Islam, civil and political rights and the universal declaration of human rights

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DOI: 10.25148/etd.FI14032378
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 ISLAM, CIVIL AND POLITICAL RIGHTS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

A thesis submitted in partial fulfillment of the requirements for the degree of
MASTER OF ARTS in
INTERNATIONAL STUDIES
by
Iyad Z. Awadallah

2005
To: Dean R. Bruce Dunlap  
College of Arts and Sciences

This thesis, written by Iyad Z. Awadallah, and entitled Islam, Civil and Political Rights and the Universal Declaration of Human Rights, having been approved in respect to style and intellectual content, is referred to you for judgment.

We have read this thesis and recommend that it be approved.

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Date of Defense: March 29, 2005

The thesis of Iyad Z. Awadallah is approved.

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Dean R. Bruce Dunlap  
College of Arts and Sciences

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Florida International University, 2005
DEDICATION

To those who have sacrificed their lives in the pursuit of justice and to those who continue the struggle for freedom.
ACKNOWLEDGMENTS

I thank the members of my thesis committee for their assistance and encouragement throughout the process of the research project. Specifically, I am indebted to my committee chairman, Dr. Mohiaddin Mesbahi for sharing with me his vast knowledge and skills that have enabled me to bring this project to successful completion. I am moreover grateful for the support of my other committee members, Dr. Charles MacDonald and Dr. Aisha Musa, who have provided me with guidance and support from the beginning.

I am obliged to Ms. Mary Cossio, Senior Secretary of the Department of International Relations, for providing me with direction from day one. I convey my full appreciation to the members of the faculty and staff at the Department of International Relations whom I have not named specifically, yet who have contributed significantly to providing for an enriching learning experience here at Florida International University. Last but not least, I thank my family for their encouragement and support.
ABSTRACT OF THE THESIS

ISLAM, CIVIL AND POLITICAL RIGHTS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

by

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Florida International University, 2005

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When speaking of international criminal law, it is assumed that this system is of Western origin. The fact that concepts of human rights and a common international standard regulating these rights existed in Islam centuries (about 1409 years ago) before Western case law, the Universal Declaration of Human Rights, and the United Nations body existed is largely unrecognized. This research examines whether Islamic international criminal law and Western international criminal law are compatible, and analyzes the possibility of applying principles of Islamic human rights and justice universally. The analysis of primary textual material, mainly the Quran, supports the major arguments of my thesis.

Evidence presented refutes competing explanations of Islamic international criminal law as being in contradiction to international law and human rights norms. On the contrary, Islam and human rights are not only compatible, they are more so inextricable from each other. I take the position that it is not Islam which should be reformed, but rather it is the Muslim people who must reform their understanding of Islam and revert to observing the mandates of their religion, thus living up to international standards.
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Introduction

When speaking of international criminal law, it is assumed that this system is of Western origin. It is largely unrecognized in the United States that the concepts of Islamic international criminal law and human rights existed in Islam centuries¹ before Western case law, treaties, the Universal Declaration of Human Rights, and the United Nations body ever existed. The purpose of this thesis is to show the commonalities between the Western international criminal law system and Islamic international criminal law. Many Western intellectuals, human rights organizations, and even some Muslim intellectuals speak about an "Islamic reformation" to conform Islam to the standards of international human rights.² I take the position that it is not Islam which should or even could (under Islamic religious law) be reformed, but rather it is the Muslim people who must re-form their understanding of Islam and revert to observing the mandates of their religion, thereby conforming to international standards. A close examination of Islamic sources will reveal that widely recognized and accepted principles that are now described in terms of "human rights and international criminal law" have indeed existed for centuries prior to their articulation in Western case law, treaties, and the Universal Declaration of Human Rights. It must be emphasized that when I speak of Islamic law in this paper, I speak of law according to the Quran and Sunnah—not the law of Muslim-majority states.

¹ About 1409 years ago.

Statement of Problem

Historically, some scholars have had covert motives, mostly hidden agendas that are a result of politics, which have led them to portray Islam as a brutal and backwards religion that produces Taliban-style governments and hijackers. Western media and popular literature is usually interested in Islam only when there is a need to speak of more sensational headlines such as “Islamic Fundamentalism,” “Terrorism,” and of “Women in Islam.” Islamic literature for the most part has been misinterpreted and misunderstood. Given the perception that human rights and democracy are exclusively Western values, and therefore incompatible with Islam as it is commonly portrayed, the West has divided the world into two spheres. The Western sphere is of course “civilized” and “modern”, while the “Other” (Islamic) is the “uncivilized” and “backwards” sphere. The outcome of this division, intentional or not, is the alienation of the “Other” which is the root cause of hatred, misunderstanding, and misconception of Islam.

Significance of Issue

Why are these questions of great concern and importance? As we enter the twenty first century, the issue of human rights takes center stage in international relations.

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5 Said, Edward. Orientalism. New York: Pantheon, 1978. Edward Said, perhaps the foremost respected Arab Christian scholar of Orientalism, defines the term as follows: “...by Orientalism I mean several things, all of them, in my opinion, interdependent. The most readily accepted designation for Orientalism is an academic one, and indeed, and indeed the label still serves in a number of academic institutions. Anyone who teaches, writes about, or researches the Orient—and this applies whether the person is an anthropologist, sociologist, historian, or philologist--either in its specific or its general aspects, is an Orientalist, and what he or she does is Orientalism.” Said, p. 2.
In the West, there is also a growing interest in Islam and Muslims. Western intellectuals, human rights organizations, and even some Muslim scholars speak of an "Islamic reformation" to conform Islam to the standards of international human rights, while on the other hand the controversial debate between the "orientalists", "fundamentalists" and the "reformists" rages on. Just as important, there are over 1.2 billion Muslims around the world, and Islam is the world's fastest growing religion, therefore the impact of Islam has to be understood in the context of human rights and justice. Equating Islam with "terrorism" is an injustice; understanding and appreciating the religion for what it has to offer may lead to coexistence and peace.

Research Questions

The research questions are the following:

1. How does the system of Islamic international criminal law compare to that of the Western system of international criminal law?

2. What are the consequences of Islamic international criminal law for the international criminal law system?

3. What is the view of Islamic law on international crimes?

4. How are principles of human rights outlined in the Universal Declaration of Human Rights compare to the Islamic Universal Declaration of Human Rights and the Quran?

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Methodology

This study aims to clarify the above issues through textual analysis of primary material, mainly from the Quran, as well as the Prophet Muhammad’s *Hadeeth* and *Sunnah* (The actions, words, as well as attributes of the Prophet). Although scholars such as Bernard Lewis, Joseph Schacht, and others do analyze primary sources of Islamic law, their Western methodology and conclusions, for the most part, are unfairly critical of Islam. This is due to two main reasons. First, it is because historically, the West has viewed Islam as an inherently flawed set of belief structures, derived from what is believed to be a false religion. Thereafter, the West modernized its belief of Islam; the view today is that Islam is simply incompatible with human rights and international law. Again, the West consistently perceives its beliefs to be superior to that of Muslim reasoning. These misplaced assumptions result in Western misunderstanding of Islamic laws.7

This study therefore takes on the challenge of examining the direct source of Islamic law, the Quran.8 This method of analysis is used because there are over 1.2 billion people around the world today who will rely on the interpretation of the *Quran* in order to make decisions regarding social as well as political issues. Evidence presented suggests that there are shared concepts and principles found in Islamic law and in the thinking of the framers of the Universal Declaration of Human Rights. Therefore, it should be clear that the evidence (Quranic verses as well as *Hadeeth*) will refute


competing explanations and interpretations of Islam that view the religion as being in contradiction with contemporary issues relating to international law and human rights.

In chapter one, a literature review presents the reader with an overview of "Orientalism," its sources, characteristics and its criticisms, while at the same time addressing the debate between the so called "fundamentalists" and "reformists." Chapter two defines the concept of Islamic international criminal law, and analyzes its sources and characteristics. Chapter three examines the issue of rights and duties that deal with the relationship between the individual and the state, as well as rights between individuals in general. Other foundational principles, such as issues of justice and equity, are also examined. Chapter four examines the point of view of Islamic Criminal Law with regards to important issues that include aggression, warfare, genocide, and slavery. Finally, the conclusion will offer alternatives to the various views that have been examined, and once again briefly re-addressing and summing up the controversial debate between the "Orientalists", "fundamentalists" and the "reformists."
Chapter I:

Orientalism: Its Sources and Characteristics

The unevenness of political power between the West and the Muslim world manifests itself in the imposition of Western narratives of human rights "masquerading as universalism" and in Anglo-American critiques of legal systems. Such critiques further the goals of Orientalism by portraying the Western legal system as superior and the Islamic legal system as backward.

Arab society, it has been argued, is so conservative that the Islamic legal system cannot keep up with the liberalism which concepts of human rights and equality demand. For example, in Joseph Schacht's *Introduction to Islamic Law*, which is considered the leading text on the topic, Schacht explains that

[the] Arabs were and are bound by traditions and precedent. Whatever was customary was right and proper; whatever the forefathers had done deserved to be imitated. This was the golden rule for Arabs whose existence on a narrow margin in an unpropitious environment did not leave much room for experiments and innovations which might upset the precarious balance of their lives...in this idea of precedent or sunna the whole conservatism of the Arabs found expression...The idea of sunna presented a formidable obstacle to every innovation...

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10 Id. at 6.

Schacht speaks of the reliance on traditions, customs and precedent as if they are qualities that are exclusively Arab; furthermore, the reliance on these things is viewed as a problem that keeps Arabs (and therefore the Islamic legal system) in a state of backwardness. However, as John Strawson explains, such conclusions fail to come to grips with the fact that Islam was itself a revolutionary concept which nonetheless managed to find acceptance within this conservative society that Schacht speaks of.

As to how this society managed to accept the innovations that Islam presented, Schacht merely says “Islam, the greatest innovation that Arabia saw, had to overcome this obstacle, and a hard fight it was”\(^\text{12}\) and then goes on to explain that “the old conservatism reasserted itself; what had shortly before been an innovation now became a thing to do, a thing hallowed by precedent and tradition, a sunna.”\(^\text{13}\) However, when Schacht notes that “the ancient Arab concept of sunna” became “one of the core concept of Islamic law,” he is, in effect, and as Strawson explains, noting that Arab society, just like other societies, “adapt[ed] past culture forms of law-making to radically new conditions.”\(^\text{14}\) This development, thus, is not any different than, for example, the English common law, which adapted itself from its feudal form to its present while “[t]he important contents of [its] legal system, its norms, have changed radically.”\(^\text{15}\)

In an effort to transform society, Prophet Muhammad and his companions utilized past customs while giving them novel meanings. Yet Western critiques, in general,

\(^\text{12}\) Schacht, p. 17.
\(^\text{13}\) Strawson, p.7.
\(^\text{14}\) Id.
\(^\text{15}\) Id.
attempt to merely portray Arab society and its legal system as an obstruction to contemporary society. Such critiques also attempt to narrow the relevance of Islamic law. In his critique, for example, Schacht explains

Worship and ritual, and other purely religious duties, as well as constitutional, administrative and international law have been omitted, the first because they developed under different conditions and in close connection with dogma, the second on account of its essentially theoretical and fictitious character and the intimate connection of the relevant institutions with the history of the Islamic states rather than with the history of Islamic law.\textsuperscript{16}

Thus in this way, Schacht and others succeed in isolating those areas of the Islamic legal system which define the powers of the state and regulate relations among states and other international players. Such a critique also has the power to define the scope of Islamic law, which Western authors have confined to personal status and criminal law.\textsuperscript{17} As Strawson explains, “[i]n [those] areas the habits of a conservative, albeit exotic, society can be portrayed picturesquely, but without any threat to the legitimacy of the power of Europe.”\textsuperscript{18}

The body of law known as international law is seen by most as a European invention. Even Butros Butros Ghali, former Secretary General of the United Nations,

\begin{itemize}
\item \textsuperscript{16} Strawson, p. 7.
\item \textsuperscript{17} Id. at 8.
\item \textsuperscript{18} Id.
\end{itemize}
holds to the story that international law began with Grotius. However, it is a fact that Islamic jurists wrote *al-Siyar*, texts dealing with what is now known as international law, centuries before Grotius was born. For example, Al-Shaybani’s *Siyar*, which outlines detailed codes for the laws of war, occupation, treaties and the rights of non-Muslims, was written in the eighth century (C.E.).

