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Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court

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Abstract

Although the International Criminal Court (ICC) has been mostly hailed as a victory, Islamic states still regard its application of international criminal-law norms with scepticism. The Rome Statute instructs the Court to apply general principles of law derived from national laws of legal systems *of the world* including the national laws of states that would normally exercise jurisdiction over the crime but, so far, the Court has relied purely upon Western inspiration and may fail to acquire the legitimacy to establish a universal system. Among the legal systems that are unjustifiably neglected by the ICC is the Islamic legal tradition. This paper argues that the principles of Islamic law are, for the most part, consistent with internationally recognized norms and standards, particularly those enshrined in the Rome Statute, and are on an equal footing with the common and Continental legal systems that are currently employed by the Court in the search for general principles of law.

Key words

duress (*ikrah*); Islamic jurisprudence (*fiqh*); Islamic law (*Shari'a*); Islamic legal maxims (*al-Qawā'id al-Fiqhīyah*); *mens rea*; presumption of innocence; principle of legality; superior orders

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.¹

I. INTRODUCTION

Numerous scholars have debated the formation, functioning, and practice of the International Criminal Court (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, Islamic states supported the existence of an international criminal-justice institution. However, they also viewed it with

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1 R. B. Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations', (1957) 51 AJIL 734, at 741.

suspicion and showed reluctance in ratifying the statute, because of the selectivity of the Court in the application of principles of criminal law.²

It has been noted by scholars that there is a tendency towards viewing Islamic law as a static or non-progressive legal system, whose main principles are derived from religious texts.³ Most Western scholarly debates centre 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'.⁴ It has also been argued that it is almost impossible for Islamic law to be compared to the Western legal system, because the legal systems of almost all Islamic states are based on the principles of *Shari'a*, making the path to the creation of a dialogue between Islamic law and international institutions virtually non-progressive.⁵

The aim of this paper is to find out whether it is viable for the ICC to adopt principles of international criminal law from the Islamic legal system. As it is obviously impossible to cover every aspect of Islamic law and its counterpart in the ICC Statute, the scope of this paper is limited to some fundamental principles of Islamic criminal law and its compatibility with international criminal-law principles, namely 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. Other general defences such as duress and superior orders are also included in this paper.

To achieve its purpose, the second and third parts of this paper examine in detail the sources of Islamic law, categories of crimes, the leading schools of Islamic thought (*madhāhib*), and Islamic legal maxims (*al-Qawā'id al-Fiqhiyah*).

2. ISLAMIC LAW (*SHARI'A*)

Islamic law (*Shari'a*) 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.⁶ 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.⁷ 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.⁸ In any case, Islamic

2 J. C. 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', (2007) 7 *International Criminal Law Review* 3.

3 M. J. Kelly, 'Islam and International Criminal Law: A Brief (In)Compatibility Study', (2010) *Pace International Law Review Online Companion*, available at <http://digitalcommons.pace.edu/pilronline/8>.

4 M. H. Kamali, 'Legal Maxims and Other Genres of Literature in Islamic Jurisprudence', (2006) 20 *Arab Law Quarterly* 77; G. Badr, 'Islamic Law: Its Relationship to Other Legal Systems', (1978) 26 *American Journal of Comparative Law* 187.

5 M. Zahraa, 'Characteristic Features of Islamic Law: Perceptions and Misconceptions', (2000) 15 *Arab Law Quarterly* 168; see also D. Westbrook, 'Islamic International Law and Public International Law: Separate Expressions of World Order', (1993) 33 *Virg. JIL* 819.

6 H. Enayat, *Modern Islamic Political Thought* (1982); A. Hourani, *Arabic Thought in the Liberal Age: 1798–1939* (1983); W. B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul-al Fiqh* (1997).

7 J. Schacht, *An Introduction to Islamic Law* (1964), 1.

8 M. H. Kamali, *Shari'ah Law: An Introduction* (2008), 1.

law, one of the recognized legal systems of the world,⁹ 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 the full range of possible legal phenomena.¹⁰

Islamic law, like Roman law, used to be a 'jurist law', in the sense that it was a product of neither legislative authority nor case law, but a creation of the classical jurists, who elaborated on the sacred texts.¹¹ However, with the first codifications in the mid-nineteenth century, Islamic law became 'statutory law', promulgated by a national territorial legislature.¹²

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.¹³ 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.¹⁴

2.1. The application of Islamic law in Muslim states today

Modern Islamic society is divided into sovereign nation states. Today, there are 57 member states of the Organization of the Islamic Conference (OIC), which is considered the second-largest inter-governmental organization after the United Nations.¹⁵ The organization claims to be the collective voice of the Muslim world and aims to safeguard and protect its interests.¹⁶ Most states who joined the OIC are predominantly Sunni, with only Iran, Iraq, Azerbaijan, Bahrain, and Lebanon having a predominantly Shi'a population. Apart from Lebanon and Syria, all Arab states consider Islam the state religion and the source of law.¹⁷

Professor Bassiouni divides these countries into three categories. The first category comprises secular states, like Turkey or Tunisia, who, despite their moral or cultural connection with Islam, do not subject their laws to the *Shari'a*. Countries from the second category, such as Iraq and Egypt, expressly state in their constitutions that

9 See R. David and J. Brierly, *Major Legal Systems in the World Today* (1978), 421.

10 Schacht, *supra* note 7, at 2.

11 A. Layish, 'The Transformation of the *Shari'a* from Jurists' Law to Statutory Law', (2004) 44 *Die Welt des Islams* 85, at 86; see also F. A. Hassan, 'The Sources of Islamic Law', (1982) 76 *ASIL Proc.* 65, at 65.

12 Layish, *ibid.*

13 J. L. Esposito, 'The Islamic Threat: Myth or Reality?', in J. Rehman et al. (eds.), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (2007), 5; see also J. Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (2005).

14 J. Gathii, 'The Contribution of Research and Scholarship on Developing Countries to International Legal Theory', (2000) 41 *Harv. ILJ* 263; S. S. Ali and J. Rehman, 'The Concept of Jihad in Islamic International Law', (2005) 10 *JCSL* 321; M. A. Boisard, 'On the Probable Influence of Islam on Western Public and International Law', (1980) 11 *International Journal of Middle East Studies* 429.

15 This number includes Palestine, which is not yet considered a state under international law. For more information on the OIC, see www.oic-oci.org/page_detail.asp?p_id=52.

16 In 2004, the OIC 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 M. A. Baderin (ed.), *International Law and Islamic Law* (2008), xv.

