíʿah* to also include *fiqh*, see Kamali, 2008, *supra* note 9.

[26] The *Qur'án* (translation by Arthur J. Arberry), 16:89; Mohamed Selim El-Awa, "Approaches to *Sharíʿa*: A Response to N.J. Coulson's A History of Islamic Law", in *Journal of Islamic Studies*, 1991, vol. 2. pp. 143–46.

[27] 6,239 verses (Bassiouni, 2010, see *supra* note 19); 6,235 verses (Kamali, 2008, see *supra* note 9); and 6,666 verses (Irshad Abdal-Haqq, "Islamic Law: An Overview of Its Origin and Elements", in *Islamic Law and Culture*, 2002, vol. 7, p. 27).

[28] There are 80 legal verses according to Coulson, 120 according to Bassiouni, 350 according to Kamali, 500 according to Ghazali, and 800 according to Ibn Al-Arabi. Shawkani opines that any calculation can only amount to a rough estimate.

To properly understand its legislation, one has to take into consideration the *Sunnah* as well as the circumstances and the context of the time of the revelation. According to the common understanding of Muslims, the sayings and practices of the Prophet Muḥammad or the *Sunnah*, collected in *ḥadíths*, are the second source of Islamic law.[29] While the *Qur'án* is believed to be of manifest revelation – that is, that the very words of God were conveyed to the Prophet Muḥammad by the Angel Gabriel – the *Sunnah* falls into the category of internal revelation – that is, it is believed that God inspired Muḥammad and the latter conveyed the concepts in his own words.[30] The *Qur'án* and *Sunnah* therefore do not only provide specific rules and answers to particular real life situations but mostly give guidance and examples from which general principles can be derived that have a universal applicability.

9.2.2.2. *Fiqh*

Since the *Qur'án* and *Sunnah* many times do not address specific issues, the Prophet mandated the use of sound reasoning in reaching a judgement.[31] When appointing a judge to Yemen, the Prophet asked him:[32]

> According to what shalt thou judge? He replied: According to the Book of Allah. And if thou findest nought therein? According to the *Sunnah* of the Prophet of Allah. And if thou findest nought therein? Then I will exert myself to form my own judgement. [The Prophet replied] Praise be to God Who had guided the messenger of His Prophet to that which pleases His Prophet.

This concept of exerting one's reasoning in determining a matter of law is called *ijtihád* and it is the essence of *úṣúl al-fiqh*, a legal method of ranking the sources of law, their interaction, interpretation and application.[33] The result of this method is *fiqh*, which literally means human understanding and knowledge on deducing and applying the prescriptions of

[29] El-Awa, 1991, p. 153, see *supra* note 26.

[30] Kamali, 2008, p. 18, see *supra* note 10.

[31] Abdal-Haqq, 2002, p. 35, see *supra* note 27.

[32] Said Rammadan, *Islamic Law: Its Scope and Equity*, Macmillan, London, 1970, p. 75.

[33] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd rev., The Islamic Texts Society, Cambridge, 2006, p. 469.

the *Sharíʿah* in real or hypothetical cases.[34] As such it does not command the same authority as that of the *Sharíʿah* and it is the subject of different *Sunní* and *Shí'ah* scholarly and methodological approaches.[35]

When a rule is discerned from the *Qur'án* and *Sunnah* based on analogy from an existing rule, this is referred to as *qiyás*.[36] An example of *qiyás* is the extension of the prohibition of wine to a prohibition of any drug that causes intoxication, because the prevention of the latter is the effective cause of the original prohibition.[37] When learned jurists reach a consensus of opinion on a legal matter (*ijmá'*), a practice established by the companions of the Prophet (*ṣaḥábah*),[38] this is considered a rational proof of *Sharíʿah*.[39] Other methods of determining legal rules within Islamic law include *istiḥsán* (equity in Islamic law), *maṣlaḥah mursalah* (unrestricted considerations of public interest), *'urf* (custom) and *istiṣḥáb* (presumption of continuity).[40]

9.2.3. The Leading Schools of Islamic Jurisprudence (*Madháhib*)

Early interest in law evolved where men learned in the *Qur'án* began discussions of legal issues and assumed the role of teachers.[41] At first students rarely restricted themselves to one teacher and it only became the normative practice in the second half of the ninth century for jurists to adopt a single doctrine.[42] When prominent jurists[43] began to have loyal

---

34 *Ibid*., pp. 40–41.

35 Bassiouni, 2010, p. 10, see *supra* note 20.

36 See Robert M. Gleave, "Imami Shi'i Refutations of Qiyas", in Bernard G. Weiss (ed.), *Studies in Islamic Legal Theory*, Brill, Leiden, 2002, p. 267: "Refutations of the validity of *qiyás* are to be found in Imámi *Shi'i* collections of reports, all available *Shi'i* works of *úṣúl al-fiqh*, polemics against *Sunní* thought and not infrequently in works of *furú' al-fiqh*". See also Kamali, 2006, p. 264, *supra* note 33. The *'ulama'* (Muslim jurists) are in unanimous agreement that the *Qur'án* and the *Sunnah* constitute the sources of the original case, but there is some disagreement as to whether *ijmá*' constitutes a valid source for *qiyás*, see Kamali, 2008, p. 268, see *supra* note 10.

37 Kamali, 2006, p. 267, see *supra* note 33.

38 Abdal-Haqq, 2002, p. 25, see *supra* note 27.

39 *Ibid*., pp. 28–29.

40 Kamali, 2006, see *supra* note 33.

41 Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, Cambridge University Press, Cambridge, 2005, p. 153.

42 *Ibid*.

followers which would exclusively apply their doctrine in courts of law, the so-called 'personal schools' emerged and only a few of these leaders were raised to the level of founder of a 'doctrinal school', what is referred to in Islamic law as the *madhhab*.[44] When they emerged, the doctrinal schools did not remain limited to the individual doctrine of a single jurist but possessed a cumulative doctrine in which the legal opinions of the leading jurists were, at best, *primi inter pares*.[45]

The surviving four *Sunní* schools are the *Ḥanafí*, named after Imám Abú Ḥanífah, the *Málikí*, named after Imám Málik, the *Sháfi'í*, named after Imám Al Sháfi'í and the *Ḥanbalí* named after Imám Ibn Ḥanbal. Out of these schools, the *Ḥanafí* school was geographically the most widespread and, for much of Islamic history, the most politically puissant. The *Shí'ah* schools are the Twelvers, the *Ismá'ílí* and the *Zaydí*.[46] Out of these, the Twelvers are the best known and have the largest percentage in Iran and Iraq.[47]

It is hard to find consensus among the various schools and subschools; however, some consensus can be found among the four *Sunní* schools and some consensus among the *Shí'ah* schools. This proves that Islamic law is not a monolithic set of rules but rather an evolving body of legislation, depending on several factors at any given time. While the main schools have been dominant in the Islamic legal thought, this does not imply their monopoly on *ijtihád*, nor has it prevented interpretations and deductions from the *Sharí'ah*, which correspond to modern times and the new challenges faced by the Muslim community as well as humanity as a whole.

9.2.4. Categories of Crimes in Islamic Criminal Law

In Islamic law offences have been divided into three categories according to complex criteria which combine the gravity of the penalty prescribed,

[43] *Ibid*. Those jurists are Abú Ḥanífah, Ibn Abí Layla, Abú Yúsuf, Shaybání, Málik, Awza'i, Thawri and Sháfi'í.

[44] *Ibid*., p. 157.

[45] *Ibid*., p. 156.

[46] *Ibid*.