Having dismissed all that Islamic law can offer vis-à-vis international law, many writers then go on to discuss how this defective system can be made to fit into the system of international law (i.e., European law). Thus writers such as the translator of Al-Shaybani’s *Siyar*, talk about “the integration of Muslim states into the modern community of nations.” Rather than seeing Islamic law as part of the international legal system, it is framed as being in confrontation with it. Furthermore, any aspect of Islamic law that Western writers view as positive is seen as an adoption of European law. In *The Khedives’s Egypt*, for example, Edward De Leon is impressed with the “native ministers” because they are “imbued with the European culture.” Yet it is not enough that the law administered by Islamic bodies fit the standard set by European values; as Alfred Milner explains in *England in Egypt*, “the spirit by which they are animated” should be “up to the standard of European ideas of justice.”

19 Id.


22 Strawson, p. 10.

23 Id. at 9.
In an effort to further isolate the Islamic legal system, writers such as Noel Coulson analyze ancient Islamic government through the application of doctrines and values that did not even exist in Europe at the time of the existence of the governments they are analyzing. For example, in *History of Islamic Law*, Coulson, in speaking about the Ummayyid state, concludes that it "was not based upon any firm separation of the executive and the judicial functions."\(^2\) As to the Abbasid dynasty, he explains that "the shari'ah courts never attained that position of supreme judicial authority independent of political control, which would have provided the only sure foundation and real guarantee for the ideal of Civitas Dei."\(^2\)5 As Strawson notes, such authors apply doctrines such as the separation of powers doctrine to Islamic governments that existed centuries before the European Enlightenment and a thousand years before the American Revolution.\(^2\)6 A more genuine comparative analysis would be to compare Islamic governments to the European governments that existed during the same time.

The assertion that the international human rights system is a Western invention must be seriously examined. Strawson asks an important question:

> How precisely can Europeans claim this superiority, particularly in the fields of human rights, democracy and pluralism, when our entire societies have been founded on the systematic denial of these benefits to the

\(^{24}\) Id.

\(^{25}\) Id.

\(^{26}\) Id.
population of the colonized world until well into the second half of this century?\textsuperscript{27}

In the West, pluralism and human rights are really a twentieth century discussion, whereas these issues were addressed in detail by the Quran and Islamic scholars centuries ago, as was previously mentioned.\textsuperscript{28} It is interesting to note, as Strawson has, that the Europe of the twentieth century saw German Nazism, Russian Stalinism, Iberian Fascism, and similar systems in Greece and Rumania.\textsuperscript{29} Similarly, Europe’s Age of Enlightenment was succeeded by an American constitution that allowed slavery, distinguished between men and women and property-holders and the poor.\textsuperscript{30} Even in France, women did not get the right to vote until after World War II.

Nonetheless, many still believe that the West is the grantor and the protector of human rights and as such it must intervene in the affairs of others in order to ensure that its version of human rights is observed. It is implied that the civilized European countries, presumably as the embodiment of human rights, have the right to intervene and punish others in the non-European world when they fall short of European ideals.

The Western colonization of Muslim countries and current Western imperialism cannot be separated from the Western critiques of Islamic law. The Islamic legal system is part of Muslim culture, and having colonized the Muslim world, its legal culture also

\textsuperscript{27} Strawson, p. 11.


\textsuperscript{29} Id.

\textsuperscript{30} Id.
came under attack and was and still is seen as something to be conquered. The colonizers marginalized Islamic law, curtailed its jurisdiction, and only tolerated it in so far as it applied to personal status. What was left of the Islamic system is then portrayed by Western writers as defective.

It is in this context that the views of the so called "reformists" and "fundamentalist" must be understood. While the reformists appear to adopt Western rhetoric and assume that the Islamic legal system is defective and that steps need to be taken to make it comply with the European system, the "fundamentalist’s" defense mechanism causes them to adopt the ways of Western rhetoric by claiming superiority of the Islamic system and defectiveness of the Western system. It should, however, be noted that the reason many of the ideas of the so-called fundamentalists appear so radical to Western observers and writers is that the fundamentalists argue for the re-implementation of Islamic law in the powerful areas of politics and economics; in other words, they are aiming for "the creation of a new basis of power"\(^{31}\) by regulating areas which had been preempted by European law. The reemergence of Islamic law in such powerful spheres undoubtedly threatens Western dominance and sense of control.

\(^{31}\) Strawson, p. 14.
The following chapter, entitled Islamic Criminal Law: Sources and Characteristics will first provide the reader with an understanding of the term “Islamic international criminal law,” and introduce the sources of Islamic criminal law, mainly the Quran, but also the hadeeth and the sunna of the Prophet Muhammad. The characteristics of Islamic criminal law, such as the principle of universality, the principle of legality, and the non-retroactivity principle will also be examined. This will lead readers to understand the laws establishing what constitutes a crime and how punishment is dealt with.
Chapter II:

Islamic Criminal Law: Sources and Characteristics

Islam regulates conduct between nations regardless of their theological beliefs, and has as its dominant concern the making of peace; thus, what is considered to be a crime if committed by a Muslim nation against another Muslim nation will also be a crime if committed by a Muslim nation against a non-Muslim nation. Furthermore, since equality between subjects is one of the main elements of Islamic international law, individuals and groups possess an independent international legal personality. Thus, Islamic international law has a personal rather than a territorial character, and individuals are the basic subjects of its law.\(^{32}\) This research utilizes the phrase “Islamic international law,” as compared to “Islamic law,” in order to deal more specifically with the issues revolving around non-Muslim minorities within the Islamic state, as well as with rulers within adjacent countries, and thus better represents the purpose and parameters of my research. Farhad Malekian, a leading authority in international criminal law, defines Islamic international law as

the equal, mutual and reciprocal respect of obligations expressed by rules, norms, regulations, provisions, customs, including moral obligations, which prevail for one reason or another between states, states and organizations, states and groups and states and individuals in order to maintain their universal relations.\(^{33}\)

The international aspects of Islamic criminal law have always existed in Islam, and scholarly writings on the ‘law of nations’ go back at least to the eighth century A.D., with Shaybani’s *Siyar*. According to Majid Khadduri, “The Islamic law of nations, however, is not a system separate from Islamic law. It is merely an extension of the sacred law, the Shari’a designed to govern the relations of Muslims with non-Muslims, whether inside or outside the territory of Islam.”

Therefore, the *Siyar*, meaning the Islamic law of nations, is an extension of the Shari’a, and can be seen as the Shari’a writ large.

The jurist Shams al-Din Muhammad ibn Ahmad Sarakhsi (d. 1101) defined *siyar* as follows:

It describes the conduct of the believers in their relations with the unbelievers of enemy territory as well as with people with whom the believers had made treaties, who may have been temporarily (musta’mins) or permanently (Dhimmis) in Muslim lands; with apostates who were the worst of the unbelievers, since they abjured after they had accepted [Islam]; and with rebels (baghis), who were not counted as unbelievers, though they were ignorant and their understanding [of Islam] was false.

The fact that Islamic international law has a personal, rather than a territorial character, is also noted by Khadduri:

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35 Id. at 6.

36 Id.

The Islamic law of nations was binding on territorial groups as well as individuals. Like all ancient law, the law of Islam was inherently personal rather than territorial, for if Islam were intended for all mankind, the territorial basis of law would be irrelevant. However, since many non-Islamic lands remained outside the pale of Islamic law, the siyar was bound to grant consideration to the territorial basis and to regulate the relationships among Muslims and non-Muslims, both on the personal and territorial levels.\(^{38}\)

Malekian is the first to analyze modern Islamic international criminal law as a separate field of law and is the one who coined the term “Islamic international criminal law.” In his book, *The Concept of Islamic International Criminal Law*, Malekian defines this body of law as:

\[
\text{that part of the Islamic law which exclusively relates to certain customs, principles, rules and obligations prohibiting and preventing the commission of certain activities in the relations between individuals and states, the commission of which are extraditable, prosecutable and punishable within the law.}^{39}\]

The Quran, the holy book of Islam, is the basic and primary source of Islamic law.\(^{40}\) The Quran is described by God as a book of Guidance, and therefore can be

\(^{38}\) Id. at 7.

\(^{39}\) Malekian, p.20.

\(^{40}\) All Quran quoted herein is mere translations/interpretations; the original Arabic text is the only authoritative text. Yusuf Ali's and Marmaduke Mohammad Pickthall's translations are used.
viewed as a flexible constitution which does not need modification. Quranic verses must be read in conjunction with each other and the historical context under which a verse was revealed must also be considered. It should, however, be noted that there are some verses in the Quran which were abrogated by the Quran itself. Remember, the Quran did not come down at once; revelation came down to address specific issues. According to Islam, the Quran came to reaffirm, extend, and abrogate parts of prior legislation (the Torah, Gospel...) and is but part of a unified message. While some laws are specific and detailed, many more can be interpreted differently by different Muslim Ulama (scholars/jurists). It is here that the second source of Islamic law, the Sunnah interchangeably throughout the thesis. Also, God is beyond the imagination of a human and as such is neither 'he' nor 'she' nor 'it'; however, in order to speak to humans within the context of their own culture, God uses the masculine or plural forms sometimes.

See verse [2:2] which says: This is the Book; in it is guidance sure, without doubt, to those who fear Allah. While the Quranic text may not be changed, Muslim generations may discover new meanings within the text. This is especially true in the case of verses that allude to science. For example, in verse [75:3-4] God says that do they think that We cannot recreate them? Surely We can; and surely we can re-assemble them and the finger. Scholars were for many years puzzled as to the significance of 'the finger,' until science discovered that every human has a distinguished finger print. Another verse [4:56] says 'Indeed, those who disbelieve in Our verses (i.e. signs, proofs) - We will drive them into a Fire. Every time their skins are roasted through We will replace them with other skins so they may taste the punishment. Indeed, Allah is ever Exalted in Might and Wise. Science later found that there are different layers of skin and that there are sensory glands in the top layers (hence, the need to renew skin in order to feel pain). There are many other such verses, including [21:30], the Big Bang verse; [86:1-3], Black holes; [23:13-14], human embryology; [53:45], determination of the sex of a fetus. It is still unclear why many chapters in the Quran open with “Alif. Lam. Mim” (A. L. M.), but the prevalent view is that they indicate some mystic words. For more on scientific evidence in the Quran, see: Muhammed Asadi. The Unifying Theory of Everything: Koran & Nature's Testimony. Also refer to: Maurice, Dr. Bucaille The Bible, the Qu'ran and Science: The Holy Scriptures Examined in the Light of Modern Knowledge.