17 C. B. Lombardi, 'Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the *Shari'a* in a Modern Arab State', (1998) 37 *Col. JTL* 81.

their laws are to be subject to the *Shari'a*; therefore, their constitutional courts decide on whether a given law is in conformity with the *Shari'a* and can also review the manner in which other national courts interpret and apply the laws to ensure conformity.¹⁸ The third category of states proclaims the direct applicability of the *Shari'a*. According to one commentator, the majority of Muslim states fall between the two poles of 'purist' Saudi Arabia and 'secular' Turkey.¹⁹ Most states have been selective in determining which *Shari'a* rules apply to their national legislations.²⁰ As a consequence of colonialism and the adoption of Western codes, *Shari'a* was abolished in the criminal law of some Muslim 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 Western criminal codes.²¹

2.2. Sources of Islamic law: *Shari'a* 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.²² 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 (*Shari'a* 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*).²³

Shari'a literally means 'the pathway'²⁴ and, in its original usage, it meant the road to the watering place or path leading to the water, that is, the way to the source of life.²⁵ It rules and regulates all public and private behaviour as well as legal aspects.²⁶ The word *Shari'a* occurs once in the *Qur'an*: 'Thus we put you on the right way [*sharī'atan*] of religion. So follow it and follow not the whimsical desire (*hawā*) of those who have no knowledge' (*Qur'an*, 45:18).

Shari'a is derived directly from the *Qur'an* 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. 'Muslim jurists throughout history have not been concerned with establishing a particular field or science or even theory – to them the divine sources are comprehensive enough to encompass any possible human action, conduct or transaction.'²⁷ However, it is important to mention that in contrast to the belief of the Sunni, the Shi'a believe that divine

18 M. C. Bassiouni, *The Shari'a and Post-Conflict Justice* (2010), 15 (on file with the author).

19 J. Esoisutim, 'Contemporary Islam: Reformation or Revolution?', in J. Esposito (ed.), *The Oxford History of Islam* (1999), 643.

20 H. Hamoudi, 'The Death of Islamic Law', (2009) 38 Georgia JICL 316, at 325.

21 R. Peters, *Crime and Punishment in Islamic Law* (2007), 124.

22 M. Khadduri, 'The Modern Law of Nations', (1956) 50 AJIL 358.

23 M. A. Baderin, *International Human Rights and Islamic Law* (2005), 32–4. Some scholars use the terms 'Islamic law', *Shari'a*, and/or *fiqh* interchangeably. For example, Kamali considers *Shari'a* to also include *fiqh*; see Kamali, *supra* note 8.

24 A. Rahim, *The Principles of Islamic Jurisprudence* (1994), 389.

25 F. Robinson, *Atlas of the Islamic World since 1500* (1982), 320.

26 A. S. Alarefi, 'Overview of Islamic Law', (2009) 9 *International Criminal Law Review* 707, at 707–8; Schacht, *supra* note 7, at 1–5.

27 Zahraa, *supra* note 5, at 171.

revelation continued to be transmitted after the Prophet's death to the line of their recognized religious leaders (*imams*).²⁸ They thus consider as part of the divine revelation the pronouncements of their imams, whom they believe infallible.²⁹

2.2.1. *Qur'ān*

The *Qur'ān* is considered by Muslims to be the embodiment of the words of God as revealed to the Prophet Muhammad through Angel Gabriel. It is the chief source of Islamic law and the root of all other sources.³⁰ 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:³¹ 'We have sent down to thee the Book explaining all things, a Guide, a Mercy, and Glad Tidings to Muslims' (*Qur'ān*, 16:89).

The *Qur'ān* consists of more than 6000 verses (*ayat*).³² Jurists differ on the number of verses that are of legal subject matter, as they use different methods of classification for determining what constitutes a legal verse – estimates range from 80 up to 800 verses.³³ The legal verses are not accumulated in their own separate chapter (*sura*), but may occur alongside verses about belief, general behaviour, the nature of existence, or the history of bygone peoples. A particular judgment may occur on a number of different occasions and in different styles to deepen and broaden the understanding of the believer while reminding him of the rule.³⁴

The *Qur'ān* is an indivisible whole and a guide that must be accepted and followed in its entirety.³⁵ It was revealed, a few verses at a time, over a period of 23 years, ending with the death of Prophet Muhammad in 632 CE. 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.

2.2.2. *Sunnah*

According to the common understanding of Muslims, the second sources of Islamic law are the sayings and practice of the Prophet Muhammad or the *Sunnah*, collected in *hadīths*.³⁶ While the *Qur'ān* is believed to be of manifest revelation – that is, that the very words of God were conveyed to the Prophet Muhammad by the Angel Gabriel – the *Sunnah* falls into the category of internal revelation, that is, it is believed that God inspired Muhammad and the latter conveyed the concepts in his own words.³⁷

The *Sunnah* is complementary to the *Qur'ān* as a source for knowing the divine will, which is explicitly stated in the *Qur'ān* itself: 'And what the

28 Kamali, *supra* note 8, at 88.

29 *Ibid.*

30 Alarefi, *supra* note 26, at 709–10.

31 M. S. El-Awa, 'Approaches to Shari'a: A Response to N. J. Coulson's A History of Islamic Law', (1991) 2 *Journal of Islamic Studies* 143, at 146.

32 6239 verses (Bassiouni, *supra* note 18); 6235 verses (Kamali, *supra* note 8); 6666 (I. Abdal-Haqq, 'Islamic Law: An Overview of Its Origin and Elements', (2002) 7 *Islamic Law and Culture* 27).

33 There are 80 legal verses according to Coulson (*infra* note 57), 120 according to Bassiouni (*supra* note 18), 350 according to Kamali (*supra* note 8), 500 according to Ghazali, and 800 according to Ibn Al-Arabi, while, according to Shawkani, any calculation can only amount to a rough estimate.

34 El-Awa, *supra* note 31, at 146.

35 Kamali, *supra* note 8, at 22.

36 El-Awa, *supra* note 31, at 153.

37 Kamali, *supra* note 8, at 18.

Messenger gives you, take; and what he has forbidden you, leave alone' (*Qur'ān*, 59:7).

The *Qur'ān* authorizes the Prophet Muhammad to make legal decisions in response to developments in the Muslim community and delegates to him the task of explaining the judgements of the *Qur'ān*.³⁸

Judge between them according to what God has revealed, and do not follow them in their vain desires.' *Qur'ān* (5:49); 'No, by your Lord, they are not (truly) believers until they make you the judge of the disputes that arise among them, and find no resistance in their- selves to what you decide but accept (it) with complete submission. (*Qur'ān*, 4:65)

2.2.3. Fiqh

When an issue is not specifically addressed in either the *Qur'ān* or the *Sunnah*, the Prophet mandated the use of sound reasoning in reaching a judgment.³⁹ When appointing a judge to Yemen, the Prophet asked him:

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.⁴⁰

This concept of exerting one's reasoning in determining a matter of law is called *ijtihad* and it is the essence of *ūsūl al-fiqh*, a legal method of ranking the sources of law, their interaction, interpretation, and application.⁴¹ The result of this method is *fiqh*, which literally means human understanding and knowledge in deducing and applying the prescriptions of the *Shari'a* in real or hypothetical cases.⁴² As such, it does not command the same authority as does the *Shari'a* and it is the subject of different Sunni and Shi'a scholarly and methodological approaches.⁴³

In the formative period of Islamic law, the science of *ūsūl al-fiqh* did not yet exist as a separate branch of intellectual endeavour and no fixed hierarchy of sources was adopted.⁴⁴ Later, however, it became almost universally recognized that the *Qur'ān* has primacy over the *Sunnah*, followed by the two main proofs of law attained through human reasoning, namely *ijmā'* and *qiyas*.