[47] Bassiouni, 2010, see *supra* note 20.

the manner and the method used in incriminating and punishing and the nature of the interest affected by the prohibited act.[48]

The first category is *ḥudúd* crimes. These crimes are penalised by the community and punishable by fixed penalties as required in the *Qur'án* and the *Sunnah*.[49] Both crime and punishment are precisely determined with some flexibility for the judge depending upon the intent of the accused and the quality of the evidence.[50] Mostly there are seven recognised *ḥudúd* crimes: *riddah* (apostasy); *baghí* (transgression); *sariqah* (theft); *ḥirábah* (highway robbery or banditry); *ziná'* (illicit sexual relationship); *qadhf* (slander); and *sharb al-khamr* (drinking alcohol).[51] It has been argued that these matters cover the most vital areas of collective life (in the following order of priority: religion, life, family, intellect, wealth)[52] and require collective commitment to these values as law.[53] In these offences it is the notion of man's obligation to God rather than to his fellow man that predominates.[54] The state owes the right to Allah to implement the *ḥudúd*.[55]

Opinions vary on which crimes are to be considered *ḥudúd*. Mawardi (of the *Sháfi'í* school) claims there are four *ḥudúd* offences: adultery, theft, drunkenness, and defamation, while Ibn Rushid and Al Gazali (also of the *Sháfi'í* school) claim there are seven: apostasy, rebellion, adultery, theft, highway robbery, drunkenness, and defamation.[56] Some of these offences, such as apostasy, adultery, drunkenness, and defamation of religion are clearly in conflict with modern Western legal sys-

48 Nagaty Sanad, *The Theory of Crime and Criminal Responsibility in Islamic Law: Sharí'ah*, University of Illinois, Chicago, 1991, p. 50.

49 Aly Mansour, "Hudud Crimes", in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System*, Oceana Publications, New York, 1982, pp. 195–209.

50 Kamali, 2008, p. 161, see *supra* note 10.

51 M. Cherif Bassiouni, "Crimes and the Criminal Process", in *Arab Law Quarterly*, 1997, vol. 12, p. 269.

52 Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*, Advanced Legal Studies Institute, Islamabad, 2000, p. 28.

53 El-Awa, 1991, p. 157, see *supra* note 26.

54 Noel Coulson, *A History of Islamic Law*, Edinburgh University Press, Edinburgh, 1964, p. 124.

55 Nyazee, 2000, p. 18, see *supra* note 52.

56 Butti Sultan Al-Muhairi, "The Islamisation of Laws in the UAE: The Case of the Penal Code", in *Arab Law Quarterly*, 1996, vol. 11, p. 363.

tem and a secular international law. It is not surprising, therefore, that based on these categorisations of *ḥudúd* crimes, many believe that there exists an essential incompatibility between Islamic law and international criminal law. However, one has to acknowledge that based on Qur'ánic principles, such as 'no compulsion in religion', some have started to doubt that there is a basis in the primary sources to characterise apostasy or blasphemy as *ḥudúd* offences in the first place. Regardless of an actual or perceived lack of uniformity between Islamic law and international criminal law when it comes to the category of *ḥudúd* crimes, there is no need to criminalise said conduct on an international level and therefore there is no practical conflict between the two systems.

The *Qur'án* unequivocally considers that apostasy amounts to a religious sin. This position can be understood from a number of verses, such as verse 4:137, which refers to "those who have believed, then disbelieved, then believed, then disbelieved". Ibn Kathir says that this verse is characteristic of hypocrites, noting that they "believe, then disbelieve, and this is why their hearts become sealed". However, this verse is notable as it clearly illustrates that apostates could not have been killed for their (un)belief, because had this been the case, they could not have "believed" again. It implicitly proves that the apostate was not to be punished by death, since it mentions a recurrence of apostasy. If the *Qur'án* had prescribed the death penalty for the first instance of apostasy, then such repetition of the 'offence' would not be possible. As former Chief Justice of Pakistan S.A. Raḥmán observed: "The verse visualises repeated apostasies and reversions to the faith, without mention of any punishment for any of these defections on this earth. The act of apostasy must, therefore, be a sin and not a crime".[57] Perhaps a more pertinent conflict presents itself in the context of the second category of crimes in Islamic law, which consists of *qiṣáṣ* and *diyya* crimes. In Islamic law, the punishment prescribed for murder and the infliction of injury is named *qiṣáṣ*, that is, inflicting on the culprit an injury exactly equal to the injury he or she inflicted upon his or her victim. The right to demand retribution or compensation lies with the victim or in cases of homicide the victim's next of kin. Sometimes the relationship between this person and the offender can prevent retaliation.[58]

[57] See Mohamed Elewa Badar *et al.*, "The Radical Application of the Islamist Concept of Takfir", in *Arab Law Quarterly*, 2017, vol. 31, pp. 137–38.

[58] *Ibid*., p. 48.

Qiṣáṣ and *diyya* crimes fall into two categories: homicide and battery.[59] International criminal law, as it stands, does not allow for the imposition of the death penalty or any other corporal punishment based on the crimes of the offender. In other words, war criminals can only get prison sentences. This may be problematic from the point of view of Muslim societies, who may perceive it as unfair, especially in cases of the worst international crimes.

The third category of crimes in Islamic law is called *ta'zír* crimes. These crimes are punishable by penalties left to the discretion of the ruler or the judge (*qáḍí*). They are not specified by the *Qur'án* or *Sunnah*; any act which infringes private or community interests of the public order can be subject to *ta'zír*.[60] It is the duty of public authorities to lay down rules penalizing such conduct. These rules must however draw their inspiration from the *Sharí'ah*.[61] An example of a *ta'zír* crime is the trafficking of persons. It is not defined in the *Qur'án* or the *Sunnah* but it constitutes a clear violation of the right to personal security, one of the five essentials of Islam.[62]

Ta'zír is used for three types of cases:

1. Criminal acts which must by their very nature be sanctioned by penalties which relate to *ḥudúd*, for example attempted adultery, illicit cohabitation or simple robbery;
2. Criminal acts normally punished by *ḥudúd*, but where by reason of doubt, for procedural reasons or because of the situation of the accused, the *ḥudúd* punishment is replaced by *ta'zír*; and
3. All acts under the provisions of the law, which are not punished by *ḥudúd or qiṣáṣ*.[63]

---

59 M. Cherif Bassiouni, "Quesas Crimes", in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System*, Oceana Publications, New York, 1982, p. 203.

60 Ghaouti Benmelha, "Ta'azir Crimes", in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System*, Oceana Publications, New York, 1982, p. 213.

61 *Ibid*.

62 United Nations Office on Drugs and Crime, "Combating Trafficking in Persons in Accordance with the Principles of Islamic Law", 13 October 2016, p. 45 (http://www.legal-tools.org/doc/0056b6/).

63 Benmelha, 1982, pp. 213–14, see *supra* note 60.

9.3. Core Principles of Islamic Law Corresponding to Core Principles of International Law

Despite the potential conflicts between the two systems, there are many convergences when it comes to core principles as recognised by both. Some of these are described below.

9.3.1. Islamic Legal Maxims (*Al-Qawá'id Al-Fiqhíyyah*)

An example of the flexibilities which can be found in the Islamic legal traditions and which may prove particularly useful for international criminal law in the future are legal maxims. In public international law, 'maxims of law' are viewed as synonymous with 'general principles of law'.[64] Similarly, in Western legal traditions, maxims play a vital role in the process of judgment. According to a Latin proverb, a general principle is called a maxim because its dignity is the greatest and its authority the most certain, and because it is universally approved by all.[65] For instance, by the time of Coke,[66] the maxim *actus non facit reum nisi mens sit rea*[67] (an act does not make a person guilty unless his mind is guilty) had become well ingrained in common law.