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43 Such of Our revelations as We abrogate or cause to be forgotten, We bring (in place) one better or the like thereof. Knowest thou not that Allah is Able to do all things? (2:106). To illustrate, consider the issue of drinking alcohol. Initially this was not forbidden to Muslims; later on, a revelation came down ordering Muslims not to approach prayer while drunk. A final revelation came down stating that wine was no longer allowed because although it had some benefits, its evils outweighed its benefits. Refer to verses (2:219; 4:43; 5:90; 5:91).
('custom;' mode of life of the Prophet), which includes Prophetic Hadeeth (the narrations of the sayings of Prophet Muhammad), is especially helpful. The Hadeeth can restrict or expand the rules and interpretations of the Quran and can also be a source of law in and of itself; it therefore must be consulted when interpreting the Quran, and the Quran itself requires that Muslims follow what the Prophet taught (Quran, 59:7). It is essential to note, however, that there is an entire field dealing with the science of Hadeeth. Not all hadeeth are considered authentic; some are classified as 'weak' (Da’if) and other as ‘strong’ (Qawi). According to Abd al-Hadi al-Fadli, “Da’if is a report that does not fulfill any of the conditions...because its chain [of transmission] comprises a reporter who has been defamed because of his immorality, etc. or because he is unknown or because he is a fabricator.” As the hadeeth is not the word of Allah, it is open to suspicion. In any event, a hadeeth that contradicts the Quran or other hadeeth will not be relied on.

In the case that both the Quran and the Hadeeth are silent on a particular issue, Muslim jurists can arrive at a rule through Ijma’ (juristic consensus); such consensus should be based on the Quran and the Hadeeth. Muhammad b. Idris al-Shafi’i, (d.

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44 For a discussion on the Prophet’s tradition and sunnah, see Nasr, Seyyed Hossein. Ideals and Realities of Islam. p. 62-92.


46 Id. at 27.

204/820), is credited with establishing the first principles by which the Islamic legal doctrines were organized into a coherent system, defines *ijma* in his *Risala* as “The adherence of the congregation (*jama'a*) of Muslims to the conclusions of a given ruling pertaining to what is permitted and what is forbidden after the passing of the Prophet, Peace be upon him.”

Shafi’i states that “The Prophet's order that men should follow the Muslim community is a proof that the Ijma' of the Muslims is binding.”

He also quotes a hadeeth whereby the Prophet said: “Believe my Companions, then those who succeed them, and after that those who succeed the Successors. But after them falsehood will prevail when people will swear to the truth without having been asked to swear, and testify without having been asked to testify. Only those who seek the pleasures of Paradise will keep to the Congregation...”

Shafi’i explains: “He who holds what the Muslim Congregation (*jama'a*) holds shall be regarded as following the Congregation, and he who holds differently shall be regarded as opposing the Congregation he was ordered to follow. So the error comes from separation; but in the Congregation as a whole there is no error concerning the meaning of the Qur'an, the Sunna, and analogy (*qiyas*).”

According to Ralph Salmi, Ijma’ is legitimized, based on the Quranic verse that speaks of “… those who turn away from the Prophet and do not follow the way of the believers”, thus “the way of the believers” has come to be understood as referring to the *consensus* of

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49 Id. at 253.

50 Id. at 286.

51 Id. at 286.
the believers. Consistent with the above Quranic verse which validates *Ijma* is a saying of the Prophet that “My community will never unanimously agree on error”. Most significantly, the concept of *Ijma* finds support in a chapter in the *Quran* entitled “Counsel,” which establishes that Muslims should arrive at matters that concern their community through counsel. Even the Prophet himself was to rule on the basis of public consultation. In it the Prophet is addressed:

> It was by the mercy of Allah that thou wast lenient with them, for if thou hadst been stern and fierce of heart they would have dispersed from round about thee. So pardon them and ask forgiveness for them and consult with them upon the conduct of affairs. And when thou art resolved, then put thy trust in Allah. Lo! Allah loveth those who put their trust (in God) (3:159).53

There are three views on what constitutes a consensus: according to one, there must be a complete agreement between all those who participated in the decision; the second view holds that it is enough that a particular group agree on a matter and that others are silent; finally, the third group, which is probably the majority opinion, holds that what is needed is an overwhelming majority.54 According to Malekian, what is needed in the context of Islamic international criminal law is a majority vote from

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53 This revelation was in response to the Prophet having gone along with the desire of his military on a particular tactical issue during the battle of Uhud, which he nonetheless did not feel was the wisest decision. Khadduri, Majid. *War and Peace in the Law of Islam*. Baltimore: The Johns Hopkins University Press, 1955. p. 210.

participants in a recognized Islamic assembly; he compares it to a high majority decision on a resolution in the UN General Assembly.\textsuperscript{55}

In the event that a matter is not addressed through \textit{Ijma'}, or juristic consensus, (and it is rare that a matter of importance to the whole Muslim community would not be so addressed), individual jurists can engage in \textit{Ijtihad} ["to strive"]\textsuperscript{56}: independent reasoning by which each jurist thinks and expresses his findings according to his personal comprehension in light of the \textit{Quran} and \textit{Hadeeth} and issues a Fatwa (judicial decision) based on \textit{Qiyas} (analogical reasoning) and \textit{Istihsan} (juristic preference; embracing the ‘best’ alternative). Although many would not admit it, \textit{Qiyas} and \textit{Istihsan} tend to be conclusion-driven; they can be used to arrive at equitable judgments, but I suggest that they might also lead to decisions which are not in the spirit of basic Islamic principles, for such a method of arriving at a rule is based on cultural assumptions which may or may not be just. \textit{Qiyas} has been criticized for its lack of rules and predictability; similarly, while some define \textit{Istihsan} as the “[departing] from a judgment based on \textit{Sharia} (Islamic law) proof, by means of a second, more powerful Sharia proof,”\textsuperscript{57} There is plenty of room for judicial discretion (ultimately it is up to the jurist’s own reasoning to

\textsuperscript{55} Malekian, p.33.

\textsuperscript{56} The word \textit{Ijtihad} is derived from the root Jahad, meaning to exert oneself to the utmost or to the best of one’s ability. The concept of \textit{Ijtihad} was recognized by the Prophet Muhammad, according to a well known Hadeeth wherein the Prophet appointed Muadh Bin Jabal as Governor of Yemen, and approved of Muadh’s resolve to exercise \textit{Ijtihad} in cases where the Quran and the Sunnah were silent with regards to an issue facing the community. For the full Hadeeth, see: Hadeeth Sunan Abu-Dawud Book 24, Number 3585, available at http://www.usc.edu/dept/MSA/reference/searchhadith.html. Also found in Hassan, Farooq. \textit{The Concept of State and Law in Islam}. Washington D.C.: University Press of America Inc., 1981 p. 37-38.

decide what is a ‘stronger’ proof). *Istisihan* “legitimizes a judgment which is otherwise contrary to the principles of analogy through recognition of more persuasive rationales” based on the *Quran* and *Sunnah*, while taking into account public interest.\(^{58}\) Necessity would seem to demand that this method of arriving at laws be employed, and certainly the use of reasoning is not only allowed but also mandated by the *Quran* and the *Hadeeth*.\(^{59}\) This source of law, which gives the Islamic system its adaptability and flexibility, is compared by Malekian to the role of distinguished publicists in international law.\(^{60}\) This source of law would appear to be “particularly important in the system of Islamic international criminal law” because “in a broader perspective it encourages the solving of international problems with analogical reasoning and the use and application of different methods for promoting pacific settlements of international disputes”.\(^{61}\)

As different jurists, observing the same procedure for arriving at a rule, might nonetheless arrive at different conclusions, no scholarly opinion is considered wrong. Difference in legal opinions is considered a divine mercy to humanity and an individual

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\(^{58}\) Bardakoglu, at p.71. What is ‘public interest’ is discovered through legislative guidance or a controlling religious text or consensus. In the case where neither of these are available, a decision will be arrived at based on perceived public interest, ‘istislah,’ which comes from the word ‘silh,’ meaning ‘wishing the improvement, amendment and correction of something. According to Bardakoglu, the Islamic religion sought to protect five principles: religion; life; reason; generation; and property. These are considered the ‘indispensable interests.’ In addition, there are the ‘complementary’ interests which ‘are intended to solve problems and satisfy the needs of human beings, and to facilitate the realization of the aims of the five principles. Finally, ‘there are certain interests, referred to as ‘embellishments,’ which deal with the moral accomplishments of human beings and their virtues and manners’ (74).

\(^{59}\) Qiyas and Istihsan may become problematic, I presume, in cases where the ‘essence’ of Islam is disregarded in favor of cultural presumptions and [pre-Islamic Arab] customs.

\(^{60}\) Malekian, p. 38.

\(^{61}\) Id. at 35.
is to adopt the one that makes most sense to her. The Qur'an gives good tidings to those who hear advice and follow the best thereof. Such are those who Allah guides (39:17-18).

The Character of Islamic Law

First, Islamic international criminal law is based on the principle of universality. According to Majid Khadduri, "Similar to the law of ancient Rome and the law of Medieval Christendom, the Muslim law of nations was based on the theory of a universal state." It is a recognized precept that Islamic law applies to Muslims as well as non-Muslims living in a Muslim state, and extends further into territories outside of Muslim control. Khadduri explains that "...the Muslim law of nations was ordinarily binding upon individuals rather than territorial groups. For Islamic law, like all ancient law, had a personal rather than a territorial character and was obligatory upon the Muslims, as individuals or as a group, regardless of the territory they resided in." In modern times however, the main reason that law has been attributed to and applied unto people in relation to the territory they reside in, and not on collective individuals is due to the "pressure of modern material civilization and culture," according to Khadduri.

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62 In Islam, no person must have a monopoly over the religion. As a matter of fact, a person who is qualified to use 'ijtihad' (an institutional degree is not a necessity, although the process is demanding and consuming) must rely on his own findings. However, given the reality that most people do not have the time to be a 'mujtahid,' (one who does ijtihad), s/he is allowed to choose from the school of law ('madhab') that makes most sense to him/her. Once a person chooses to follow a particular school in regard to a particular issue, he/she is to follow that same school in other rules that directly relate to that particular issue in order to preserve consistency. See Baderin, Mashood A. International Human Rights and Islamic Law. Oxford: Oxford University Press, 2003. p. 39. Also see Amin Sayed Hassan, Islamic Law in the Contemporary World. Tehran: Vahid Publications, 1985. pg. 8-13.