2.2.3.1. *Consensus by collective reasoning (ijmā')*. When the *Qur'ān* and the *Sunnah* do not provide an answer on an issue, learned jurists are to reach a consensus of opinion (*ijmā'*) – a practice established by the companions of the Prophet (*Sahaba*).⁴⁵ *Ijmā'* is a rational proof of *Shari'a* and, because of its binding nature, it requires that the

38 El-Awa, *supra* note 31, at 147.

39 Abdal-Haqq, *supra* note 32, at 35.

40 S. Rammadan, *Islamic Law: Its Scope and Equity* (1970), 75.

41 M. H. Kamali, *Principles of Islamic Jurisprudence* (2006), 469.

42 Kamali, *supra* note 8, at 40–1.

43 Bassiouni, *supra* note 18, at 10.

44 J. E. Brockopp, 'Competing Theories of Authority in Early Maliki Texts', in B. G. Weiss (ed.), *Studies in Islamic Legal Theories* (2002), 3.

45 Abdal-Haqq, *supra* note 32, at 55.

consensus be absolute and universal; however, in practice, it has often been claimed also for rulings on which only a majority consensus existed.⁴⁶

2.2.3.2. *Analogical deduction by individual reasoning* (qiyas).⁴⁷ *Qiyas* is the extension of *Shari'a* value or ruling from an original case to a new case, not found in the *Qur'an*, the *Sunnah*, or a definite *ijmā'*, because the new case has the same effective cause as the original one.⁴⁸ An example of *qiyas* 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 purpose of the original prohibition.⁴⁹

Other methods include *istihsān* (equity in Islamic law), *maslahah mursalah* (considerations of public interest), *'urf* (custom), *istishāb* (presumption of continuity), and *ijtihad* (personal reasoning).⁵⁰

2.3. Categories of crime in Islamic criminal law

In Islamic law, offences have been divided into three categories according to complex criteria that combine the gravity of the penalty prescribed, the manner and the method used in incriminating and punishing, and the nature of the interest affected by the prohibited act.⁵¹

The first category is *hudūd* crimes. These crimes are penalized by the community and punishable by fixed penalties as required in the *Qur'an* and the *Sunnah*.⁵² 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.⁵³ Mostly, there are seven recognized *hudūd* crimes: *ridda* (apostasy); *baghi* (transgression); *sariqa* (theft); *haraba* (highway robbery); *zina* (illicit sexual relationship); *qadhif* (slander); and *shorb al-khamr* (drinking alcohol).⁵⁴ 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)⁵⁵ and require collective commitment to these values as law.⁵⁶ In these offences, it is the notion of Man's obligation to God rather than to his fellow man that predominates.⁵⁷ The state owes the right to Allah to implement the *hudūd*.⁵⁸

Opinions vary on which crimes are to be considered *hudūd*. For the Maliki school of law, there are two different sets of *hudūd* offences. Mawardi (Shafi'i school) claims

46 Ibid., at 228–9.

47 'Refutations of the validity of qiyas are to be found in Imami Shi'i collections of reports, all available Shi'i works of *ūsūl al-fiqh*, polemics against Sunni thought and not infrequently in works of *furu al-fiqh*: R. M. Gleave, 'Imami Shi'i Refutations of Qiyas', in Weiss, *supra* note 44, at 267.

48 Kamali, *supra* note 41, at 264. The *ulama* (Muslim jurists) are in unanimous agreement that the *Qur'an* and the *Sunnah* constitute the sources of the original case, but there is some disagreement as to whether *ijmā'* constitutes a valid source for *qiyas*; see Kamali, *ibid.*, at 268.

49 Ibid., at 267.

50 Ibid.

51 S. Nagaty, *The Theory of Crime and Criminal Responsibility in Islamic Law: Shari'a* (1991), 50.

52 A. Mansour, 'Hudud Crimes', in M. C. Bassiouni (ed.), *The Islamic Criminal Justice System* (1982), 195.

53 Kamali, *supra* note 8, at 161.

54 M. C. Bassiouni, 'Crimes and the Criminal Process', (1997) 12 *Arab Law Quarterly* 269.

55 I. A. K. Nyazee, *General Principles of Criminal Law: Islamic and Western* (2000), 28.

56 El-Awa, *supra* note 31, at 157.

57 N. J. Coulson, *A History of Islamic Law* (1964), 124.

58 Nyazee, *supra* note 55, at 18.

there are four *hudūd* offences: adultery, theft, drunkenness, and defamation, while Ibn Rushid and Al Gazali (Shafi'i school) claim there are seven: apostasy, rebellion, adultery, theft, highway robbery, drunkenness, and defamation.⁵⁹

The second category consists of *qisās* and *diyya* crimes. In Islamic law, the punishment prescribed for murder and the infliction of injury is named *qisās*, that is, inflicting on the culprit an injury exactly equal to the injury he/she inflicted upon his/her victim. The right to demand retribution or compensation lies with the victim or, in cases of homicide, the victim's next of kin.⁶⁰ Sometimes, the relationship between this person and the offender can prevent retaliation.⁶¹ *Qisās* and *diyya* crimes fall into two categories: homicide and battery.⁶² These crimes are thus treated in Islamic law as private, not public, offences.⁶³

The third category of crimes in Islamic law is called *ta'azir* crimes. These crimes are punishable by penalties left to the discretion of the ruler or the judge (*qadi*). They are not specified by the *Qur'ān* or *Sunnah*; any act that infringes private or community interests of the public order can be subject to *ta'azir*.⁶⁴ It is the duty of public authorities to lay down rules penalizing such conduct. These rules must, however, draw their inspiration from the *Shari'a*.⁶⁵ An example of a *ta'azir* crime is the trafficking of persons. It is not defined in the *Qur'ān* or the *Sunnah* but it constitutes a clear violation of the right to personal security, one of the five essentials of Islam.⁶⁶

Ta'azir is used for three types of cases:

1. Criminal acts which must by their very nature be sanctioned by penalties which relate to *hudūd*, for example attempted adultery, illicit cohabitation, or simple robbery;
2. Criminal acts normally punished by *hudūd*, but where by reason of doubt, for procedural reasons, or because of the situation of the accused, the *hudūd* punishment is replaced by *ta'azir*;
3. All acts under the provisions of the law, which are not punished by *hudūd*.⁶⁷

2.4. The leading schools of law (*madhāhib*)

Scholars tracing their doctrine to the same early authority regarded themselves as followers of the same school. Early interest in law evolved where men learned in the *Qur'ān* began discussions of legal issues and assumed the role of teachers.⁶⁸ At first, students rarely restricted themselves to one teacher and it only became the

59 B. Al-Muhairi, 'The Islamisation of Laws in the UAE: The Case of the Penal Code', (1996) 11 *Arab Law Quarterly* 363.

60 Rules establishing the next of kin vary according to different schools; see Peters, *supra* note 21, at 45.

61 *Ibid.*, at 48.

62 M. C. Bassiouni, 'Qesas Crimes', in Bassiouni, *supra* note 52, at 203.

63 Coulson, *supra* note 57, at 124.

64 G. Benmelha, 'Ta'azir Crimes', in Bassiouni, *supra* note 52, at 213.

65 *Ibid.*, at 213.