Islamic legal maxims (*al-qawá'id al-fiqhíyyah*), similar to their Western counterparts, are theoretical abstractions in the form usually of

64 As noted by the English jurist Lord Phillimore in the Proceedings of the Advisory Committee of Jurists, 16 June to 24 July 1920, in *Proces-verbaux* 335, quoted in Frances Freeman Jalet, "The Quest for the General Principles of Law Recognized by Civilized Nations – A Study", in *Los Angeles Law Review*, 1963, no. 10, p. 1046.

65 "Maxime ita dicta quia maxima est ejus dignitas et certissima auctoritas atque quod maxime omnibus probetur", see Earl Jowitt and Clifford Walsh, *Jowitt's Dictionary of English Law*, 2nd ed., Sweet and Maxwell, London, 1977, p. 1164, quoted in Luqman Zakariyah, *Legal Maxims in Islamic Criminal Law: Theory and Applications*, Brill Nijhoff, Leiden, 2015, p. 55, fn. 154.

66 See Edwardo Coke, *The Third Part of the Institutes of the Laws of England*, W. Clarke and Sons, London, 1817 ('Coke's Third Institute'), p. 6. The Latin maxim appears in Chapter 1.

67 James Stephen notes that the authority for this maxim is Coke's Third Institute, where it is cited with a marginal note ('Regula') in the course of his account of the Statute of Treasons. Stephen admits that he does not know where Coke quotes it from, see James F. Stephen, *A History of the Criminal Law of England*, Macmillan, London, 1883, p. 94. Pollock & Maitland traced it correctly back to St. Augustine where the maxim reads "Reum non facit nisi mens rea" and certainly contained no reference to an *actus*; see Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed., Cambridge University Press, London, 1923, p. 476.

short epithetic statement that are expressive of the nature and sources of Islamic law and encompassing general rules in cases that fall under their subject.[68] They are different from *úṣúl al-fiqh* (fundamental guiding principles of Islamic jurisprudence) in that the maxims are based on the *fiqh* itself and represent rules and principles that are derived from the reading of the detailed rules of *fiqh* on various themes.[69] One of the main functions of Islamic legal maxims is to depict the general picture of goals and objectives of Islamic law (*maqáṣid al-Sharí'ah*).[70] Today, legal maxims have become "*sine qua non* for any Islamic jurist and judge to master a certain level of rules (*al-qawá'id al-fiqhíyyah*) in order to be able to dispense Islamic verdicts and to pass accurate judgment".[71] As Imám Al-Qarrafi affirms:[72]

> These maxims are significant in Islamic jurisprudence […] By it, the value of a jurist is measured. Through it, the beauty of *Fiqh* [Islamic jurisprudence] is shown and known. With it, the methods of *Fatwá* [legal verdict or opinion] are clearly understood […] Whoever knows *Fiqh* with its maxims (*al-qawá'id al-fiqhíyyah*) shall be in no need of memorizing most of the subordinate parts [of *Fiqh*] because of their inclusion under the general maxims.

Legal maxims aid judges in comprehending the basic doctrines of Islamic law on any contentious issue. For instance, the Islamic legal maxim which calls upon judges to avoid imposing *ḥudúd* and other sanctions when beset by doubts as to the scope of the law or the sufficiency of the evidence is frequently referenced and applied by judges of the Abu Dhabi Supreme Court of the United Arab Emirates.[73] It has been noted that "ex-

[68] Mustafa A. Al-Zarqá, *Al-Madkhal al-Fiqhí al-'Amm*, vol. 2, 1983, p. 933.

[69] Kamali, 2008, p. 143, see *supra* note 10.

[70] Kamali, 2006, p. 78, see *supra* note 6.

[71] Zakariyah, 2015, pp. 57–58, see *supra* note 65.

[72] A. Al-Qarafi, *Al-Furúq*, vol. 1, p. 3, quoted in Zakariyah, 2015, p. 59, see *supra* note 65.

[73] Supreme Court of the United Arab Emirates ('UAE'), Appeal No. 36, Penal Judicial Year 5, Session 9 January 1984; Supreme Court of the UAE, Appeal No. 40, Penal Judicial Year 6, Session 18 January 1985; Supreme Court of the UAE, Appeal No. 32, Penal Judicial Year 13, Session 15 January 1992; Supreme Court of the UAE, Appeal No. 42, Penal Judicial Year 8, Session 1986; Supreme Court of the UAE, Appeal No. 43, Penal/*Sharí'ah* Judicial Year 18, Session 4 May 1996.

ploring this opportunity would also give scholars, judges and jurists of Islamic law the ability to deliver sound and just legal judgments".[74]

It is difficult to trace the precise dates for the emergence of Islamic legal maxims (*al-qawá'id al-fiqhíyyah*) as a distinctive genre of roots of Islamic jurisprudence (*úṣúl al-fiqh*). Suffice to say that *al-qawá'id al-fiqhíyyah* has gone through three stages of development.[75] The first stage (the primitive stage) can be traced back to the seventh century (around 610–632) as the Prophet of Islam was endowed with the use of precise yet comprehensive and inclusive expressions (*jawámi' al-kalim*).[76] Despite the fact that the term *qawá'id* (plural of *qa'idah*) was not explicitly mentioned in the expressions of the Prophet, the prophetic *ḥadíth* are full of expressions of legal maxims. For instance, the *ḥadíth* of '*lá ḍarar wá-lá dirár*' (let there be no infliction of harm nor its reciprocation); '*innamá al-a'mál bil-niyyát*' (acts are valued in accordance with their underlying intentions); and '*al-bayyinah 'alá al-mudda'í wa al-yamín 'alá man ankar*' (the burden of proof is on the claimant and the oath is on the one who denies) are few of those prophetic *ḥadíths* that emerged as Islamic legal maxims.

The second stage (the florescence stage) where *al-qawá'id al-fiqhíyyah* began to gain popularity was in the middle of the fourth century of *Hijrah* and beyond when the idea of imitation (*al-taqlíd*) emerged and the spirit of independent reasoning (*ijtihád*)[77] was on the edge of extinction.[78] At this stage, legal maxims became recognised as a distinct subject from *úṣúl al-fiqh*.[79] The first visible work on Islamic legal maxims, *úṣúl al-Karkhí*, was written by the *Ḥanafí* jurist, Ibn Al-Hassan Al-Karkhí.[80] This was followed by other significant contributions by jurists from other

74 Zakariyah, 2015, pp. 56–59, see *supra* note 65.

75 *Ibid*., pp. 25–35.

76 *Ibid*., p. 25.

77 *Ijtihád* (independent reasoning) literally means legal methods of interpretation and reasoning by which a *mujtahid* derives or rationalizes law on the basis of the *Qur'án*, the *Sunnah* or consensus.

78 Zakariyah, 2015, pp. 28–32, see *supra* note 65, pp. 28–32.

79 *Ibid*.

80 Khaleel Mohammed, "The Islamic Law Maxims", in *Islamic Studies*, 2005, vol. 44, no. 2, pp. 191–96; Wolfhart Heinriches, "Qawa'id as a Genre of Legal Literature", in Bernard Weiss (ed.), *Studies in Islamic Legal Theory*, Brill, Leiden, 2002, p. 369.

ma<u>dh</u>áhib (legal schools), namely the *<u>Sh</u>áfi'í*, *Ḥanbalí* and *Málikí* schools.[81]

The Islamic legal maxims reached the stage of maturity (the third stage) around the thirteenth century AH (eighteenth century AD). According to one commentator, "one of the distinctive features of this stage is the establishment of maxims as a separate science in Islamic jurisprudence, while at the same time the formula of their codification was standardized".[82] The *Mejell-i Ahkam Adliyye*, an Islamic law code written by a group of Turkish scholars, in the late nineteenth century, is said to present the most advanced stage in the compilation of Islamic legal maxims.