64 Id.

65 Id.
Furthermore, unlike the system of international law which builds the concept of international criminal law on conventional obligations between states, the Islamic system builds the concept of international criminal law on the fact that certain principles which are violated constitute crimes under its religious system.\footnote{Malekian, p. 24.}

Second, Islamic law follows the principle of \textit{de lege lata}\footnote{Meaning “what the law is” (as opposed to what the law ought to be).}, and therefore the law cannot be modified through legislation. However, even though Islamic law is eternal, Islam accepts new rules and obligations so long as they do not contradict its basic values of equality and justice. Thus, a state following Islamic law is not prohibited from entering into international treaties. As a matter of fact, the Prophet entered into treaties with non-Muslims, some of which were extremely one-sided in favor of the non-Muslims and prohibited Muslims from engaging in otherwise legitimate and religiously sanctioned actions. It is a serious violation of religious law to violate a treaty obligation; the \textit{Quran} stresses

\begin{quote}
And fulfill the covenant of God when you have made a covenant, break not your oaths after you have confirmed them (16:19); How can there be an agreement between the polytheists and God and His Apostle, except with those you have made a treaty...? Therefore as long as they adhered to their agreement with you, you should also adhere to your agreement with them, surely God loves the righteous (\textit{Quran}, 9:7).
\end{quote}
Although Malekian’s book does not categorize them as such, treaties, including extradition agreements\textsuperscript{68}, can be categorized as a distinct source of Islamic international criminal law since the concept of \textit{pacta sunt servanda} is one of the most important principles of Islamic law.\textsuperscript{69} According to Piscatori, “The pre-eminent international norm, \textit{pacta sunt servanda} (‘agreements must be kept’), is just as easy to accept...the duty to fulfil the terms of a contract stems from an oath, voiced or unvoiced, which contractors make before God.”\textsuperscript{70} Islam highly regards international treaty as a legal instrument that is to be honored and respected. Piscatori also notes that “…it is indigenous to the Islamic order, either because the Quran and \textit{sunna} speak of mutual relations, truces, and even an alliance (\textit{mithaq}) among rulers, believing and infidel; or because ijtihad approves of any kind of agreement redounding to the public interest (\textit{maslaha}).”\textsuperscript{71} A most relevant Quranic verse to those Muslims who have chosen to make their religion a source of obstacle to entering treaties is the following: \textit{And make not Allah, by your oaths, a hindrance to your being righteous and observing your duty unto Him and making peace among mankind…} (2:224).

\textsuperscript{68}Extradition agreements were entered into as far back as the Prophet’s time; see the agreement of Hudaibiyah, concluded between Muhammad and the city-state of Mecca.

\textsuperscript{69}The concept of \textit{pacta sunt servanda}, Latin for “pacts must be respected,” is a basic principle of all law. With reference to international agreements, “every treaty in force is binding upon the parties to it and must be performed by them in good faith” (From the Vienna Convention on the Law of Treaties, 1969, article 26. Available at: \url{http://www.un.org/law/ilc/texts/treaties.htm}). Also, (The Vienna Convention on the Law of Treaties between States and International Organizations 1986, article 26). Available at: \url{http://www.un.org/law/ilc/texts/trbtstat.htm}).


\textsuperscript{71}Id.
Third, Islamic law follows the concept of non-retroactivity of criminal law, including punishment. Among the Quranic verses showing the non-retroactivity of law are the following: *...nor was it becoming of Us that We punish until We raised an Apostle (17:15); And marry not women whom your fathers married, except what has already passed (4:22).* It is interesting to note, however, that while Islamic international criminal law is based on the principle of legality, the perpetrators of war crimes during WWII could have been easily punished without violating this principle; this is due to the fact that such perpetrators were in violation of then existing Islamic international regulations governing the conduct of armed conflict.72

The principle of legality aims at preventing the prosecution and punishment of an individual for acts which are reasonably believed to be lawful at the time of their commission.73 The Permanent Court of International Justice gave an Advisory Opinion on the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, 4 December 1935*, that concerned the principle of legality, having said the following:

> "The problem of the repression of crime may be approached from two different standpoints, that of the individual and that of the community. From the former standpoint, the object is to protect the individual against the State: this object finds its expression in the maxim *Nulla poena sine lege*. From the second standpoint, the object is to protect the community

72 Malekian, p. 22.

against the criminal, the basic principle being the notion *Nullum crimen sine poena*...It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.”

This principle has lasted till the present day, and its modern version is enshrined in the Universal Declaration of Human Rights, Article 11 (2), which states:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

It is interesting to note that in order not to violate this principle of legality, prosecution of individuals before an international criminal tribunal applying international criminal law would require proof of the pre-existence of two things. First, there would have to be recognition or a precedent that an individual, as opposed to a state, could be subject to criminal punishment by an international tribunal. Second, the conduct for which the individual could be guilty would have to have already been proscribed by the international community of states as a crime subject to international sanctions, with clearly defined set of penalties. According to Kriangsak Kittichaisaree, “These

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conditions are difficult to fulfil as long as an international criminal code does not exist."\textsuperscript{77}

And while attempts were made to find such precedents prior to the judgment of the International Military Tribunal which was set up to prosecute major Nazi war criminals after WWII, no international recognition, or international proscription was found.\textsuperscript{78}

Finally, while \textit{jus cogens}\textsuperscript{79} rules in the international law system can be modified by an overwhelming majority of consent, no consensus which is in contradiction of the basic principals of Islamic law is valid under Islam. While consensus cannot modify the \textit{Quran} or \textit{Sunnah}, it can modify a rule that was arrived at through previous \textit{Ijma}' if it does not contradict the \textit{Quran} and \textit{Sunnah}.

Article 53 of the Vienna Convention on the Law of Treaties of 1969 stipulates that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. The Article defines a peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."\textsuperscript{80} Article 64 of the 1969 Convention calls this norm \textit{jus cogens} and stipulates that if a new peremptory norm of

\textsuperscript{77} Id. at 14.

\textsuperscript{78} Id.

\textsuperscript{79} Latin for "compelling law." These are peremptory norms. Examples of such norms in the modern period are the prohibition of genocide, slave trade, piracy and the waging of aggressive war. These norms are embodied in the Vienna Convention on the Law of Treaties, 1969, articles 53 and 64, and reiterated in the Vienna Convention on the Law of Treaties, 1986, article 53. The full text is available at: United Nations, \textit{Treaty Series}, vol. 1155, p.331 [http://www.un.org/law/ilc/texts/treaties.htm [Accessed 7 March 2005]. However, whereas in the international law system there is disagreement over how such norms are established and recognized, and in fact, such norms can and do change over time, in Islamic law these principals are concrete, as they are established in the Quran and the Sunnah.

\textsuperscript{80} Id.
international law emerges, any existing treaty in conflict with this norm becomes void and terminates. According to Kittichaisaree, "There is no criteria to define how and when a norm becomes a *jus cogens*, however. It seems that one has to look for the answer in pronouncements of international tribunals and from State practice for further indication."\(^81\)

**Crime and Punishment in Islamic Law**

According to the Quran, crime can be committed against any living creature, including the natural environment. A criminal act has 'double criminalization;' in other words, it is a crime against the immediate victim as well as a crime against God. According to Islamic jurisprudence, there is no such thing as being "naturally evil."\(^82\) The soul of all individuals is free of sin, crimes are not inevitable, and even though everyone's destiny is pre-written, it is not pre-determined.\(^83\) In order for one to be punished for a crime, s/he must have had the requisite intent. Thus, the immature, mentally disabled and the one acting under duress cannot be punished.\(^84\)


82 The following verse attests to the fact that humans are created by God without possessing an inherent evilness. *We have indeed created man in the best of moulds.* (95:4).

83 Islam lays down the principle that humans are neither master's of their fate, nor are they blinded towards predestination. The concept of predestination in Islam does not imply that humans should abandon themselves to an undesirable fate by not exercising their right and duty of freewill. Verse (36:67) addresses the topic of freewill. *And if it had been Our Will, We could have transformed them (to remain) in their places; then should they have been unable to move about, nor could they have returned (after error).* The issue of destiny was also discussed by the Prophet; Caliph Ali reported that one day Allah's Messenger was sitting with a wood in his hand and he was scratching the ground. He raised his head and said: There is not one amongst you who has not been allotted his seat in Paradise or Hell. They said: Allah's Messenger, then, why should we perform good deeds, why not depend upon our destiny? Thereupon he said. No, do perform good deeds, for everyone is facilitated in that for which he has been created (hadeeth Sahih Muslim, Book 33, Number 6400).
Islamic jurists divide punishment into three categories: **hadd**, **qis**, and **ta’zir**. Literally, hadd (or the plural hudud) means boundary; in this context it has been interpreted as ‘prevention’ or ‘restraint.’ This category applies to those crimes for which the Quran prescribes a specific punishment: extra-marital sex; false accusation of adultery; apostasy after freely embracing Islam; theft; and highway robbery. Hadd crimes have specific punishments that are found in the Quran. A judge can only impose the _Hadd_ punishment when a person confesses to the crime or there are enough witnesses to the crime. The usual number of witnesses is two, but in the case of adultery four witnesses are required. Contrary to popular Western belief that the Islamic hadd punishments will produce a crippled society, these punishments were hardly carried out in the first few centuries of the Islamic State, and they continue to be carried out only sparingly in countries that apply Islamic law. There are many reasons for this, not the least of which are the facts that what constitutes a crime in this category is narrowly defined and the amount of evidence necessary to carry out the _hadd_ punishment is not only overwhelming but beyond a shadow of _any_ doubt. The slightest introduction of a “_shubuha_” (doubt) will render the carrying out of the _hadd_ punishment impermissible. The punishments for these crimes are harsh by both Western and Islamic standards. The more destabilizing a crime is to society, the stronger the need for deterrence and thus the harsher the punishment.

Consider, for example, the case of extra-marital sex. First, there are two potential punishments: one, consisting of one-hundred lashes, applies to a person who is not

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married; the other, stoning to death, is applied to a person who is married. In order to convict someone of this crime, there needs to be at least four eyewitnesses who are well known in the community for being adl (just). Furthermore, nothing less than the witness of the actual act of penetration will do. Introduction of the slightest doubt into evidence, such as evidence that a witness has an ulterior motive, should dismiss the case. The burden of proof is on the accusing party. Furthermore, those who wage such an accusation risk facing a harsh punishment of eighty lashes if they do not prove their case; if they are judged to have provided false testimony, their testimony will be forever invalid. Verse (24:4) warns: And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors. Furthermore, punishment is promised to those who bring forth false accusations against innocent women; Those who slander chaste women, indiscreet but believing, are cursed in this life and in the Hereafter: for them is a grievous Penalty (24:23).

Spying and intruding on the privacy of others are also contrary to other Quranic laws which criminalize the invasion of privacy; for example, it is a crime in and of itself for someone to spy on another while that other is in the privacy of her home.

85 The punishment for adultery by unmarried persons is specified in verse (24:2): The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes. The punishment prescribed for married persons committing adultery is stoning to death, as specified in the following hadeeth: I am afraid that with the lapse of time, the people (may forget it) and may say: We do not find the punishment of stoning in the Book of Allah, and thus go astray by abandoning this duty prescribed by Allah. Stoning is a duty laid down in Allah's Book for married men and women who commit adultery when proof is established Sahih Muslim, Book 017, Number 4194). Available at http://www.usc.edu/dept/MSA/reference/searchhadith.html.