66 UNDOC, Combating Trafficking in Persons in Accordance with the Principles of Islamic Law, 45, available at www.unodc.org/documents/human-trafficking/islamic_law_TIP_E_ebook_18_March_2010_V0985841.pdf.

67 Benmelha, *supra* note 64, at 213–14.

68 W. B. Hallaq, *The Origins and Evolution of Islamic Law* (2005), 153.

normative practice in the second half of the ninth century for jurists to adopt a single doctrine.⁶⁹ When prominent jurists⁷⁰ began to have loyal followers who would apply exclusively 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 *madhhāb*.⁷¹ 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*.⁷²

The four Sunni schools are the Hanafi, named after Imam Abu Hanifa, the Maliki, named after Imam Malik, the Shafe'i, named after Imam Al Shafe'i, and the Hanbali, named after Imam Ibn Hanbal. Out of these schools, the Hanafi school was geographically the most widespread and, for much of Islamic history, the most politically puissant. The Shi'a schools are the Twelvers, the Isma'ili, and the Zaydi.⁷³ Out of these, the Twelvers are the best known and have the largest percentage in Iran and Iraq.⁷⁴

It is hard to find consensus among the various schools and sub-schools; however, some consensus can be found among the four Sunni schools and some consensus among the four Shi'a schools. The difference in the rules for interpreting the *Qur'an* is the fundamental element that separates the *madhhāb* from one another.⁷⁵ While there is no question that the *Qur'an* is the first source of the *Shari'a*, followed by the *Sunnah*, there are differences among the schools as to the ranking of the other sources of law.

In order to create greater legal certainty, rulers could direct the judge (*qadi*) they appointed to follow one school.⁷⁶ This was the practice of Ottoman sultans, while Saudi kings left their *qadi* totally free in choosing the *madhhāb* and opinions for deciding cases, as there is a strong sense of independence among the religious scholars staffing the courts, based on their view that the realm of the *fiqh* is their prerogative and the state should not interfere.⁷⁷

While, today, there is a general understanding in Islamic republics that the law has to comply with the *Shari'a*, the concurrence of legislation with the whole body of Islamic law, including Islamic jurisprudence (*fiqh*), and the doctrine of a particular school of Islamic law is not always included.⁷⁸ An example can be derived from the Constitution of the Islamic Republic of Pakistan, which states that 'All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and *Sunnah*'. Similarly, the Afghanistan Constitution declares that 'no

69 Ibid.

70 Ibid. Those jurists are Abu Hanifa, Ibn Abi Layla, Abu Yusuf, Shaybani, Malik, Awza'i, Thawri, and Shafi'i.

71 Ibid., at 157.

72 Ibid., at 156.

73 Ibid.

74 Bassiouni, *supra* note 18.

75 Rahim, *supra* note 24, at 73–110.

76 Peters, *supra* note 21, at 6.

77 Ibid. Nevertheless, Saudi *qadis*, as a rule, follow the Hanbali School.

78 R. Moschtaghi, *Max Planck Manual on Afghan Constitutional Law*, Vol. I, *Structure and Principles of the State* (2009), at 31.

law can be contrary to the sacred religion of Islam', but restricts the application of the Hanafi jurisprudence in Article 130 only to cases 'when there is no provision in the Constitution or other laws regarding the ruling on an issue'. In Saudi Arabia, on the other hand, Hanbali legal rules constitute the laws of the kingdom.⁷⁹ In Iran, the constitution states that laws and regulations must be based on Islamic criteria, which, in practice, is covered by the *Shari'a*, *fiqh*, and *fatwa*, and by the doctrine of the Ja'fari fraction of Islam.⁸⁰

3. ISLAMIC LEGAL MAXIMS (*AL-QAWĀ'ID AL-FIQHĪYAH*)

In public international law, 'maxims of law' are viewed as synonymous with 'general principles of law'.⁸¹ Similarly, in Western legal traditions, maxims play a vital role in the process of judgment. The significance and the role of legal maxims in Western law are observed as follows: 'A general principle; a leading truth so called, *quia maxima est eius dignitas et certissima auctoritas atque quod maxime omnibus probetur* – because its dignity is the greatest and its authority the most certain, and because it is universally approved by all.'⁸² For instance, by the time of Coke,⁸³ the maxim *actus non facit reum nisi mens sit rea*⁸⁴ (an act does not make a person guilty unless his mind is guilty) had become well ingrained in the common law.

'Legal maxims' (*al-qawā'id al-fiqhīyah*) is a term applied to a particular science in Islamic jurisprudence. Islamic legal maxims, similar to their Western counterparts, are theoretical abstractions in the form, usually, of short epithetic statements that are expressive of the nature and sources of Islamic law and encompass general rules in cases that fall under their subject.⁸⁵ They are different from *ūsūl al-fiqh* (roots and sources 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.⁸⁶ One of the main functions of the Islamic legal maxims is to depict the general picture of goals and objectives of the Islamic law (*maqāsid al-Sharī'ah*).⁸⁷ Today, legal maxims become '*sine qua non* for any Islamic jurist and

79 S. Mahmoudi, 'The Sharia in the New Afghan Constitution: Contradiction or Compliment?', (2004), 868, available at www.mpil.de/shared/data/pdf/mahmoudi_the_shari%27a_in_the_new_afghan_constitution_contradiction_or_compliment.pdf.

80 Ibid., at 871.

81 As noted by the English jurist Lord Phillimore in the *Proceedings of the Advisory Committee of Jurists*, 16 June–24 July 1920, in *Proces-verbaux*, 335, quoted in F. F. Jalet, 'The Quest for the General Principles of Law Recognized by Civilized Nations: A Study', (1963) 10 *University of California, Los Angeles Law Review* 1041, at 1046.

82 J. Early and C. Walsh, *Jowitt's Dictionary of English Law*, Vol. 2 (1977), at 1164, quoted in L. Zakariyah, 'Applications of Legal Maxims in Islamic Criminal Law with Special Reference to Shari'ah Law in Northern Nigeria (1999–2007)', D. Phil. thesis, University of Wales, 2009.

83 See E. Coke, *The Third Part of the Institutes of the Laws of England* (1817), 6; the Latin maxim appears in Coke's *Third Institute*, Chapter 1 ('High Treason').

84 James Stephen notes that the authority for this maxim is Coke's *Third Institute*, in which 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 J. F. Stephen, *A History of the Criminal Law of England* (1883), 94; Pollock and 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*; F. Pollock and W. Maitland, *The History of English Law before the Time of Edward I* (1923), 476.