Islamic legal maxims are divided into two types. The first are those which reiterate the *Qur'án* and the *Sunnah*, whereas the second are those formulated by jurists.[83] The former carry greater authority than the latter. The most expansive collection of legal maxims is known as '*al-qawá'id al-fiqhíyyah al-aslíyah*' (the original legal maxims) or '*al-qawá'id al-fiqhíyyah al-kulíyah*' (the overall legal maxims). These types of maxims stand as the pillars of *úṣúl al-fiqh*; they could be applied broadly to the entire corpus of Islamic jurisprudence; each of these maxims has supplementary maxims of a more specified scope and; there is a consensus among the legal schools over them.[84] The five generally agreed upon maxims are as follows:

1. '*Al-umúr bi-maqáṣidhá*' (acts are judged by their goals and purposes);
2. '*Al-yaqín lá yazálu bi'l-<u>sh</u>ak*' (certainty is not overruled by doubt);
3. '*Al-ma<u>sh</u>aqqatu tajlib al-taysír*' (hardship begets facility);
4. '*Al-ḍararu yuzál*' (harm must be removed); and
5. '*Al-'áda muḥakkamah*' (cultural usage shall have the weight of law).

The maxim 'certainty is not overruled by doubt', has several submaxims, one of which reads: 'Knowledge that is based on mere probabil-

81 Kamali, 2006, pp. 142–44, see *supra* note 33.

82 Zakariyah, 2015, pp. 32–35, see *supra* note 65.

83 Heinriches, 2002, pp. 364, 385, see *supra* note 80; Mohammed, 2005, pp. 191–209, see *supra* note 80; Mohammad Hashim, "Sharia and the Challenge of Modernity", in *Journal of the Institute of Islamic Understanding Malaysia*, 1994, vol. 1, reprinted in *Islamic University Quarterly*, 1995, vol. 2.

84 Zakariyah, 2015, p. 55, see *supra* note 65.

ity is to be differentiated from knowledge that is based on certainty' ('*yufarraqu bayn al-'ilmi baynahu idhá thabata yaqínan*'). Two examples are illustrative in this regard: "When the judge adjudicates on the basis of *certainty*, but later it appears that he *might have* erred in his judgment, if his initial decision is based on clear text and consensus, it would not be subjected to review on the basis of a mere probability".[85] This maxim also applies for a "missing person whereabouts is presumed to be alive, as this is the certainty that is known about him before his disappearance. The certainty here shall prevail and no claim of his death would validate distribution of his assets among his heirs until his death is proven by clear evidence. A doubtful claim of his death is thus not allowed to overrule what is deemed to be certain".[86]

It has been observed that "[t]he abstract and synoptic stance of the Islamic Legal maxims gives them elevated level of elasticity and agelessness; and thus makes them related to all current global issues".[87] For example, the legal maxim 'no harming and no counter-harming' derived from the common principles of several *ḥadíths* and Qur'ánic verses, can be taken as a basis for environmental law and also for filling the *lacuna* that exists in international criminal law in terms of environmental crimes.

The provisions from the *Qur'án* and the *Sunnah* on which this maxim is based provide guidelines for elimination of damages caused to environment and also demonstrate the versatility of *Sharí'ah* and its applicability to all matters at any imminent era.[88]

9.3.2. Principle of Legality and Non-Retroactivity

One of the rare provisions set out as a non-derogable norm in all of the major human rights instruments is the *nullum crimen sine lege* rule.[89] Ar-

[85] M.A. Barikati, *Qawá'id al-Fiqh*, 1961, pp. 142–43, quoted in Kamali, 2008, p. 145, see *supra* note 10.

[86] S.M. Zarqá, *Sharh al-Qawá'id al-Fiqhiyyah*, 1993, p. 382, in Kamali, 2008, p. 145, see *supra* note 10.

[87] Muḥammad Shettima, "Effects of the Legal Maxim: 'No Harming and no Counter-Harming' on the Enforcement of Environmental Protection", in *International Islamic University Malaysia Law Journal*, 2011, vol. 19, p. 308.

[88] *Ibid*.

[89] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, p. 403 with reference to universal and regional human rights instruments. See also Geneva Convention (III) relative to the Treatment of

ticle 22 of the Rome Statute confirms the core prohibition of the retroactive application of criminal law together with other two major corollaries of this prohibition, namely, the rule of strict construction and the requirement of *in dubio pro reo*.[90] The prohibitions of retroactive offences together with the prohibition of retroactive penalties, *nulla poena sine lege*,[91] form the 'principle of legality'.

In Islamic law, there is no place for an arbitrary rule by a single individual or a group.[92] In fact, long before the Declaration of the Rights of Man, which in 1789 first proclaimed the legality principle in Western law, the Islamic system of criminal justice operated on an implicit principle of legality.[93] Evidence of this principle can be found in the following Qur'ánic verses: "We never chastise, until We send forth a Messenger (to give warning)";[94] and "[We sent] Messengers who bear good tidings, and warning, so that mankind might have no argument against God, after the Messengers; God is All-mighty, All-wise".[95]

Islamic law includes a number of legal maxims which complement this principle, for example: "the conduct of reasonable men (or the dictate of reason) alone is of no consequence without the support of a legal text", which means that no conduct can be declared forbidden (*ḥarám*) on grounds of reason alone or on the ground of the act of reasonable men;

Prisoners of War, 12 August 1949, in force 21 October 1950, Article 99 (http://www.legal-tools.org/doc/365095/); Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, in force 7 December 1978, Article 2(c) (http://www.legal-tools.org/doc/d9328a/); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, in force 7 December 1978, Article 6(c) (http://www.legal-tools.org/doc/fd14c4/).

90 See Bruce Broomhall, "Article 22 – *Nullum crimen sine lege*", in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., Nomos, Baden-Baden, 2008, p. 714.

91 Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001 ('Rome Statute'), Article 23 (http://www.legal-tools.org/doc/7b9af9/).

92 Kamali, 2008, p. 180, see *supra* note 10.

93 Taymour Kamel, "The Principle of Legality and its Application in Islamic Criminal Justice", in M. Cherif Bassiouni (ed.), *Islamic Criminal Justice System*, Oceana Publications, New York, 1982, pp. 149–50.

94 The *Qur'án*, 17:15, see *supra* note 26.

95 *Ibid.*, 4:165.

rather, a legal text is necessary.[96] Another maxim declares that 'permissibility is the original norm' (*al-aṣl fi'l-ashyáh al-ibáhah*) which implies that all things are permissible unless the law has declared them otherwise.[97] *Sharí'ah* also establishes the rule of non-retroactivity, unless it is in favour of the accused:[98]

> Say to the unbelievers, if they give over He will forgive them what is past; but if they return, the wont of the ancients is already gone![99]

This principle is also mirrored in the tradition of the Prophet. When 'Amr Ibn Al-'Ass embraced Islam, he pledged allegiance to the Prophet and asked if he would be held accountable for his previous transgressions. To this the Prophet replied: "Did you not know, O 'Amr, that Islam obliterates that which took place before it?".[100] Similarly, the Prophet refrained from punishing crimes of blood or acts of usury which had taken place prior to Islam: "Any blood-guilt traced back to the period of ignorance should be disregarded, and I begin with that of Al-Harith Ibn 'Abd Al-Muttalib; the usury practised during that period has also been erased starting with that of my uncle, Al-'Abbás Ibn 'Abd Al-Muttalib".[101]

Ḥudúd crimes are firmly based on the principle of legality as the crimes themselves, as well as the punishments, are precisely determined in the *Qur'án* or the *Sunnah*. *Qiṣáṣ* crimes are bound to specific procedures and appropriate penalties in the process of retribution and compensation and thus also show their basis in the principle of legality.[102] More problematic are *ta'zír* crimes, which according to some schools of thought give very broad discretionary powers to the *Caliph* (ruler) and to the *qáḍí* (judge) with regard to the applicable punishment for particular conduct.[103]

96 Kamali, 2008, p. 186, see *supra* note 10.

97 Al-Ghazálí, a-Mustasfá, I, 63; Al-Āmidí, Al-Ihkám, I, 130, in Kamali, 2008, see *supra* note 10.

98 Kamali, 2008, p. 188, see *supra* note 10.

99 The *Qur'án*, 8:38, see *supra* note 26.

100 Muslim, Sahíh Muslim, Kitáb Al-Imán, Báb al-Islam yahdim má qablah wa kadhá al-hijrah wa al-ḥajj; Abú Zahrah, Al-Jarímah, 343 in, Kamali, 2008, p. 186, see *supra* note 10.