86 The relevant Quranic verses state: You who believe, do not let one (set of) people make fun of another set. Do not defame one another. Do not insult by using nicknames. And do not backbite or speak ill of one another. Do not spy on one another (49:11-12). And: O ye who believe! enter not houses other than your
Furthermore, a person cannot enter another’s house without invitation; this would mean that an officer cannot enter a house without invitation just because he suspects that an act of adultery is taking place. Nor is a person required to report such crimes. There is an actual example of this scenario in early Islam, where an officer who kept “night watch” knew that an act of adultery was taking place but did not enter the house. Finally, the need for four people to witness actual penetration suggests that the punishment is not only to deter adultery as such, but also to deter public indecency.

The goal of Islam is not to flog and stone but rather to avoid these harsh punishments. Take for example the case of a woman who had committed adultery and, feeling guilty, came to the Prophet to confess so that he might administer her punishment. The Prophet first tried to persuade the lady that perhaps what she did was not adultery, perhaps there was no penetration, and so on. The woman persisted and the Prophet had no choice but to implement the punishment. However, the woman was pregnant and so the Prophet told her not to come back to him until she had given birth and then until she had past the time of breast feeding.

Similar stringent evidentiary rules govern the other mentioned crimes. Theft, for example, requires, among other things, stealing something (of a set minimum value) that was protected in a closed container so that a person cannot be said to have been induced to commit the theft. Furthermore, the *hadd* punishment for theft does not apply to a poor

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*own, until ye have asked permission and saluted those in them: that is best for you, in order that ye may heed. If ye find no one in the house, enter not until permission is given to you: if ye are asked to go back, go back.*

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87 Refer to hadeth in Sahih Muslim, Book 17, Number 4206. Available at [http://www.usc.edu/dept/MSA/reference/searchhadith.html](http://www.usc.edu/dept/MSA/reference/searchhadith.html).
man who steals a loaf of bread in a land that has obviously failed to take care of him as Islam demands.

This brings us to another element that must be present in order for *hadd* punishments to be carried out—a just society. While this cannot be used as a requisite because a just society is only an ideal, there are at least certain ‘minimums’ which must be present; a society cannot be corrupt, discriminatory, and unjust to a level that would induce a person to commit a crime and then later turn around and apply the *hadd* punishments. Part of the rationale behind the harsh punishments is that a decent society (even if not perfect) has been put in place, so that a person who nonetheless commits a crime must have done so out of his own immoral sense. Caliph Umar had announced the *hadd* punishment for theft will be suspended where the state had not fulfilled its Islamic obligation of providing for the public welfare in a time of famine. Similarly, when the Prophet went to Madina, he had the power to implement the Islamic system but instead he chose to do it in a gradual fashion by allowing people to first become accustomed to Islam. The Quran itself imposed total prohibition (of alcohol) in three phases.\(^{88}\)

Finally, assess the punishment for highway robbery or piracy—a crime which has international implications. While the concept of ‘piracy’ in international criminal law denotes the commission of criminal activities on the high sea, in Islamic international criminal law the term ‘piracy’ is used in connection with ‘international highwaymen’ or ‘land piracy’ (Malekian 133). The relevant Quranic provision reads as follows:

\[^{88}\text{The Quranic verses reveal that the prohibition of alcohol took place in three stages. In the first stage, it was revealed that its harm outweighed its benefits. In the second phase, Muslims were prohibited from coming to the mosque while intoxicated. Finally, liquor was prohibited as the handiwork of the devil. The specific verses are as follows: (2:219; 4:43; 5:90; 5:91).}\]
The only reward of those who wage war against God and His apostle and strive to make mischief in the land will be that they should be slain or crucified, or their hands and feet should be cut off from opposite sides, or they should be exiled from the land; this shall be as a disgrace for them in this world, and in the Hereafter they shall have a grievous chastisement. Except those who repented and turned to the right path but before they fell into your power. For know that God is Forgiving, Merciful (5:33-4)

The fact that it is agreed upon that the above verse permits a person who voluntarily submits himself to the relevant state authorities to be forgiven demonstrates that “the significance of punishment was not necessarily to harm the criminals but explicitly and implicitly to prevent others from involving themselves in [such] behaviour...”89 The severity of the punishment must be understood in its context; this was a time when “there was no law governing maritime navigation or the security of traders between two countries by land or upon the seas and further, the capacity of communication between states was in its absolute infancy.”90 There was no international system in place; Islam came to fill that void. The Hadd penalties are the maximum that a person can receive; if a doubt is introduced or extenuating circumstances are present, the penalty falls. Finally, recall that treaties are binding on Muslims, and as such, Islam does not prevent Muslims from entering into treaties which govern this or any other international crime.

As to the second category of punishments, qisas is the rough equivalent of ‘retribution.’ This refers to the punishment of crimes for which the law provides a fixed

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89 Malekian, p. 134.

90 Id. at 134.
punishment that can nonetheless be remitted to the victim. The crime of murder will be examined here since it is relevant on the international level. While the *Quran* allows the death penalty in the case of murder, it recommends forgiveness. The following is the relevant verse:

> O you who believe, retaliation is prescribed for you in the matter of the murdered; the freeman for the freeman, and the slave for the slave, and the female for the female. And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness. This is an alleviation and a mercy from your Lord (2:178).

Thus, in the case of murder or any other crime falling under *qisas* it is the victim’s family which has standing—not the state. The injured may ask for the death penalty or may ask for some sort of compensation. The state’s role is to carry out the punishment after a court has provided a fair trial and considered any extenuating circumstances. Based on the fact that the above verse does not forbid complete forgiveness; and based on other verses that state that it is better to be patient and forgive, jurists also agree that the injured can forego any punishment. Muslims are to emulate the qualities of God; since one of those qualities is mercy, a person with a strong faith may wish to emulate that quality and forego punishment. Furthermore, while the victim’s family has the right to ask for *qisas*, they have been urged to forgive (2:178; 42:40); forgiveness is described as better than revenge or punishment (5:45; 2:237; 24:22; 2:109). Thus, the victim’s family often forgives in order to help their loved one as well as their own souls in the afterlife.\(^9\)

some may question the deterrence effect of allowing someone to forego punishment, it is highly doubtful that a person would be induced to commit murder because s/he hopes that the family of his/her victim will completely forgive. Furthermore, this restriction on the state “is one more element in the Islamic system of checks and balances.”92

Note the part of the verse stating the freeman for the freeman, and the slave for the slave, and the female for the female. There are some countries, who claim to follow Islamic law, who will allow the death penalty only in the case where the genders of the criminal and the victim are the same; this would appear to be the verse on which they rest their position.93 Such a law has the effect of sparing the life of a man who kills a woman and is in contradiction with countless other verses that clearly state the equivalence in the dignity of females and males. Such a law further ignores the interpretation of this verse; this verse came down to address a practice in pre-Islamic Arabia whereby a tribe which had one of its females (or slaves or free males) killed would wage a war and, claiming that their own victim was worth the lives of three or four females (or slaves or free males) from the other tribe, would kill more than just the killer. This part of the verse merely explains the concept of individual criminal responsibility.

While the Quran prescribes the same punishments for men and women, it does differentiate between classes when speaking of the punishment for adultery by

92 Id.

93 The complete verse reads as follows: O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty (2:178).
prescribing for a believing female captive who commits adultery half of the punishment (prescribed) for free women...But to have patience would be better for you. Allah is Forgiving, Merciful (4:25). This distinction is the result of “ihsan,” which means to restore the balance by making up for a loss or deficiency. This verse is described as God’s compassion for women slaves who were socially disadvantaged. Note also that the crime of adultery differs from the crime of murder in that adultery is primarily a crime against God; as such, God can choose to alleviate the punishment for crimes committed against God. On the other hand, murder is primarily a crime against a human; since the Quran recognizes the equality of all human life, it goes against Islamic principles to allow a crime against a human to receive a lesser penalty if the victim and criminal are of different classes. Today, there is no class based differentiation in punishment under the Islamic international criminal system.

As to the goal of retaliation, reflect on the following verse: And there is life for you in retaliation, O people of understanding, that ye may ward off (evil) (2:179). Even if the severity of a punishment was not enough to deter the actor, the implementation of the punishment can still serve to deter him/her and others from committing it in the future, thus preserving the peace of the rest of the law-abiding society. At the same time, forgiveness is preferred: And the recompense of evil is punishment like it, but he who forgives and reforms the offenders or makes reconciliation, his reward is with God, surely God does not love unjust tyrants (42:40).

The final class of punishments is ta’zir, meaning discretionary. This deals with acts which, although criminalized, have punishments which are left to the discretion of the jurists/courts in regard to the form in which the punishment is to be carried out.
Crimes in this category are the least serious. Again, a crime is essentially an act of injustice against oneself and God. The punishment that a society administers to this crime is not meant to give the criminal atonement. Sins can only be ‘wiped away’ by God through true repentance. However, as a crime is also an act against the social order a punishment on earth is meant to protect and strengthen the society. Realizing most people’s need for retaliation, the Quran allows it while recommending forgiveness. The Hadd punishments will not be administered if a doubt is introduced and will only be carried out after extenuating circumstances have been considered. In attempting to understand the role of the threat of punishment under an Islamic framework, bear in mind the fact that the Quranic verses describing heaven highly outnumber those speaking of hell. Under Islamic philosophy

law is not the main, or even major, vehicle in the total framework for the reinforcement of morality; it is the individual’s belief, his Allah-consciousness and ‘taqwa’—that inherent and innate quality which makes him want to refrain from what displeases Allah and do what pleases him…[A] whole environment is established where to do right is encouraged, facilitated and found easy and to do wrong is discouraged, inhibited and found difficult. All men and women are enjoined [by the Quran], as their foremost duty, to aid, exhort and commend each other to do good and to avoid evil94

With every institution of society being value oriented and owing a duty to the moral development of the individual, reform is seen as a pre-crime responsibility—not a post-crime syndrome. If a person commits a crime, the best place for reform lies in the family and society. As such, once the guilt of an individual is established his punishment is to be carried out swiftly; the guilty is to pay for her crime as fast as possible and is to return to the community with all the rights and obligations of any other member of society. Prison fails to satisfy this conception.

Examine further the following analysis of punishment in Islam:

If all men were equally spiritual, and if all could fear God, then there would be no need of law. But most men are not afraid of God so much as they are afraid of their society, public opinion and the punishment for evil-doing which they receive from the court of law. Therefore, the fear of God is and will remain confined to a few persons...Since the Shariah seeks to build society and a political community, it has to take account of all kinds of men, good or bad, virtuous or vicious. For men fearing God, it inculcates love and charity and holds out the promise of reward in the hereafter, but for the greater number of people in whom the fear of God is not very strong, it prescribes laws and lays down punishments. Thus it makes use of both moral and legal sanctions because it realizes that both morality and law are necessary for political and social life.95

While Western scholars and human rights organizations criticize the system of punishment in Islam as uncivilized, to an observant Muslim it is the straying away from God’s orders—orders which are given by the one who created the human and knows best how to govern the life of that human—and the arrogance of the human in thinking that s/he can do better in an area that has been ‘pre-empted’ by God, which is considered uncivilized. It can be argued that the Western conception of human dignity evokes unnecessary sympathy for the criminal—so much so that it places the criminal above the rest of society’s right to peace and security. The absolute reliance on prisons not only isolates the offender from society, thereby not arousing in her a sense of shame or repentance, but also hardens criminals, and punishes the family who must suffer the absence of its member. A criminal in the United States, after being released from a long prison sentence nonetheless faces a society that resists her return towards a dignified life (for example, laws that prevent ex-convicts from holding a seat in the legislature and other employment). Furthermore, for “international human” rights organizations to claim that Islamic law fails to observe international human rights standards when these “international” standards leave more than one billion people out of its “standard” seems very “Western-centric.” Who is to say that administering some lashes\textsuperscript{96} for someone convicted of possessing drugs is more ‘cruel’ than a ten-year prison sentence?