85 M. A. al-Zarqā, *al-Madkhal al-Fiqhī al-'Amm*, Vol. II (1983), 933.

86 Kamali, *supra* note 8, at 143.

87 Kamali, *supra* note 4, at 78.

judge to master a certain level of rules (*al-qawā'id*) in order to be able to dispense Islamic verdicts and to pass accurate judgment'.⁸⁸ As Imam al-Qarrafi (d. 684 AH) affirms:

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 Fatwa [legal verdict or opinion] are clearly understood. . . . Whoever knows Fiqh with its maxims (*qawā'id*) shall be in no need of memorizing most of the subordinate parts [of Fiqh] because of their inclusion under the general maxims.⁸⁹

Legal maxims aid judges in comprehending the basic doctrines of Islamic law on any contentious issue. For instance, the Islamic legal maxim that calls upon judges to avoid imposing *hudūd* 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.⁹⁰ It has been noted that 'exploring this opportunity would also give scholars, judges and jurists of Islamic law the ability to deliver sound and just legal judgments'.⁹¹

It is difficult to trace the precise dates for the emergence of the legal maxims (*al-qawā'id al-fiqhiyah*) as a distinctive genre of roots of Islamic jurisprudence (*ūsūl al-fiqh*). Suffice to say that *al-qawā'id al-fiqhiyah* has gone through three stages of development.⁹² The first stage can be traced back to the seventh century (610–632) as the Prophet of Islam was endowed with the use of precise yet comprehensive and inclusive expressions (*jawāmi' al-kalim*).⁹³ Despite the fact that the term *qawā'id* (plural of *qa'idah*) was not explicitly mentioned in the expressions of the Prophet, the prophetic *hadīths* are full of expressions of legal maxims. For instance, the *hadīth lā darar walā dirār* ('let there be no infliction of harm nor its reciprocation'); *innamā al-a'māl bil-niyyāt* ('acts are valued in accordance with their underlying intentions'); and *al-bayyinah 'alā al-mudda'ī wa al-yamīn 'alā man ankar* ('the burden of proof is on the claimant and the oath is on the one who denies') are a few of those prophetic *hadīths* that emerged as Islamic legal maxims.

The second stage at which *al-qawā'id al-fiqhiyah* began to gain popularity was in the middle of the fourth century of *Hijrah* (ninth century AD) and beyond when the idea of imitation (*al-taqlīd*) emerged and the spirit of independent reasoning (*ijtihād*)⁹⁴ was on the edge of extinction.⁹⁵ At this stage, legal maxims became recognized as a distinct subject from *usūl al-fiqh*.⁹⁶ The first visible work on Islamic legal maxims,

88 Zakariyah, *supra* note 82, at 58–9.

89 A. Al-Qarafi, *al-Furūq*, Vol. 1, 3, quoted in Zakariyah, *supra* note 82, at 59.

90 Appeal No. 36, Penal Judicial Year 5, Session 9/1/1984; Appeal No. 40, Penal Judicial Year 6, Session 18/1/1985; Appeal No. 32, Penal Judicial Year 13, Session 15/1/1992; Appeal No. 42, Penal Judicial Year 8, Session 1986; Appeal No. 43, Penal/Shari'a Judicial Year 18, Session 4/5/1996.

91 Zakariyah, *supra* note 82, at 59–60.

92 *Ibid.*

93 *Ibid.*, at 38.

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

95 Zakariyah, *supra* note 82, at 42.

96 *Ibid.*

usūl al-Karkhī, was written by Hanafi's jurist, Ibn al-Hassan al-Karkhī.⁹⁷ This was followed by other significant contributions by jurists from other *madhāhib* (legal schools), namely the Shafe'i's, the Hanbali, and the Maliki schools.⁹⁸

The Islamic legal maxims reach the stage of maturity 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'.⁹⁹

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 the Islamic legal maxims.

Islamic legal maxims are divided into two types. The first are those that reiterate the *Qur'ān* and the *Sunnah*, whereas the second are those formulated by the jurists.¹⁰⁰ The former carry greater authority than the latter. The most expansive collection of legal maxims is known as *al-qawā'id al-fiqhīyah al-asliyah* or *al-qawā'id al-fiqhīyah al-kullīyah* ('the normative/basic legal maxims'). This kind of maxim stands as the pillars of *usūl 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 consensus among the legal schools over them.¹⁰¹ The five generally agreed-upon maxims are as follows: (i) *al-umūr bi-maqāsidhā* ('acts are judged by their goals and purposes'); (ii) *al-yaqīn lā yazālu bil-shak* ('certainty is not overruled by doubt'); (iii) *al-mashaqqatu tajlib al-taysīr* ('hardship begets facility'); (iv) *al-dararu yuzāl* ('harm must be eliminated'); and (v) *al-'ādatu muuhakamatun* ('custom is the basis of judgment').

The maxim 'certainty is not overruled by doubt' has several sub-maxims, one of which reads 'knowledge that is based on certainty is to be differentiated from manifest knowledge that is based on probability' (*yufarraqu bayn al-cilmi idhā thabata zahirān we baynahu idhā thabata yaqīnan*). 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.¹⁰²

This maxim also applies where a:

missing person (*mafqud*) of unknown 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

97 K. Mohammed, 'The Islamic Law Maxims', (2005) 44 *Islamic Studies* 19, at 196; W. Heinrichs, 'Qawā'id as a Genre of Legal Literature', in Weiss, *supra* note 44, at 369.

98 Kamali, *supra* note 41, at 142–4.

99 Zakariyah, *supra* note 82, at 46.

100 Heinrichs, *supra* note 97, at 364 and 385; Mohammed, *supra* note 97, at 191–209; M. H. Kamali, 'Shari'ah and the Challenge of Modernity', (1994) 1 *Journal of the Institute of Islamic Understanding Malaysia*, reprinted in (1995) 2 *Islamic University Quarterly*.

101 Zakariyah, *supra* note 82, at 55.

102 M. A. Barikati, *Qawā'id al-Fiqh* (1961), 142, quoted in Kamali, *supra* note 8, at 145 (emphasis added).

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.¹⁰³

4. 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.¹⁰⁴ Article 22 of the ICC Statute confirms the core prohibition of the retroactive application of the criminal law together with the other two major corollaries of this prohibition, namely the rule of strict construction and the requirement of *in dubio pro reo*.¹⁰⁵ The prohibitions of retroactive offences together with the prohibition of retroactive penalties, *nulla poena sine lege*,¹⁰⁶ form the 'principle of legality'.

In Islamic law, there is no place for arbitrary rule by a single individual or a group.¹⁰⁷ 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.¹⁰⁸ Evidence of this principle can be found in the following *Qur'anic* verses:

Nor would We visit with our wrath until we had sent a messenger (to give warning).
(*Qur'an*, 17:15)

Messenger, who gave good news as well as warning, that mankind, after (the coming) of the apostles, should have no plea against Allah. For Allah is Exalted in Power, Wise.
(*Qur'an*, 4:165)

Islamic law includes a number of legal maxims that complement this principle, such as: '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 (*harām*) on the ground of reason alone or on the ground of the act of reasonable men; rather, a legal text is necessary.¹⁰⁹ Another maxim declares that 'permissibility is the original norm' (*al-asl, fi'l-ashyā' al-ibāhah*), which implies that all things are permissible unless the law has declared them otherwise.¹¹⁰ *Shari'a* also establishes the rule of non-retroactivity, unless it is in favour of the accused:¹¹¹ 'Say to the Unbelievers, if (now) they desist (from Unbelief), their past would be

103 S. M. Zarfā, *Sharh al-Qawā'id al-Fiqhiyyah* (1993), 382, in Kamali, *supra* note 8, at 145.

104 W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 403, with reference to universal and regional human rights instruments together with relevant provision (Art. 99) in the third Geneva Convention of 1949 Relative to the Treatment of Prisoners of War and Arts. 2(c) and 6(c) the two Additional Protocols to the 1949 Geneva Conventions Relating to the Protection of Victims of International and Non-International Armed Conflict, respectively.