101 Taymour Kamel, 1982, p. 151, see *supra* note 93.

102 *Ibid*., p. 161.

103 Silvia Tellenbach, "Fair Trial Guarantees in Criminal Proceedings Under Islamic, Afghan Constitutional and International Law", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 2004, vol. 64, pp. 929–41.

While *ta'zír* crimes are for that reason viewed by Western scholars as clearly violating the principle of legality,[104] Muslim scholars have mostly defended the wide discretion given to judges, claiming that this is merely a safeguard which serves to balance the principle of legality and thus avoid the problem of its potential inflexibility.[105]

One might argue that the application of *ta'zír* crimes runs contrary to the principle of legality as the jurisprudence of the UN Human Rights Committee and the European Court of Human Rights expressly states that the law must be adequately accessible and that "a norm cannot be regarded as a law unless it is formulated with the sufficient precision".[106]

9.3.3. Presumption of Innocence

The provision on the presumption of innocence as enshrined in Article 66 of the ICC Statute[107] is threefold and its mechanics are best illustrated by the European Court of Human Rights in *Barberà v. Spain*. It requires, *inter alia*, that when carrying out their duties: (1) the members of a court should not start with the preconceived idea that the accused has committed the offence charged; (2) the burden of proof is on the prosecution; and (3) any doubt should benefit the accused.[108]

Under Islamic law, no one is guilty of a crime unless his guilt is proved through lawful evidence.[109] One of the sub-maxims of the maxim, 'certainty is not overruled by doubt', is the maxim, which reads: 'The norm [of *Sharí'ah*] is that of non-liability' (*al-aṣlu barā'al-dh-dhimmah*). The prophet is reported to have said "everyone is born inherently pure".[110]

---

104 Taymour Kamel, 1982, p. 157, see *supra* note 93.

105 *Ibid*., p. 151; Mohamed Selim El-Awa, 1991, see *supra* note 26; Ghaouti Benmelha, 1982, see *supra* note 60.

106 European Court of Human Rights, *Case of the Sunday Times v. the United Kingdom*, Judgment, Application no. 6538/74, 6 November 1980, para. 49. (http://www.legal-tools.org/doc/46e326/).

107 Rome Statute, Article 66, see *supra* note 91 (http://www.legal-tools.org/doc/7b9af9/).

108 European Court of Human Rights, *Case of Barberà, Messegué and Jabardo v. Spain*, Judgment, Application no. 10590/83, 6 December 1988, para. 77 (http://www.legal-tools.org/doc/a84e3a/), quoted in William Schabas, "Presumption of Innocence", in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., Nomos, Baden-Baden, 2008, p. 1236.

109 Abú Yúsuf, *Kitáb al-Kharáj*, p. 152, quoted in Kamali, 2008, p. 181, see *supra* note 10.

110 Baderin, 2008, p. 103, see *supra* note 18.

According to the legal principle of *istiṣḥáb*, recognised by the *Sháfi'í* and *Ḥanbalí* schools, there is a presumption of continuation of a certain state, until the contrary is established by evidence.[111] Therefore, an accused person is considered innocent until the contrary is proven. In the words of Kamali: "to attribute guilt to anyone is treated as doubtful. Certainty can […] only be overruled by certainty, not by doubt".[112] The Prophet is reported to have said:

> The burden of proof is on him who makes the claim, whereas the oath [denying the charge] is on him who denies.[113]
>
> 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.[114]
>
> Avoid condemning the Muslim to *ḥudúd* whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imám errs, it is better that he errs in favour of innocence (pardon) than in favour of guilt (punishment).[115]

From the latter *ḥadíth*, jurists have derived the general principle and it is agreed by the four major *Sunní* schools that doubt (*shubhah*) also fends off *qiṣáṣ*.[116] The following case is illustrative in this regard:[117]

> During the time of the Muslim polity's fourth *Caliph* 'Alí, Medina's patrol found a man in the town ruins with a blood-stained knife in hand, standing over the corpse of a man who had recently been stabbed to death. When they arrested him, he immediately confessed: "I killed him." He was brought

111 Kamali, 2006, p. 384, see *supra* note 33.

112 Kamali, 2008, pp. 145–46, see *supra* note 10.

113 Al-Bayhaqí, "As-Sunan Al-Kubrá, Kitáb Ad-Da'wá wa Al-Bayyinát, Báb Al-Bayyinah 'alá al-Mudda'á wa al-Yam n 'alá al-Mudda'á 'alayh", in Kamali, 2008, p. 182, see *supra* note 10.

114 Al Baihagi, *The 40 Hadith of Imam al Nawawi*, No. 33 in Bassiouni, 2010, p. 40, see *supra* note 20.

115 *Ibid*.; Al Turmuzy, no. 1424; Al Baihagi, No. 8/338; Al Hakim, no. 4384.

116 Sayed Sikander Shah Haneef, *Homicide in Islam: Legal Structure and the Evidence Requirements*, A.S. Noordeen, Kuala Lumpur, 2000, p. 120.

117 Quoted in Intisar A. Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: Hudud – Avoidance in Cases of Doubt", in *Arab Law Quarterly*, 2010, vol. 17, pp. 64–65.

> before ‘Alí, who sentenced him to death for the deed. Before the sentence was carried out, another man hurried forward, telling the executioners not to be hast. “Do not kill him. *I* did it,” he announced. ‘Alí turned to the condemned man, incredulously. “What made you confess to a murder that you did not commit?!” he asked. The man explained that he thought that ‘Alí would never take his word over that of the patrolmen who had witnessed a crime scene, he was a butcher who had just finished slaughtering a cow. Immediately afterward, he needed to relieve himself, so entered into the area of the ruins, bloody knife still in hand. Upon return, he came across the dead man, and stood over him in concern. It was then that the patrol arrested him. He figured that he could not plausibly deny having committed the crime of murder. He surrendered himself and confessed to the “obvious”, deciding to leave the truth of the matter in God’s hands. The second man offered a corroborating story. He explained that *he* was the one who had murdered for money and fled when he heard the sounds of the patrol approaching. On his way out, he passed the butcher on the way in and watched the events previously described unfold. But once the first man was condemned to death, the second man said that he had to step forward, because he did not want the blood of *two* men on his hands.

Having realised that the facts surrounding the above case had become doubtful without a fail-safe means to validate one story over the other, the fourth *Caliph* released the first man and pardoned the second.[118]

The system of proof applicable for *ḥudúd* and *qiṣáṣ* makes it very difficult and sometimes almost impossible to prove a crime.[119] On this matter the *Qur’án* states:[120]

> And those who cast it up on women in wedlock, and then bring not four witnesses [to support their allegation], scourge them with eighty stripes, and do not accept any testimony of theirs ever; those – they are the ungodly […].

[118] *Ibid*., p. 66.

[119] Tellenbach, 2004, p. 930, see *supra* note 102.

[120] The *Qur’án*, 24:4, see *supra* note 26.