The important thing to note is that these punishments deal with Muslims; Muslim societies have the right to govern themselves as they see fit. Yet many of the criticisms

\textsuperscript{96} There are rules that govern the administration of lashes. For example, the administrator must sit in a chair so that he is almost on the same level as the criminal who is laying stomach down; the administrator’s arm is to be bent at the elbow—not raised up in the air; this makes for light lashes. The point is not to beat one like men used to beat a slave, but rather to instill a sense of shame in the criminal and a sense of repulsion in the audience.
that Western international groups raise, in relation to a particular judgment in the Muslim world (i.e., criticism of lack of due process rather than the criticism of the type of punishment per se), are legitimate. Take for example the case of Bariya Ibrahim Magazu, the young Nigerian woman who in July 2000 was found to be pregnant, and subsequently was convicted of “zina” (fornication) and sentenced to one hundred lashes for allegedly having engaged in extra-marital sex, and an additional eighty lashes for allegedly making false accusations against the men who impregnated her.97 The judgment in that case clearly flew in the face of procedural and substantive due process under Islamic law. The overwhelming majority of opinion is that pregnancy is not admissible as proof of adultery because it is mere circumstantial evidence and introduces a “shubuha” (doubt). The majority of jurists take the Quranic verse on adultery as establishing an exclusive method of proof. Even a DNA test is considered an introduction of a doubt and is thus impermissible in the case of hadd punishments. Moreover, the Quran stresses the need to protect women against charges of adultery. For example, the account of Mary miraculously giving birth to Jesus is detailed in the Quran (19:20-34). Here, Mary gives birth to Jesus, without having a husband, and upon her return to the village, the townspeople are struck by the site, and hence conclude that she has committed a heinous crime of adultery. She is therefore accused of being evil and unchaste:

At length she brought the (babe) to her people, carrying him in her arms.

They said: "O Mary! truly a strange thing you have brought! "O sister of Aaron! Thy father was not a man of evil, nor thy mother a woman

unchaste!" But she pointed to the babe. They said: "How can we talk to one who is a child in the cradle?" He said: "I am indeed a servant of Allah: He hath given me revelation and made me a prophet (19:27-30).

The above Quranic verse revealed that pregnancy is not an absolute proof of adultery because it is mere circumstantial evidence and introduces a doubt. Even under the view of the small minority, the Maliki school, which allows pregnancy as proof of adultery, this proof is negated (a rebuttable presumption) where there is the slightest doubt or where there is any mitigating evidence against punishment in a particular case (example: the accused is very young). In Bariya Magazu’s case, there was more than a slight doubt; the young girl claimed she was raped. Furthermore, Bariya raised the issue of coercion, insisting that she was compelled to have intercourse as payment for her father's debt to three men. Finally, the Nigerian court outright ignored the Quranic requirement which states that four eye witnesses must testify to having witnessed the actual act; no such witnesses were produced to testify against Bariya. In such cases all need to raise their voice to prevent the commission of injustice; like any other system, there are many faults.

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98 Proving rape does not need four witnesses; it can be established through circumstantial evidence, medical data (such as bruises and cuts) and expert testimony. Jurists had at one time made the punishment a prison sentence or a “diya” (a payment that a murderer would pay for the family of his/her victim); today, many jurists have adopted the death penalty. However, given the fact that in many Muslim societies it is the victim of rape who will be ostracized, women are not likely to bring charges. Jurists recognize rape between husband/wife; however, an oft-used and abused Hadeeth, which advises that a woman should not refuse her husband sex unless she has a reasonable excuse, is used by many to justify marital rape. These people apparently forget to quote a complimentary Hadeeth that demands that men give the same consideration to their wives. Thus, a Hadeeth which speaks of mutual rights that a husband and wife have onto each other has been transformed into an argument for justifying unwanted, violent, and forced sex.

99 The specific verse here is (24:4): And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors. Another verse reiterates that those who do not produce four witnesses to the act of fornication, are liars. Why did they not bring four witnesses to prove it? When they have not brought the witnesses, such men, in the sight of Allah, (stand forth) themselves as liars! (24:13).
in the justice systems of the Muslim world—almost all of whom do not even follow
Islamic law—and these need to be criticized. The problem occurs, however, when
international organizations examine other cultures exclusively through Western lenses
shaded with Western assumptions.

Chapter three, “Islamic International Law: The Concept of “Rights” and other
Foundational Principles,” will discuss the issue of individual rights and obligations as
well as the rights and obligations of the state. The equally important principles of
procedural justice according to the Quran, piety, and judging between all people in
fairness will be examined.
Chapter III:

Islamic International Law: The Concept of “Rights” and other Foundational Principles

Islam provides for three categories of rights: rights due to God, rights to the living (including the rights of one’s body), and rights due to the dead. It is interesting to note that the Arabic/Quranic word for right is the same as that for duty (‘haq’); thus, with freedoms come obligations. Muslim scholars, such as Leghari, feel that the world needs a “Universal Declaration of Human Obligations” as a counterpart to the “Universal Declaration of Human rights” in order to “put one’s obligations on an equal footing with one’s rights”. 100

Human rights in Islam deal with the relationship between the individual and the state as well as the relationship between individuals. The state cannot (legally) nullify or restrict a right through legislation, even in the face of exigencies. Some rights can be enforced by the state, while others are considered moral rights (example: the rights of the elderly to be cared for). According to Leghari,

To maximize the observance of human rights, or any other legal norm for that matter, Islam gives due regard for the inner as well as outer dimensions of the human personality. 101 A mere reliance on external sources may not secure the desired objectives (60).

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101 Here, “the inner” dimension of the human personality refers to ones moral sense as well as the fear of God. The “outer dimensions” of ones personality on the other hand, deals with ones fear of society and punishment.
Attention is given to the duty of the state and each individual to provide the minimum required to keep those unable to provide for themselves in a respectable existence, rather than merely existing. Special concern is given to the orphans. One verse warns: *Give to the orphans their possessions, and do not replace things of your own which are bad with things which are good among theirs, and do not intermix their goods with your own...for this is a grievous crime (4:2).* In another verse, the Quran commands: *Do not spend the belongings of the orphans but for their betterment, until they come of age; and give in full measure, and weigh justly on the Balance...*(6:152).

The Quranic verse which makes it legal for a male to marry four females was revealed in order to protect orphans and widows at a time when men were outnumbered by women due to war; it speaks specifically about orphans: *And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only)...* (4:3).

The concept of justice is referred to in the Quran under terms such as *adl* (fairness; a balanced approach to all things; also, the human quality of being spiritually and behaviorally balanced), *qist* (equity; acting fairly with others), *mizan* (literally the word for the balance scale), *haqq* (right/duty), and *bir* (piety/righteousness).103 According to Ali Bardakoglu, *adl* is mentioned twenty eight times, *qist* twenty five times, and *haqq* three hundred times.104 One of the basic objectives of Islam, according to the

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102 Space does not allow further discussion. However, there are many human rights that were protected by the Quran and Sunnah centuries before they were recognized under international law (including the right of women to work and hold property in their own right).

Quran, is to bring justice to earth (We verily sent Our messengers with clear proofs, and revealed with them the Scripture and the Balance ['mizan'], that the people may observe right measure... 57:25). However, the Quran does not give any particular philosophical definition of what justice is. According to the Quran, absolute justice is something that is known only to God. This is because it is only God that knows what is truly best for the people God created and what motivates all actions, and therefore what is absolutely just (2:216: ...but it may happen that ye hate a thing which is good for you, and it may happen that ye love a thing which is bad for you. Allah knows, ye know not).

Yet striving for what is “just” is spoken of as the responsibility of every individual, for each individual is God’s “trustees on the earth” (6:165). Seeking justice is part of worship. Even where ‘adl’ does not demand the doing of a good, or where there is no benefit to be gained, one is to do ‘good.’ When asked “When will justice be realized on Earth?” The Prophet answered, “Not until he who sees injustice being done to another suffers from the sight of it as much as its victim.” To be unjust to others is to be unjust to oneself; this is so for two reasons: first, since (according to the Quran) all of humanity was created “kanafsin wahida,” as a single indivisible self, if a person does injustice to another he inevitably does injustice to himself; second, while one can very well avoid justice on earth, s/he will have to face it in the next life.

\[104\] Bardakoglu, p. 65.

\[105\] Leghari, p. 51.

\[106\] Reference here is to verse (31:28): And your creation or your resurrection is in no wise but as an individual soul: for Allah is He Who hears and sees (all things).
Among other things, the Quran speaks of piety, non-transgression, and judging between all people in fairness as “just.” (5:8: O you who believe, stand up as witnesses for God in all fairness, and do not let the hatred of a people deviate you from justice. Be just: This is closest to piety...; 2:229: Do not exceed the limits of God, for those who exceed the bounds set by God are transgressors; 6: 85: ...so give full measure and full weight (‘mizan’) and wrong not mankind in their goods...). The Quran defines righteousness, or piety, as one who gives his wealth, for love of Him, to kinsfolk and to orphans and the needy and the wayfarer and to those who ask, and to set slaves free; and observes proper worship and pays the poor-due. And those who keep their treaty when they make one, and the patient in tribulation and adversity and time of stress... (2:177).

Judges are to judge in accordance with the Quran (5:48: And to you We have revealed the Book containing the truth, confirming the earlier revelations, and preserving it (from change and corruption). So judge between them by what has been revealed by God...; Therefore, do not fear men, fear Me, and barter not My messages away for a paltry gain (5:44); And those who do not judge by God’s revelations are unjust, 5:45). Thus, while the Quran commands people to use reasoning, it also views humans as fallible, and so where there are clear instructions given by the infallible (God), the faithful is not to reject it based on his own imperfect human rationale.

The Quran further explains, We have sent down to you the Book containing the truth, in whose light you should judge among the people as God has shown you, and do not be a contender for deceivers (4:105). This verse is explained by commentators as referring to a case when one Ta’ima Ibn Ubairaq was suspected of stealing a suit of armor and, while being pursued, decided to plant it into the house of a Jewish man. When the
case was brought before the Prophet, attempts by some in the Muslim community were
made to prejudice him and deceive him into using his authority to favor Ta’ima but the
Prophet acquitted the Jewish man. This illustrates that justice is something to be
applied equally. As a matter of fact, “justice” which is pursued by a state only when it
suits its interest or which is applied only as against the weak is perceived by Islam as
oppression and injustice (24:48-51). The Prophet warned his people that “The nations
that lived before you were destroyed by God because they punished the common men for
their offenses but let their dignitaries go unpunished for their crimes.” In other words,
justice requires not only a right intent, but also an equal application.

In yet another verse, the Quran states: God enjoins that you render to the owners
what is held in trust with you, and that when you judge among the people, do so
equitably… (4:58). According to Caliph Ali, cousin of the Prophet, the best judge is
defined as one who is not prejudiced in his decisions by personal desires or relationships;
“he should neither fear nor hope, but take a natural attitude towards all that comes
before him.” Seeking to do justice is part of worship. Thus the Prophet explained,
“An hour spent in the administration of justice is more valuable than sixty years spent in
prayers.”