105 See B. Broomhall, 'Article 22: *Nullum crimen sine lege*', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), 714.

106 Art. 23 of the ICC Statute.

107 Kamali, *supra* note 8, at 180.

108 T. Kamel, 'The Principle of Legality and Its Application in Islamic Criminal Justice', in M. C. Bassiouni *supra* note 52, at 149–50.

109 Kamali, *supra* note 8, at 186.

110 Al-Ghazālī, *a-Mustasfā*, I, 63; Al-Āmidī, *al-Ihkām*, I, 130, in Kamali, *supra* note 8, at 186.

111 Kamali, *supra* note 8, at 188.

forgiven them; but if they persist, the punishment of those before them is already (a matter of warning for them)' (*Qur'ān*, 8:38).

This principle is also mirrored in the tradition of the Prophet. When 'Amr b. al-'Ass embraced Islam, he pledged allegiance to the Prophet and asked whether 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?'¹¹² Similarly, the Prophet refrained from punishing crimes of blood or acts of usury that 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-'Abbas ibn 'Abd al-Muttalib.¹¹³

Hudūd crimes are firmly based on the principle of legality, as the crimes themselves, as well as the punishments, are precisely determined in the *Qur'ān* or the *Sunnah*. *Qisās* 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.¹¹⁴ More problematic are *ta'azir* crimes, which, according to some schools of thought, give very broad discretionary powers to the khalifa (ruler) and to the *qadi* (judge) regarding what they punish and how.¹¹⁵ While *ta'azir* crimes are, for that reason, viewed by Western scholars as clearly violating the principle of legality,¹¹⁶ Muslim scholars have mostly defended the wide discretion given to the judges, claiming that this is merely a safeguard that serves to balance the principle of legality and thus avoid the problem of its potential inflexibility.¹¹⁷

The conclusion of this author is that there is nothing in the primary sources that would allow for *ta'azir* crimes to be exempt from the principle of legality.¹¹⁸ Furthermore, to arbitrarily punish under *ta'azir* those *hudūd* offences that do not meet their procedural requirements amounts to nothing more than an attempt to circumvent the *Shari'a* rule.

5. PRESUMPTION OF INNOCENCE

The provision on presumption of innocence as enshrined in Article 66 of the ICC Statute is threefold and its mechanics have been best illustrated by the European Court of Human Rights in *Barberá 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

¹¹² Muslim, *Sahih Muslim*, Kitāb al-Imān, Bāb al-Islām yahdim mā qablah wa kadhā al-hijrah wa al-hajj; Abū Zahrah, *al-Jarīmah*, 343, in Kamali, *supra* note 8, at 188.

¹¹³ Kamel, *supra* note 108, at 159.

¹¹⁴ *Ibid.*, at 161.

¹¹⁵ S. Tellenbach, 'Fair Trial Guarantees in Criminal Proceedings under Islamic, Afghan Constitutional and International Law', (2004), available at www.zaoerv.de/64_2004/64_2004_4_a_929_942.pdf.

¹¹⁶ Kamel, *supra* note 108, at 157.

¹¹⁷ *Ibid.*, at 151; M. S. El-Awa, *supra* note 31; Benmelha, *supra* note 64, at 213.

¹¹⁸ See also Bassiouni, *supra* note 18, at 56.

charged; (2) the burden of proof is on the prosecution, and (3) any doubt should benefit the accused.¹¹⁹

Under Islamic law, no one is guilty of a crime unless his guilt is proved through lawful evidence.¹²⁰ One of the sub-maxims of the maxim 'certainty is not overruled by doubt' is the maxim that reads: 'The norm [of Sharī'ah] is that of non-liability' (*al-aslu barā'at al-dhimmah*). The Prophet is reported to have said 'everyone is born inherently pure'.¹²¹ According to the legal principle of *istishâb*, recognized by the Shafi'i and Hanbali schools, there is a presumption of continuation of a certain state, until the contrary is established by evidence.¹²² 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'.¹²³ 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;¹²⁴

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;¹²⁵

and

Avoid condemning the Muslim to hudūd 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 favour of innocence (pardon) than in favour of guilt (punishment).¹²⁶

From the latter, *hadith* jurists have derived the general principle and it is agreed by the four major Sunni schools that doubt (*shubhah*) also fends off *qisās*.¹²⁷ The following case is illustrative in this regard:

During the time of the Muslim polity's fourth caliph 'Alī, 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 before 'Alī, who sentenced him to death for the deed. Before the sentence was carried out, another man hurried forward, telling the executioners not to be hasty. 'Do not kill him. I did it,' he announced. 'Alī 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 'Alī 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

119 *Barberá, Messegué and Jabardo v. Spain*, (1988) Series A No. 146, para. 77, quoted by W. A. Schabas, 'Presumption of Innocence', in Triffterer, *supra* note 105, at 1236 (numbers added).

120 Abū Yūsuf, *Kitāb al-Kharāj*, 152, in Kamali, *supra* note 8, at 181.

121 Baderin, *supra* note 23, at 103.

122 M. H. Kamali, *Principles of Islamic Jurisprudence* (2003), 384.

123 Kamali, *supra* note 8, at 145–6.

124 Al-Bayhaqī, al-Sunan al-Kubrā, *Kitāb al-Da'wā wa al-Bayyināt*, Bāb al-Bayyinah 'alā al-Mudda'ā wa al-Yam n 'alā al-Mudda'ā 'alayh', in Kamali, *supra* note 8, at 182.

125 Al Baihagi, 'The 40 Hadith of Imam al Nawawi, No. 33', in Bassiouni, *supra* note 18, at 40.

126 Al Turmuzy, No. 1424; Al Baihagi, No. 8/338; Al Hakim, No. 4384, in Bassiouni, *supra* note 18, at 40.

127 S. S. S. Haneef, *Homicide in Islam* (2000), 120.

came across the dead man, and stood over him in concern. It was then that the petrol 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.¹²⁸

Having realized 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 ‘Alī released the first man and pardoned the second.¹²⁹

The system of proof applicable for *hudūd* and *qisās* makes it very difficult and sometimes almost impossible to prove a crime.¹³⁰ On this matter, the *Qur’ān* states: ‘And those who launch a charge against chaste women and produce not four witnesses (to support their allegation) flog them with eighty stripes and reject their evidence ever after, for such men are wicked transgressors’ (*Qur’ān*, 24:4).