9.3.4. *Mens Rea*

For the first time in the sphere of international criminal law, and unlike the Nuremberg and Tokyo Charters or the Statutes of the ex-Yugoslavia and Rwanda Tribunals, Article 30 of the Rome Statute[121] provides a general definition for the mental element required to trigger the criminal responsibility of individuals for serious violations of international humanitarian law. This provision is in line with the Latin maxim '*actus non facit reum nisi mens sit rea*', that is, an act does not make a person guilty unless there is a guilty mind. But Article 30 goes still further, assuring that the mental element consists of two components: a volitional component of intent and a cognitive element of knowledge.[122]

In *Sharíʿah*, one of the basic legal maxims agreed upon by Muslim scholars is '*al-umúr bi-maqáṣidhá*', which implies that any action, whether physical or verbal should be considered and judged according to the intention of the doer.[123] The first element of the maxim, *umúr* (plural of *amr*), is literally translated as a matter, issue, act, physical or verbal.[124] The second word is *al-maqáṣid* (plural of *maqaṣad*), which literally means willing, the determination to do something for a purpose.[125] Thus, for an act to be punishable the intention of the perpetrator has to be established. Evidence of this maxim can be found in the *Qur'án* and the *Sunnah*: "[A] man shall have to his account only as he has laboured";[126] "[T]here is no fault in you if you make mistakes, but only in what your hearts pre-meditate. God is All-forgiving, All-compassionate".[127] This stand is further affirmed by the *Sunnah* of the Prophet:

---

121 Rome Statute, Article 30, see *supra* note 91 (http://www.legal-tools.org/doc/7b9af9/).

122 See Mohamed Elewa Badar, "The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective", in *Criminal Law Forum*, 2008, vol. 19, pp. 473–518.

123 Zakariyah, 2015, pp. 60–64, see *supra* note 64. For more details on the concept of intention in Islamic criminal law, see Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach*, Hart Publishing, Oxford, 2013, pp. 208–19.

124 Zakariyah, 2015, p. 64, see *supra* note 65.

125 *Ibid.*, p. 65.

126 The *Qur'án*, 53:39, see *supra* note 26.

127 *Ibid.*, 33:5.

> Actions are to be judged by the intention behind them and everybody shall have what he intends.[128]
>
> Verily, Allah has for my Sake overlooked the unintentional mistakes and forgetfulness of my *ummah* (community) and what they are forced to do.[129]
>
> Unintentional mistakes and forgetfulness of my *ummah* (community) are overlooked.[130]

Yet, the general rule in *Sharíʿah* is that a man cannot be held responsible for a mere thought. In Islam, a good thought is recorded as an act of piety and a bad thought is not recorded at all until it is acted upon.[131] According to Imám Abou Zahra, an eminent scholar, the criminal intent is the intent to act wilfully, premeditatedly and deliberately with complete consent as to its intended results.[132] Intentional crimes must meet three conditions: premeditation, a free will to choose a certain course of action, and the knowledge of the unlawfulness of the act.[133] The difference between intentional and unintentional results is in the degree of punishment.

The established jurisprudence of the Supreme Federal Court of the United Arab Emirates recognises different degrees of mental states other than the one of actual intent. Most notably, the United Arab Emirates adheres to Málik's school of thought, according to which, in murder cases, it is not a condition *sine qua non* to prove the intent of murder on the part of the defendant; it is sufficient, however, to prove (presumably on grounds of recklessness) that the act was carried out with the purpose of assault and not for the purpose of amusement or discipline. A practical example is set forth in one of Al-Málikí's jurisprudencial sources: "if two people

[128] Al-Bukhari, *Sahih*, *ḥadíth* 1; Muslim, *Sahih*, *ḥadíth* 1599.

[129] Sahih Al-Bukhari, vol. 9, p. 65, quoted in Yahaya Y. Bambale, *Crimes and Punishment in Islamic Law*, Malthouse Press, Ibadan, Nigeria, 2003, p. 7.

[130] *Ibid*.

[131] Abdullah O. Naseef, *Encyclopedia of Seerah*, The Muslims Schools Trust, London, 1982, p. 741, in Bambale, 2003, p. 6, see *supra* note 129.

[132] Muḥammad Abú-Zahra, *Al-Jarima Wal-Uquba fil Islam*, Dar al Fiqr al 'Araby, Cairo, 1998, p. 396.

[133] *Ibid*., p. 106.

fought intentionally and one of them was killed, retaliation (*qiṣáṣ*) should be imposed on the person who survived".[134]

9.3.5. Standards Used for Determining Intention in Murder Cases

Because the intention of a person is difficult to determine, Muslim jurists do not envisage an exploration of the psyche of the killer, or any extensive examination of behaviour patterns or the gradation of the relationship between the killer and the victim.[135] Instead, they consider the objects used in the crimes described by the relative *ḥadíth* as external standards that are likely to convey the inner working of the offender's mind and thus distinguish between *'amd* (intentional) and *shíbh 'amd* (quasi-intentional).[136]

In drawing analogies from relevant *ḥadíths*, the majority of Muslim scholars concluded that the *mens rea* of murder is found when the offender uses an instrument that is most likely to cause death or is prepared for killing, such as a sword, a spear, a flint or fire.[137] Abú Ḥanífah excluded all blunt instruments, such as a wooden club, from the list of lethal weapons, and claimed they testify to quasi intention, irrespective of the size of the instrument or the force applied.[138] However, he does not exclude an iron rod, relying on the words of the *Qur'án*: "We sent down Iron, wherein is great might, and many uses for men".[139] However, Ḥanífah's disciples, Imám Abú Yúsuf and Imám Muḥammad Al-Shaybání, rebutted his arguments saying that the stone and stick mentioned in the *ḥadíth* refer to a stone and stick which in the ordinary course do not cause death, not just any stone or stick.[140] This is also the opinion of the majority of jurists.[141]

---

134 Supreme Federal Court of the United Arab Emirates, Appeal 52, Judicial Year 14, Hearing, 30 January 1993.

135 Paul. R. Powers, "Offending Heaven and Earth: Sin and Expiation in Islamic Homicide Law", in *Islamic Law and Society*, 2007, vol. 14, p. 42.

136 Badar, 2008, pp. 215–19, see *supra* note 122; Nyazee, 2000, p. 98, see *supra* note 52.

137 The *Qur'án*, 57:25, see *supra* note 26; Haneef, 2000, p. 1, see *supra* note 116.

138 Nyazee, 2000, p. 99, see *supra* note 52; Haneef, 2000, p. 35, see *supra* note 116.

139 The *Qur'án*, 57:25, see *supra* note 26; Nyazee, 2000, p. 99, see *supra* note 52.

140 Imram Abú Jafar Ahmed Ibn Muḥammad Al-Tahawi, *Sharih Ma'ani al-Athar*, Dár Al Kotob Al-Ilmiyah, Beirut, 2013, vol. 3, p. 186, quoted in Haneef, 2000, p. 36, see *supra* note 116.

141 Haneef, 2000, p. 36, see *supra* note 116.

The overall balance between using subjective and objective criteria in determining intent thus tips decidedly in favour of reliance on objective evidence,[142] which seemingly becomes a constituent element of the crime in itself, replacing the actual intent. Accordingly, *Ḥanafí* Ibn Mawdud Al-Musili defines intentional killing as "deliberately striking with that which splits into parts, such as a sword, a spear, a flint, and fire",[143] and *Ḥanbalí* Ibn Qudáma deems intentional any homicide committed with an instrument "thought likely to cause death when used in its usual manner".[144]

9.3.6. Duress and Superior Orders

The Rome Statute recognises two forms of duress as grounds for excluding criminal responsibility, namely duress[145] and duress of circumstances.[146] The latter form is treated by English courts as a defence of necessity.[147] The elements of the two forms are almost identical. Unlike the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, the ICC allows the defence of duress to murder which runs contrary to Islamic law (*Sharíʿah*) as will be discussed later in this section.