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107 Al-Ghunaimi, Muhammad Tal’at. "Justice and Human Rights in Islam." Justice and Human Rights in

Also directly found in the hadeeth Sahih Bukhari, Volume 5, Book 59, Number 597. Available at

109 Al-Ghunaimi, p. 2.

110 Siddiqui, p. 23. Examine the following part of a letter which was written by the second Caliph Umar
describing to the judge of Basra the concepts of justice and procedure to be observed:
The requirements of procedural justice include giving attention to the deposition, equal protection of the law, placing the burden of proof on the claimant and the presumption of innocence (24:12-13), credibility of witnesses\(^{111}\), reviewing a judgment that is later suspected of being incorrect, and the use of analogical reasoning (\textit{qiyas}). The \textit{Quran} also recognizes the defense of compelled action.\(^{112}\) International Islamic criminal law does not seem to recognize an absolute right to trial by jury or an affirmative right to representation by lawyer. The \textit{Quran} states that a believer’s best defender is God, and parties who brought cases at the time of the Islamic state (under the Prophet Muhammad) represented themselves before a judge. Procedural justice in Islamic courts emphasizes the character of the judges, the court’s use of a council of advisor and assessors, the use of advisory opinion from outside religious scholars, and the ever-increasingly elaborate procedures for determining the credibility of witnesses—procedures which have no

\begin{quote}
"Understand the depositions that are made before you, for it is useless to consider a Plea that is not valid. Consider all the people equal before you in your court and in your attention, so that the noble will not expect you to be partial, and the humble will not despair of justice from you...
If you have a judgment yesterday, and today, upon reconsideration, you come to the correct opinion, you should not hesitate by your first judgment from retracting; for justice is primeval, and it is better to retract than to persist in worthlessness. Use your brain about matters that perplex you and to which neither the Quran nor the Sunna seems to apply. Study similar cases and evaluate the situation through analogy. If a person brings a claim which he may or may not be able to prove, set a time limit for him. If he brings proof within the time limit, you should allow his claim; otherwise, you are permitted to give judgment against him...All believers are acceptable as witnesses against each other...except such as are proved to have given false witness, and such as are suspected of partiality on the ground of client status or relationship, for God, praised be He, forgives because of oath and postpones punishment in face of evidence. Avoid fatigue and weariness and annoyance at the litigants" (Siddiqui, p. 31).
\end{quote}

\(^{111}\) In one example, Ali, the “Prince of the Faithful,” brought a case against a Jewish man accusing him of stealing his armour. Being that one of Ali’s two witnesses was his own son, the case was dismissed (Siddiqui, p. 32).

\(^{112}\) For example, while pork is forbidden, one who cannot find anything else to eat is allowed to eat it. Similarly, verse 106 of chapter 16 states that \textit{whoso disbelieveth in Allah after his belief—save him who is forced thereto and whose heart is still content with faith—but whoso findeth ease in disbelief...}
The elaborate procedures for ascertaining the credibility of witnesses is needed to protect against abuse of Islam’s high reliance on oaths. In the context of giving testimony, the Quran commands, *O you who believe, be custodians of justice and witnesses for God, even though against yourselves or your parents or relatives, whether a man be rich or poor...follow not the behests of lust lest you swerve (from justice); and if you prevaricate or avoid (giving evidence), God is cognizant of all that you do* (4:135). The presumption of innocence is seen in verses that address those who accused women of adultery.114

Justice is also to be striven for by the state, which is subject to the nation’s highest court. The government does not enjoy sovereign immunity since every person is individually liable for his acts and sovereignty belongs only to God.115 There are examples of Caliphs having to appear in private suits while they were still rulers. Furthermore, the people have the right (under Islamic principles and traditional Islamic practice) to demand judicial review of the legality of a command from the ruler. The Prophet and early Caliphs allowed people to challenge their acts. In at least one instance, the Prophet told the people that if anyone feels that they have been wronged by him, to make a claim against him so that the Prophet may rectify it. In another case, the first

113 Examining the judiciary of particular Islamic states is beyond the scope of this paper. For an actual example of the judicial system from pre-trial to post-trial, see the case of Saudi Arabia. “Human Rights in Judicial System, 2000” at http://www.saudiembassy.net/Issues/HRights/IssuesRig.asp

114 The pertinent verse states: *Why did not the believers, men and women, when ye heard it [the accusation], think good of their own folk, and say: It is a manifest untruth?...When ye welcomed it [the accusation] with your own tongues, and uttered with your mouths that whereof you had no knowledge, you counted it a trifle. In the sight of Allah it is very great* (24:12-15).

115 In one example, Caliph Umar was involved in a dispute over a citizen’s property. The two agreed to arbitration and the judge ruled against the Caliph. When told by the judge that his decision was based on the Sunnah of the Prophet, the Caliph gave up the dispute (Siddiqui, p. 38).
Caliph, Abu Bakr, addressed the people in his first inaugural speech: "Now, it is beyond doubt that I have been elected your Emir, although I am no better than you. Help me if I am in the right; set me right if I am in the wrong. Truth is a trust; falsehood is a treason. The weak among you shall be strong with me till God willing his rights have been vindicated, and the strong among you shall be weak with me till, if the Lord will, I have taken what is due from him. Obey me as long as I obey Allah and His Prophet. When I disobey Him and His Prophet, then obey me not."116

Those ruling the state are to answer to the judiciary, which is supposed to be completely independent of the state. Thus, the Quran commands But help one another in goodness and piety, and do not assist in crime and rebellion, and fear God (5:2). The Prophet is also reported as saying: "Listening and obeying is obligatory on every Muslim, male or female, in what he likes or dislikes so long as he is not ordered to disobey [Allah]; but when he is ordered to disobey [Allah] then there is no listening and obeying."117

As Ali Bardakoglu perceives it, justice in Islamic jurisprudence is of two types—one based on reason and another based on laws and rules.118 According to Bardakoglu, ...

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116 Siddiqui, p. 40


118 Bardakoglu, p. 66.
and ethical value as well. Although law generally depends on ethics, in Islam it is
religion which protects ethics from relativity and unfavourable influences...What
Islam stresses is the establishment of a coherent relationship among religion,
ethics and law to achieve justice.\(^{119}\)

According to Lawrence Rosen,

[one can] factor out at least three distinct domains of meaning when trying to
discern what is implied for many Muslims by the idea of justice: relationships
among men and toward God are reciprocal in nature, and justice exists where this
reciprocity guides all interactions [justice as regulated reciprocity]; justice is both
a process and a result of equating otherwise dissimilar entities [justice as
equivalence]; and, because relationships are highly contextual, justice is to be
grapsed through its multifarious enactments rather than as a single abstract
principle [justice as relational/contextual].\(^{120}\)

The Prophet always advocated “the middle of things,” and so to Muslims, “justice is
deviated from when the exactness of ‘preserving the middle’ is lost.”\(^{121}\) What is
important to understand is that justice “is a positive ideal which permeates and dominates


\(^{121}\) Id. at 157.
the entire community life; it is not merely an institutionalized means of inflicting punishment.”

The following chapter, “The View of Islamic Criminal Law on Certain International Crimes,” will analyze specific international crimes, including aggression (and the problem of defining what constitutes aggression), both from the perspective of the Charter of the United Nations, and from the Islamic perspective. Also, I analyze the root of the word *jihad*, which is often times incorrectly referred to as “holy war.” The concepts of war in Islam (*Qital* and *Harb*) will also be discussed in order to provide guidelines as to the circumstances which allow for an armed struggle. I will also discuss the issue of war crimes, and the rule of proportionality. Genocide, an equally important issue, is examined by looking at the origins of the term, and by also analyzing the different definitions of Genocide.

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Chapter IV:

Islamic Law and International Crimes

This chapter will focus on widely recognized international crimes, including aggression, war crimes, hostage taking, slavery, and torture. The main purpose of this chapter is to show that Islamic law addresses these issues and has rules and punishments that apply to anyone who may commit these illegal acts. The point here is that Islam is in line with international law, justice, and human rights.

A. Aggression. Although the Nuremberg Tribunal did not define “aggression”, the world order after WWII was to be governed according to the United Nations Charter, as provided for in Article 1 of the Charter, which calls for:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”

The term “aggression” was deliberately left undefined because it was feared that the progress of modern warfare would render the definition of aggression incomplete and useless, as technology progressed, and thereby possibly allow an aggressor to exploit a loophole and distort the definition to its advantage. Therefore, Article 39 of the U.N.

123 Kittichaisaree, p. 211.

124 Id.
Charter left it to the Security Council to determine what constitutes the existence of “any threat to the peace, breach of the peace, or act of aggression.”  

The U.N. attempted again to define “aggression,” and adopted Resolution 3314 of December 1974. Article 1 of the definition states that “Aggression is the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition...” Article 2 of the Resolution specifies that:

The first use of armed forces by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.”

Article 2 of the definition, therefore, allows the Security Council to decide whether the first use of armed forces is an act of aggression. It also allows for the differentiation between low-intensity conflicts and other types of conflicts, with the former not qualifying as an act of “aggression”.

Malekian defines aggression under Islamic international criminal law as “an action or inaction which directly or indirectly jeopardizes the jurisdictional
independence and security of another state by means of ideological conflicts or armed invasions". Thus, his definition is broader than that under international law. What is an "ideological conflict"? Unfortunately, Malekian does not expand on the definition he offers. However, he later refers to ideological "aggression," and the rest of his discussion shows that by "ideological conflict" he does not mean a simple difference of ideologies. That would be opposed to the Quran, which states, among other relevant verses, If it had been your Lord's will, all on earth, without exception, would have believed; will you then compel humankind to become believers? (10:99); It is not incumbent on you that you make people rightly guided. But God guides whom he wills (2:272). In yet another verse, the Quran explicitly states, there is no compulsion in religion, and tolerance is a central theme of Islam (Let there be no compulsion in religion: Truth stands out clear from error, 2:256). A further illustration of the tolerance of Islam towards differences is found in the belief that the presence of legal difference is a divine mercy to humanity. Finally, according to one hadeeth, when the Prophet was asked, “which of the religions is most beloved by God Almighty?” He said: “The primeval tolerant religion.” Thus, Malekian’s term is probably best understood in reference to ideological ‘warfare’ such as Nazism, Fascism, Zionism and the Cold War or other attempts to force ideological hegemony.

Similarly, it is unclear what Malekian means by “inaction.” Is Malekian referring, for example, to a nation’s refusal to put an end to the launching of hostilities by

129 Malekian, p. 48.

its own citizens against another nation? What is clear is that those who do not attack Muslims or their right to practice their religion cannot be attacked. The Quran is filled with verses which denounce aggressors, including the verse that "God does not love the aggressors" (2:190). The Quran forbids the waging of war against those who offer you peace (4:94), and states Allah summoneth to the abode of peace (10:25). What is also clear is that an act constituting aggression under Islamic international criminal law does not necessarily justify an armed attack.