6. *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 Yugoslavia and Rwanda Tribunals, Article 30 of the Rome Statute of the International Criminal Court 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*. 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.¹³¹

In *Shari’a*, one of the basic legal maxims agreed upon by Muslim scholars is *al-umūr bi maqāsidihā*, which implies that any action, whether physical or verbal, should be considered and judged according to the intention of the doer.¹³² The first element of the maxim, *umūr* (plural for *amr*), is literally translated as a matter, issue, act, physical or verbal.¹³³ The second word is *al-maqāsīd* (plural of *maqсад*), which literally means willing, the determination to do something for a purpose.¹³⁴ 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’ān* and the *Sunnah*: ‘That man can have nothing but what he strives for’ (*Qur’ān*, 53:39); ‘But there is no blame on you if ye make a mistake therein: (what counts is) the intention of your hearts and Allah

128 Quoted in I. A. Rabb, ‘Islamic Legal Maxims as Substantive Canons of Construction: *Hudūd* – Avoidance in Cases of Doubt’, (2010) 17 *Arab Law Quarterly* 63, at 64–5.

129 *Ibid.*, at 66.

130 Tellenbach, *supra* note 115, at 930.

131 See M. E. Badar, ‘The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective’, (2008) 19 *Criminal Law Forum* 473.

132 Zakariyah, *supra* note 82, at 64.

133 *Ibid.*, at 64.

134 *Ibid.*, at 65.

is Oft-Returning, Most Merciful' (*Qur'an*, 33:5). This stand is further affirmed by the *Sunnah* of the Prophet:

Actions are to be judged by the intention behind them and everybody shall have what he intends;¹³⁵

Verily, Allah has for my Sake overlooked the unintentional mistakes and forgetfulness of my *Ummah* (community) and what they are forced to do;¹³⁶

and

Unintentional mistakes and forgetfulness of my *Ummah* (community) are overlooked.¹³⁷

Yet, the general rule in *Shari'a* 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.¹³⁸ According to Imam Abou Zahra, an eminent scholar, the criminal intent is the intent to act wilfully, premeditatedly, and deliberately, with a complete consent about its intended results.¹³⁹ 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.¹⁴⁰ 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 (UAE) recognizes different degrees of mental states other than the one of actual intent. Most notably, the UAE adheres to Malik'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 that the act was carried out with purpose of assault and not for the purpose of amusement or discipline. A practical example is set forth in one of Malik's jurisprudence sources: 'if two people fought intentionally and one of them was killed, retaliation (*qisas*) should be imposed on the person who survived.'¹⁴¹

6.1. 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.¹⁴² Instead, they consider the objects used in the crimes described by the relative *hadiths* as external standards that are likely to convey the inner working of the offender's mind and thus distinguish between *'amd* (intentional) and *shibh al-'amd* (quasi-intentional).¹⁴³

135 Al-Bukhari, Sahih, hadith no. 1, Muslim, Sahih, hadith no. 1599.

136 Sahih al-Bukhari; Vol. 9, at 65, quoted in Y. Y. Bambale, *Crimes and Punishment in Islamic Law* (2003), 7.

137 Ibid.

138 A. O. Naseef, *Encyclopedia of Seerah* (1982), 741, in Bambale, *supra* note 136, at 6.

139 M. Abu-Zahra, *Al-Jarima Wal-Uquba fil Islam* (Crime and Punishment in Islam) (1998), 396.

140 Ibid., at 106.

141 Supreme Federal Court of the UAE, Appeal 52, judicial year 14, hearing 30 January 1993.

142 P. R. Powers, 'Offending Heaven and Earth: Sin and Expiation in Islamic Homicide Law', (2007) 14 *Islamic Law and Society* 42.

143 Nyazee, *supra* note 55, at 98.

In drawing analogies from relevant *hadīths*, 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 a fire.¹⁴⁴ Abu Hanifa 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.¹⁴⁵ However, he does not exclude an iron rod, relying on the words of the *Qur'ān*: 'We sent down Iron, in which is (material for) mighty war' (*Qur'ān*, 57:25).¹⁴⁶

However, Hanifa's disciples, Imam Abu Yusuf and Imam Muhammad al-Shaybani, rebutted his arguments, saying that the stone and stick mentioned in the *hadīth* refer to a stone and stick that, in the ordinary course, do not cause death, not just any stone or stick.¹⁴⁷ This is also the opinion of the majority of jurists.¹⁴⁸

The overall balance between using subjective and objective criteria in determining intent thus tips decidedly in favour of reliance on objective evidence,¹⁴⁹ which seemingly becomes a constituent element of the crime in itself, replacing the actual intent. Accordingly, Hanafi 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',¹⁵⁰ and Hanbali Ibn Qudama deems intentional any homicide committed with an instrument 'thought likely to cause death when used in its usual manner'.¹⁵¹

7. DURESS AND SUPERIOR ORDERS

The ICC Statute recognizes two forms of duress as grounds for excluding criminal responsibility, namely duress¹⁵² and duress of circumstances.¹⁵³ The latter form is treated by English courts as a defence of necessity.¹⁵⁴ The elements of the two forms are almost identical. Unlike the jurisprudence of the ICTY, the ICC allows the defence of duress to murder that runs contrary to Islamic law (*Shari'a*), 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

144 Haneef, *supra* note 127, at 1.

145 Nyazee, *supra* note 55, at 99; Haneef, *supra* note 127, at 35.

146 Nyazee, *supra* note 55, at 99.

147 Al-Tahawi, *Sharih Ma'ani al-Athar*, Vol. 3, 186, quoted in Haneef, *supra* note 127, at 36.

148 Haneef, *supra* note 127, at 36.

149 Powers, *supra* note 142, at 48; Peters, *supra* note 21, at 43.

150 Powers, *supra* note 142, at 42 and 48.

151 *Ibid.*, at 49.

152 Art. 31(1)(d)(i) of the ICC Statute.

153 Art. 31(1)(d)(ii) of the ICC Statute.

154 See *R. v. Conway*, [1988] 3 All ER 1025, Court of Appeal, Criminal Division; *R. v. Martin*, [1989] 1 All ER 652, Court of Appeal, Criminal Division.

must not know that the order was unlawful; and the order must not be manifestly unlawful.¹⁵⁵

In Islamic law, duress (*ikrāh*) is a situation in which a person is forced to do something against his will.¹⁵⁶ The *Qur'ān* acknowledges such a situation and prescribes thus: 'Save him who is forced thereto and whose heart is still content with Faith' (*Qur'ān*, 16:106). 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.'¹⁵⁷

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 Maliki consider it duress, some Hanafis do not, while the Shafe'i and other Hanafis believe it to be duress only if the threat relates to the father, son or other close relative.¹⁵⁸

Islamic law recognizes two kinds of duress:

1. Duress imperfect – 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 that does not pose a threat to his life. This kind of duress has no force in crimes.¹⁵⁹
2. Duress proper – a kind of duress in which the life of the agent is threatened. Both the consent and the choice of the agent are neutralized. 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 property of another, will remain unlawful, but punishment will be invalidated.¹⁶⁰ However, murder or any fatal offence are unaffected by duress and will not become either permissible acts, or subject to lenient penalty.¹⁶¹

In the latter situation of duress, *Shari'a* disapproves of both courses of action that 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 harm)' and, when this is inevitable, one should 'prefer the lesser evil'.¹⁶² Therefore, if a person has to choose between causing mild physical harm or being killed and he chooses the former, his action is justified.¹⁶³ In the case of murder, however, both evils are equal, as no person's life is more precious than another's.¹⁶⁴

The issue of punishment in the case of murder is disputed. Most Islamic scholars agree that there must be retribution (*qisās*); however, some prescribe only blood

155 Art. 33 of the ICC Statute.

156 Nyazee, *supra* note 55, at 144.

157 Ibn Majah, al-Sunan, op. cit. hadith no. 2045, in Zakariyah, *supra* note 82, at 73.

158 Peters, *supra* note 21, at 23.

159 A. Q. Oudah, *Criminal Law of Islam*, Vol. 2 (2005), 293.

160 *Ibid.*, at 300–3.