In international criminal law, the defence of superior orders is often confounded with that of duress, but the two are quite distinct. For superior orders to be a valid defence before the ICC three conditions have to be established: the defendant must be under a legal obligation to obey orders of a government or a superior; the defendant must not know that the order was unlawful; and the order must not be manifestly unlawful.[148]

In Islamic law, duress (*ikráh*) is a situation in which a person is forced to do something against his will.[149] The *Qur'án* acknowledges such a situation and prescribes: "excepting him who has been compelled, and

[142] Powers, 2007, p. 48, see supra note 135; Peters, 2007, p. 43, see *supra* note 23.

[143] Powers, 2007, pp. 42, 48, see *supra* note 135.

[144] *Ibid*., p. 49.

[145] Rome Statute, Article 31(1)(d)(i), see *supra* note 91 (http://www.legal-tools.org/doc/7b9af9/).

[146] *Ibid*.

[147] See Court of Appeal (Criminal Division) of England and Wales, *R. v. Conway*, Judgement, 28 July 1988, [1988] 3 All ER 1025; Court of Appeal (Criminal Division) of England and Wales, *R. v. Martin*, Judgement, 29 November 1988, [1989] 1 All ER 652.

[148] Rome Statute, Article 33, see *supra* note 91 (http://www.legal-tools.org/doc/7b9af9/).

[149] Nyazee, 2000, p. 144, see *supra* note 51.

his heart is still at rest in his belief".[150] The Prophet is reported to have said: "My *ummah* will be forgiven for crimes it commits under duress, in error, or as a result of forgetfulness".[151]

Under duress, the person commits a criminal act not as an end in itself but as a means to save himself from being injured. If the threat concerns persons other than the person under compulsion, the *Málikí* consider it duress, some *Ḥanafís* do not, while the *Sh*áfi'í and other *Ḥanafís* believe it to be duress only if the threat relates to the father, son or other close relative.[152]

Islamic law recognises two kinds of duress:

1. '*Duress imperfect*' is a kind of duress that does not pose a threat to the life of the agent. For example, the (threat of) confinement for a certain period or subjecting the agent to physical violence which does not pose a threat to his life. This kind of duress has no force in crimes.[153]
2. '*Duress proper*' is a kind of duress where the life of the agent is threatened. Both the consent and the choice of the agent are neutralised. Under duress proper, certain forbidden acts will not only cease to be punishable but will become permissible. These relate to forbidden edibles and drinks. Other acts, such as false accusation, vituperation, larceny and destroying the property of another will remain unlawful, but punishment will be invalidated.[154] However, murder or any fatal offence are unaffected by duress and will become neither permissible acts, nor subject to lenient penalty.[155]

In the situation of duress, *Sh*arí'ah disapproves of both courses of action the person under duress can choose from. It prohibits doing harm to others as well as endangering one's own safety. In this situation, two legal maxims apply: 'one harm should not be warded off by its like (another

[150] The *Qur'án*, 16:106, see *supra* note 26.

[151] *Ibid.*; Ibn Majah, *As-Sunan*, *ḥadíth*s 2045, in Zakariyah, 2015, p. 72, see *supra* note 65.

[152] Peters, 2007, p. 23, see *supra* note 23.

[153] Abdul Qader Oudah, *Criminal Law of Islam*, vol. 2, Kitábbhavan, New Delhi, 2005, p. 293.

[154] *Ibid*., pp. 300–03.

[155] *Ibid*., p. 298.

harm)' and when this is inevitable one should 'prefer the lesser evil'.[156] Therefore, if a person has to choose between causing mild physical harm or being killed, and he chooses the former, his action is justified.[157] In the case of murder, however, both evils are equal, as no person's life is more precious than another's.[158]

The issue of punishment in the case of murder is disputed. Most Islamic scholars agree that there must be retribution (*qiṣáṣ*), however, some prescribe only blood money (*diyát*) on the ground that duress introduces an element of doubt.[159] Within Ḥanífah's school there are three different opinions:

1. Qiṣáṣ must be borne by the forced person, for it is he who actually carried out the criminal act;
3. Neither the person who inflicts duress nor the person under duress shall be punished by qiṣáṣ, as the person who inflicts duress is merely an inciter, while the person under duress, neither has the criminal intent, nor is he satisfied with the result of the act, and blood money should only be paid by the person who compels;[160]
4. Qiṣáṣ should be borne by the person who inflicts, as the person under duress is just a puppet or a tool of murder at the hands of the one who threatens him. For a person it is a lesser evil to choose the death of another than his own. This does not mean however that he will be blameless in the next world, because his sin shall be forgiven by God on the day of judgement.[161]

Insofar as the defence of superior orders is concerned, "Islam confers on every citizen the right to refuse to commit a crime, should any government or administrator order him to do so".[162] The Prophet is reported to have said: "There is no obedience in transgression; obedience is

156 Zakariyah, 2015, pp. 158–72, see *supra* note 65.

157 Abú-Zahra, 1998, p. 379, see *supra* note 132.

158 Zakariyah, 2015, p. 73, see *supra* note 65; Oudah, 2005, p. 306, see *supra* note 153.

159 Peters, 2007, p. 24, see *supra* note 23; Zakariyah, 2015, pp. 151–52, see *supra* note 65.

160 Abú-Zahra, 1998, p. 382, see *supra* note 132; Oudah, 2005, p. 299, see *supra* note 153.

161 Abú-Zahra, 1998, p. 382, see *supra* note 132.

162 Abul A'la Mawdúdí, *Human Rights in Islam*, Islamic Foundation, London, 1980, p. 33.

in lawful conduct only";[163] and "There is no obedience to a creature when it involves the disobedience of the Creator".[164] The order of a competent authority, which implies punishment of death, grievous injury, or imprisonment for the disobedient, will be treated as duress.[165] However, if the order is given by an official who does not have the necessary powers, it will only be treated as duress if the person under his command is sure that if he fails to carry out the order, the means of duress will be applied to him or that the official in question is in the habit of applying such measures when his orders are defied.[166] In other cases, no offender may seek to escape punishment by saying that the offence was committed on the orders of a superior; if such a situation arises, the person who commits the offence and the person who orders it are equally liable.[167]

9.3.7. Rulers are Not Above the Law: Irrelevance of Official Capacity-Immunity

Similar to Article 27 of the ICC Statute (irrelevance of official capacity),[168] in Islamic law there is no recognition of special privileges for anyone and rulers are not above the law. Muslim jurists have unanimously held the view that the head of state and government officials are accountable for their conduct like everyone else.[169] Equality before the law and before the courts of justice is clearly recognised for all citizens alike, from the most humble citizen to the highest executive in the land.[170] A tradition was reported by *Caliph* Umar showing how the Prophet himself did not expect any special treatment: "On the occasion of the battle of Badr, when the Prophet was straightening the rows of the Muslim army, he hit the stomach of a soldier in an attempt to push him back in line. The soldier complained: 'O Prophet, you have hurt me with your stick.' The Prophet

163 Sahíh Muslim, *Kitáb al-Amánah*, Báb Wujúb Tá'at Al-Umará' fí Ghayr Al-Ma'siyah wa Tahrímuhá fi'l-Ma'siyah, *ḥadíth* 39. This *ḥadíth* is reported in both Bukhári and Muslim.