161 *Ibid.*, at 298.

162 Zakariyah, *supra* note 82, at 178–83.

163 Abu-Zahra, *supra* note 139, at 379.

164 Zakariyah, *supra* note 82, at 73; Oudah, *supra* note 159, at 306.

money (*diyyat*) on the ground that duress introduces an element of doubt.¹⁶⁵ Within Hanifa's school, there are three different opinions:

1. *qisās* must be borne by the forced person, for it is he who actually carried out the criminal act;
2. neither the person who inflicts duress nor the person under duress shall be punished by *qisās*, 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 only blood money should be paid by the person who compels;¹⁶⁶
3. *qisās* 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 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.¹⁶⁷

In so far 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'.¹⁶⁸ The Prophet is reported to have said: 'There is no obedience in transgression; obedience is in lawful conduct only;'¹⁶⁹ 'There is no obedience to a creature when it involves the disobedience of the Creator.'¹⁷⁰ The order of a competent authority that implies punishment of death, grievous injury, or imprisonment for the disobedient will be treated as duress.¹⁷¹ 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.¹⁷² 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.¹⁷³

8. RULERS ARE NOT ABOVE THE LAW (IRRELEVANCE OF OFFICIAL CAPACITY/IMMUNITY)

Similarly to Article 27 of the ICC Statute (irrelevance of official capacity), 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

165 Peters, *supra* note 21, at 24; Zakariyah, *supra* note 82, at 151–2.

166 Abu-Zahra, *supra* note 139, at 382; Oudah, *supra* note 159, at 299.

167 Abu-Zahra, *supra* note 139, at 382.

168 A. A. Mawdūdī, *Human Rights in Islam* (1980), 33.

169 Sahīh Muslim, Kitāb al-Amānah, Bāb Wujūb Tā'at al-Umarā' fi Ghayr al-Ma'siyah wa Tahrīmuhā fi'l-Ma'siyah, hadīth no. 39. This hadīth is reported in both Bukhārī and Muslim.

170 Abū Dāwūd al-Sijistānī, Sunan Abū Dāwūd, tr. Ahmad Hasan, hadīth no. 2285.

171 Oudah, *supra* note 159, at 295.

172 Hasia Ibn Abideen, Vol. 5, at 112, in *ibid.*

173 Mawdūdī, *supra* note 168, at 33.

of state and government officials are accountable for their conduct like everyone else.¹⁷⁴ Equality before the law and before the courts of justice is clearly recognized for all citizens alike, from the most humble citizen to the highest executive in the land.¹⁷⁵ 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 immediately bared his stomach and said, "I am very sorry, you can revenge by doing the same to me."¹⁷⁶ 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 Muhammad, had committed this crime, then I would have amputated her hand.¹⁷⁷

9. GENERAL REMARKS AND CONCLUSION

Islamic law has developed over many centuries of juristic effort into a subtle, complex, and highly developed reality. Such a complexity does not, however, make Islamic law indeterminable.¹⁷⁸ 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'.¹⁷⁹ 'Islamic law, like any other, has its "sources" (*al-masadir*); it also has its "guiding principles" (*al-usul*) that dictate the nature of its "evidence" (*al-adilla*); it equally employs the use of "legal maxims" (*al-qawa'id*) and utilizes a number of underlying "objectives" (*al-maqasid*) to underpin the structure of its legal theory.'¹⁸⁰

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 rights 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 [*Shari'a*] is that of non liability' – a very

174 Kamali, *supra* note 8, at 180.

175 Mawdūdī, *supra* note 168, at 32; cf. Abu Zahrah, *Tanzīm*, 34–5; Mutawallī, *Mabādī*, 387; Ghazāwī, *al-Hurriyyah*, 26, in Kamali, *supra* note 8, at 181.

176 Mawdūdī, *supra* note 168, at 32.

177 *Ibid.*

178 Baderin, *supra* note 23, at 32–3.

179 M. H. Kamali, *Principles of Islamic Jurisprudence* (1991), 169.

180 G. Picken, *Islamic Law*, 4 vols. (2010).

explicit rule that 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 of the ICC Statute, which stipulates that the burden of proof is on the prosecution, is equivalent to the *hadīth* of the Prophet that 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 (PTC) has affirmed that the ICC Elements of Crimes can by themselves ‘provide otherwise’. The PTC 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.¹⁸¹ In such situations, where conviction depends upon proof that the perpetrator had ‘reasonable cause’ to believe or suspect some relevant fact, the prosecution does not have much to do and the burden of proof, arguably, will lie upon the defendant – a practice that apparently conflicts with the above-mentioned *hadīth*.

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 criminally responsible for *hudūd* crimes (offences with fixed mandatory punishments) or *qisās* crimes (retaliation) unless he or she has wilfully or intentionally (*‘amdān*) 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 external factors that are likely to convey the defendant’s mental state.

Both systems collided 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,¹⁸² there is no reason for the Islamic legal system, which is recognized by such a considerable part of the

181 *Prosecutor v. Thomas Lubanga Dyilo*, Décision sur la confirmation des charges, Case No. ICC-01/04-01/06-803, 29 January 2007, paras. 356–359.

182 M. C. Bassiouni, *Islamic Criminal Justice* (1982); M. C. Bassiouni, ‘Protection of Diplomats under Islamic Law’, (1980) 74 *AJIL* 609; M. C. Bassiouni, ‘Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence’, (2007) 8 *Chicago JIL* 119; M. C. Bassiouni and A. Guellali (eds.), *Jihad and Its Challenges to International and Domestic Law* (2010); M. E. El Zeidy and R. Murphy, ‘Islamic Law on Prisoners of War and Its Relationship with International Humanitarian Law’, (2004) 14 *Italian Yearbook of International Law* 53; F. Malekian, ‘The Homogeneity of ICC with Islamic Jurisprudence’, (2009) 9 *International Criminal Law Review* 595; A. Maged, ‘Arab and Islamic Shari’a Perspectives on the Current System of International Criminal Court’, (2008) 8 *International Criminal Law Review* 477; S. C. Roach, ‘Arab States and the Role of Islam in the International Criminal Court’, (2005) 53 *Political Studies* 143.

world, not to be included in comparative studies to reveal to the international judge a more complete picture of legal systems from which he or she is to derive general principles of 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."¹⁸³

183 Schlesinger, *supra* note 1, at 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 K. Ambos, 'International Criminal Law at the Crossroads: From Ad Hoc Imposition to a Treaty-Based Universal System', in C. Stahn and L. Van den Herik (eds.), *Future Perspective on International Criminal Justice* (2010), 161, at 177.