164 Abú Dáwúd Al-Sijistání, *Sunan Abú Dáwúd*, *ḥadíth* no. 2285.

165 Oudah, 2005, p. 295, see *supra* note 153.

166 Hasia Ibn Abideen, vol. 5, p. 112 in Oudah, see *supra* note 153.

167 Mawdúdí, 1980, p. 33, see *supra* note 162.

168 Rome Statute, Article 27, see *supra* note 91 (http://www.legal-tools.org/doc/7b9af9/).

169 Kamali, 2008, p. 180, see *supra* note 10.

170 Mawdúdí, 1980, p. 33, see *supra* note 162.

immediately bared his stomach and said, 'I am very sorry, you can revenge by doing the same to me'".[171]

When a woman from a noble family was brought before the Prophet in connection with a theft and it was recommended that she be spared punishment, the Prophet made his stance on the equality of everyone before the law even clearer: "The nations that lived before you were destroyed by God, because they punished the common man for their offences and let their dignitaries go unpunished for their crimes; I swear by Him (God) who holds my life in His hand that even if Fatima, the daughter of Muḥammad, had committed this crime, then I would have amputated her hand".[172]

9.4. General Remarks and Conclusion

Islamic law has developed over many centuries of juristic effort into a complex reality. The differences between the jurists and schools of Islamic jurisprudence represent "different manifestations of the same divine will" and are considered as "diversity within unity".[173] As noted by Picken:[174]

> Islamic law, like any other, has its 'sources' (*al-maṣádir*); it also has its 'guiding principles' (*al-úṣúl*) that dictate the nature of its 'evidence' (*al-adillah*); it equally employs the use of 'legal maxims' (*al-qawá'id*) and utilises a number of underlying 'objectives' (*al-maqáṣid*) to underpin the structure of its legal theory.

This study shows that Islamic legal maxims, the majority of which are universal, play a vital role in the process of judgment. Thus, the presumption of innocence, the most fundamental right of the accused as enshrined in Article 66 of the ICC Statute, finds its counterpart in the Islamic legal maxim 'certainty is not overruled by doubt' and its sub-maxim 'the norm of [*Sharí'ah*] is that of non liability', a very explicit rule, which obligates judges not to start the trial with the preconceived idea that the accused has committed the offence charged. The second paragraph of Article 66, which stipulates that the burden of proof is on the Prosecution, is

171 *Ibid*.

172 *Ibid*.

173 Kamali, 2006, p. 196, see *supra* note 33.

174 Gavin Picken, *Islamic Law: Volume 1*, Routledge, 2011, p. 1.

equivalent to the *ḥadíth* which states: "The burden of proof [is] on him who makes the claim, whereas the oath [denying the charge] is on him who denies". But the practice of the ICC says otherwise. Our examination of the law of *mens rea* reveals that there are exceptions regarding the application of the default rule of intent and knowledge to the crimes within the *ratione materiae* of the ICC. The *Lubanga* Pre-Trial Chamber has affirmed that the ICC Elements of Crimes can by themselves "provide otherwise". The Pre-Trial Chamber considered that the fault element of negligence, as set out in the Elements of Crimes for particular offences, can be an exception to the intent and knowledge standard provided in Article 30(1) of the ICC Statute.[175] In such situations, where conviction depends upon proof that the perpetrator had 'reasonable cause' to believe or suspect some relevant fact, the prosecution has not much to do and the burden of proof, arguably, will lie upon the defendant – a practice which apparently conflicts with the above mentioned *ḥadíth*.

As far as the *mens rea* is concerned, the exclusion of recklessness as a culpable mental element within the meaning of Article 30 of the ICC runs in harmony with the basic principles of Islamic law that no one shall be held criminal responsible for *ḥudúd* crimes (offences with fixed mandatory punishments) or *qiṣáṣ* crimes (retaliation), unless he or she has wilfully or intentionally (*'amdan*) committed the crime at issue. The approach followed by Muslim jurists in determining the existence of *mens rea* in murder cases warrants further consideration. They consider the objects used in committing the crime in question as an external factor that are likely to convey the defendant's mental state.

The two systems collide regarding the validity of duress as a general defence to murder. Unlike the ICC Statute, which allows such defence, Islamic jurisprudence has a firm stand on this point as no person's life is more precious than another's. This position is based on the Islamic legal maxim 'one harm should not be warded off by its like (another)'.

Based on this preliminary study and other scholarly works,[176] there is no reason for the Islamic legal system, which is recognised by such a

[175] ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, 29 January 2007, paras. 356–59 (http://www.legal-tools.org/doc/b7ac4f/).

[176] Bassiouni, 1982, see *supra* note 59; M. Cherif Bassiouni, "Protection of Diplomats under Islamic Law", in *American Journal of International Law*, 1980, vol. 74, p. 609; Mohamed

considerable part of the world, to be completely disregarded in international criminal law, leading to an unnecessary alienation of the Muslim world. The Islamic legal maxims particularly offer enough flexibility for a wide application, which could be used in the future development of international criminal law. As Rudolph Schlesinger put it:

> The time has come, perhaps, to discard or limit the visionary goal of 'one law' or 'one code' for the whole world and to substitute for it the more realistic aim of crystallizing a common core of legal principles.[177]

M. El Zeidy and Ray Murphy, "Islamic Law on Prisoners of War and Its Relationship with International Humanitarian Law", in *Italian Yearbook of International Law*, 2004, vol. 14, p. 53; Farhad Malekian, "The Homogenity of ICC with Islamic Jurisprudence", in *International Criminal Law Review*, 2009, vol. 9, p. 595; Adel Maged, "Arab and Islamic *Sharíʿah* Perspectives on the Current System of International Criminal Justice", in *International Criminal Law Review*, 2008, vol. 8, p. 477; Steven C. Roach, "Arab States and the Role of Islam in the International Criminal Court", in *Political Studies*, 2005, vol. 53, p. 143.

[177] Rudolf B. Schlesinger, "Research on the General Principles of Law Recognized by Civilized Nations", in *American Journal of International Law*, 1951, vol. 51, p. 741. Ambos has noted that a purely Western approach must be complemented by non-Western concepts of crime and punishment, such as Islamic law, to establish and develop a universal system. See Kai Ambos, "International Criminal Law at the Crossroads: From Ad Hoc Imposition to a Treaty-Based Universal System", in Carsten Stahn and Larissa Van den Herik (eds.), *Future Perspective on International Criminal Justice*, T.M.C. Asser, The Hague, 2010, p. 177.

Nuremberg Academy Series No. 2 (2018):

Islam and International Criminal Law and Justice

Tallyn Gray (editor)

Mindful of alleged and proven core international crimes committed within the mainly-Muslim world, this book explores international criminal law and justice in Islamic legal, social, philosophical and political contexts. Discussing how law and justice can operate across cultural and legal plurality, leading Muslim jurists and scholars emphasize parallels between civilizations and legal traditions, demonstrating how the Islamic 'legal family' finds common ground with international criminal law. The book analyses questions such as: How do Islamic legal traditions impact on state practice? What constitutes authority and legitimacy? Is international criminal law truly universal, or too Western to render this claim sustainable? Which challenges does mass violence in the Islamic world present to the theory and practice of Islamic law and international criminal law? What can be done to encourage mainly-Muslim states to join the International Criminal Court? Offering a way to contemplate law and justice in context, this volume shows that scholarship across 'legal families' is a two-way street that can enrich both traditions. The book is a rare resource for practitioners dealing with accountability for atrocity crimes, and academics interested in opening debates in legal scholarship across the Muslim and non-Muslim worlds.

The book contains chapters by the editor, Onder Bakircioglu, Mashood A. Baderin, Asma Afsaruddin, Abdelrahman Afifi, Ahmed Al-Dawoody, Siraj Khan, Shaheen Sardar Ali and Satwant Kaur Heer, and Mohamed Elewa Badar, in that order.

ISBNs: 978-82-8348-188-4 (print) and 978-82-8348-189-1 (e-book).