Of course, Islam allows a people to engage in defensive action, but only after all peaceful means of settlement have been exhausted. Even during a state of war the Prophet never made the first strike. As Malekian notes, Prophet Muhammad’s practice of "arbitration for the peaceful settlement of disputes reached the highest level of justice in the Islamic world".¹³¹

The misunderstood ‘Jihad’ does not mean “holy war.” Common misconceptions prevail regarding the term Jihad and its alleged role in enticing terrorism. Whether this is intentional or simply a result of ignorance, Western scholars, the media, and even some Muslims contribute to the unfair portrayal of Jihad as a concept of indiscriminate killing of non-Muslims. The concept of Jihad has been so misunderstood and misconstrued with the concepts of war (Qital, and Harb) that today it is perhaps seen as the single biggest threat to U.S. security, and therefore, a brief explanation of Jihad and Qital is necessary.¹³²

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¹³¹ Malekian, p. 51.

James Piscatori, in his book *Islam in a World of Nation-States*, summarizes the misplaced assumptions of Bernard Lewis and others who erroneously hold the belief that jihad simply means "holy war." For example, Lewis believes that Islam places so much emphasis on the division of the world into two spheres, *dar al Islam*-or the realm of Islam or peace, and *dar al-harb*, or the realm of war, and that the aim of the Islamic world is to expand at the expense of the non-Islamic *dar al-harb*. In order to achieve expansion, Lewis concludes that Muslims are encouraged to resort to holy war, which he refers to as *jihad*.134

Lewis also wrongly states that concepts of modern international relations, such as the concept of the nation-state, have no equivalent in traditional Islamic theory, and that "foreign policy is a European concept" and is "alien and new in the world of Islam."135 Piscatori, however, affirms that "...the Quran and *hadiths* elaborate a view that is distinctly at odds with the one which focuses on the *jihad* as an instrument of Islamic militancy and expansionism. This alternative view is of a tolerant, non-violent Islam that accommodates itself to the reality of divisions and non-Muslim centres of power."136

John Esposito has this to say with regards to *jihad*:

In its most general sense, *jihad* in the Quran and in Muslim practice refers to the obligation of all Muslims to strive (*jihad*, self-exertion) or struggle to follow God’s will. This includes both the struggle to lead a virtuous life

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135 Piscatori, p. 42.

136 Id. at 46.
and the universal mission of the Muslim community to spread God’s rule and the law through teaching, preaching, and, where necessary, armed struggle.137

Still, does jihad mean a sense of self improvement, or is it really in reference to war according to Islamic precepts? Although Muslims and non-Muslims alike have disagreed as to what constitutes a “true” jihad, and although there is not one “right” definition of jihad, one can better his understanding of the meaning of jihad by looking back to the root of the word and looking at Quranic verses as well as the hadeeth.

The root of the word Jihad is derived from Jahada, meaning to exert one’s utmost, or to ‘struggle’ or ‘strive.’ Jihad can be on a personal level, such as when one struggles against his ill desires. The best Jihad is the one in which a person strives against his own self (nafs), for the sake of Allah. Jihad can also be on a social level (such as a jihad against poverty or ignorance). Although jihad is a perpetual struggle against inequality and injustice, it is not necessarily always carried out by an armed struggle. Jihad can be divided into four groups: jihad of the heart (changing oneself against unbelief, and for the better); jihad of the hand (fighting injustice through the pen); jihad of the tongue; and jihad of the sword.138

Most important is the context in which the word Jihad is used in the Quran. It is

138 Maulana, Muhammad Ali. Issues in Islam- “Jihad and Terrorism”. Available at http://www.ramazanonline.com/jihadinislam.htm accessed on March 24, 2005. It is noteworthy that the first revelation to come down to Muhammad, who was illiterate, commanded him to read and spoke of teaching through the pen, this is therefore a form of jihad in and if itself.
important to note that in the early days in Mecca, the Prophet Muhammad was dismissed by the pagan Quraysh as a poet and a madman, and therefore the first Jihad verses that were revealed to him at that time by Allah through the angel Gabriel, were meant as a Jihad to help people with a spiritual struggle against ignorance and disbelief.139 Take for example the following Quranic verse: And those who strive in Our cause (Jahadu), We will certainly guide them to our Paths (29:69). In this case the verse refers to a spiritual strive of those who earn good deeds and wish to be closer to God, and Allah promises to guide those people to the right path. Another concept relating to Jihad deals with those who have been unjustly driven out of their homes and those who are persecuted. Being patient (sabir) in times of adversity is a form of Jihad, as explained in the following verse: But verily thy Lord,- to those who leave their homes after trials and persecutions,- and who thereafter strive (jahadu) and fight for the faith and patiently (sabaru) persevere,- Thy Lord, after all this is oft-forgiving, Most Merciful (16:110).

The Quranic verses that were revealed while the Prophet Muhammad was in Medina reflect the circumstances of the time, when Muslims were forced to take up arms in self defense. First the Arabs in Mecca, and now the Jews in Medina attempted to inflict harm on Muslims and the Prophet. It was not until the disbelievers attempted to kill the Prophet Muhammad that he decided to travel to Medina. God finally gave Muhammad permission to fight. Here we see the verses the beginning of the Qital (mutually attempting to kill each other) verses. Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors (2:190). It is evident from this verse that fighting (Qital) is allowed when it is for defensive purposes.

Even then, there are limits which God says should not be exceeded. Therefore, it is prohibited, for example to attempt to annihilate an entire population, or to use torture to oppress a population, or to destroy the environment, or to kill animals just for the sake of crushing the spirits of an entire population.

**Qital** becomes Jihad when it is *fi sabeel Allah*, meaning in the path or cause of God. The cause of God should be justice. The Quranic verses are clear with regards to what constitutes a just war, and when war can be used. *To those against whom war is made, permission is given (to fight), because they are wronged;— and verily, Allah is most powerful for their aid* (22:39). *(They are) those who have been expelled from their homes in defiance of right,— (for no cause) except that they say, "our Lord is Allah". Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure. Allah will certainly aid those who aid his (cause);— for verily Allah is full of Strength, Exalted in Might, (able to enforce His Will)* (22:40).

There are other criteria which must be met for **Qital** to qualify as a form of *Jihad*, or *fi sabil Allah*. **Qital** is permitted when someone interferes with your ability to freely practice your religion, or if someone prevents you from reaching the mosque (for example, Israel’s policy of prohibiting worshipers from access to Al Aqsa mosque). **Qital** is justifiable is it is for defending the weak, and women and children.

*And what is the matter with you that you do not fight in the cause of Allah and for those weak, ill-treated and oppressed among men, women and children whose only cry is: ‘Our Lord rescue us from this town whose*

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people are oppressors, and raise for us from you one who will protect us

(Quran 4:75).

Qital is permissible against those who break their treaty (the Quran instructed the Prophet Muhammad to free himself from the Treaty of Hudaybiah, signed in 628, only when the Quraysh violated the treaty). Qital is acceptable if it is in defense of allies, or if you are being driven out of your homes (such as Israel’s policy towards Palestinians, i.e. eviction and “transfer”), or if it is against those who actively support those who drive you out. All of these things justify fighting “in the way of God”, fi sabeel Allah. This is also when Qital can be considered a Jihad.

It is important to emphasize that Jihad is not always a physical struggle. Take for example the following two verses, We have enjoined on people kindness to parents; but if they strive (jahada) to make you ascribe partners with Me that of which you have no knowledge, then obey them not... (29:8). But if they strive to make thee join in worship with Me things of which thou hast no knowledge, obey them not... (31:15). These two verses refer to non-Muslim parents who strove (Jahada) to convert their children to a religion other than Islam. The context of the verse does not refer to an actual physical fight, it refers to parents attempting to convince their children to not accept Islam. Children should not obey their parents in this case, yet they should not wage an armed struggle against them either.

The Hadeeth also helps to clarify the meaning of Jihad. For instance, a man once asked the Prophet Muhammad: “Should I join the jihad?”, “Do you have parents?” the Prophet asked. The man said, “Yes!” The Prophet replied, “then strive by (serving)

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Another Hadeeth had this to say about Jihad: The Prophet also said, “The Hajj is the most excellent of all jihads.” In conclusion, jihad in Islam means to strive in the way of Allah by pen, hand, tongue, and, if necessary, through the use of arms as a last resort. Qital on the other hand means mutually attempting to kill each other in war, and Harb refers to a battle. Qital is Jihad only when it meets certain criteria, and thereby becomes fi sabeel Allah. If Qital is done without the intention that it is for sabeel Allah, then it is simply an act of unjustifiable murder.

The question remains-- under what circumstances does Islam allow for an armed struggle? An armed struggle is legitimate when carried out against an initiator of an armed attack; furthermore, Muslims have a duty, and non-Muslims have a legal right, to assist a state which is a victim of an aggressive war. Similarly, an armed struggle may be waged against a party which breaks a treaty and refuses to observe a necessary obligation (example: protection for Muslim minorities in its jurisdiction). In the case of a ‘humanitarian war,’ however, the nation or group must ask for help. The following verse deals with this issue:

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\text{Those who believed and left their homes and strove with their wealth and their lives for the cause of Allah, and those who took them in and helped them: these are protecting friends one of another. And those who believed but did not leave their homes, you have no duty to protect them till they leave their homes; but if they seek help from you in the matter of religion}\]


\[144\] It was, however, a recognized practice of the Prophet to allow amnesty for those who violated their peace treaties.
then it is your duty to help except against a folk between whom and you there is a treaty (8:72).

Thus, a nation must first ask for or seek help concerning a ‘matter of religion.’ Of course at the time of the verse persecution was based on religious-affiliation; this verse does not prevent Islamic law from developing through scholarly *Ijma* (consensus) and analogical reasoning. As Malekian explains, “[a] far reaching interpretation of the verse in accordance with modern circumstances is that a nation can give humanitarian help to a requesting nation if both nations hold common concepts, beliefs or are parties to a treaty…”¹⁴⁵. Second, note that while the verse shows great concern for treaty law, it has not been interpreted as forbidding aid in cases where “a regime or government has illegally come into power, has been judged illegal on the grounds of its criminal activities or practices political tyranny over its own or other nations”¹⁴⁶. This conclusion is supported by verses which make necessity an exception to many rules, one such verse does not count it a sin for “one who is driven by necessity, neither craving nor transgressing” to fail to observe a treaty. Since no international organizations existed at the time of these revelations, Islam’s notion of universality “aim[ed] to function as a universal organization for the prevention of war”.¹⁴⁷

Unlike the system of international law, seeking refuge is an absolute right under Islamic law, and the Islamic state must provide necessary aid from the public wealth of the state. In the case that a humanitarian war is waged, the *Quran* commands that any

¹⁴⁵ Malekian, p. 145.

¹⁴⁶ Id. at 146.

¹⁴⁷ Id.
spoils of war were to go to the orphans and the needy and the wayfarer, that it become not a commodity between the rich among you...it is for the poor fugitives who have been driven out from their homes and their belongings... (59: 7-8). The Qur'an further speaks of those who love those who flee unto them for refuge, and find in their breasts no need for that which hath been given them, but prefer (the fugitives) above themselves though poverty become their lot... (59: 9).

At minimum, the following must exist for a war to be defensive: first, there must be a “definite sign of action” which “clearly constitutes a serious internationally wrongful conduct jeopardizing the security of a state.” As a consequence of this rule comes the very important rule which prohibits reprisals. Reprisals are forbidden and it is not self-defense to engage in retaliatory armed war after a wrongful act has already been committed. Third, all other avenues for negotiation or arbitration must be closed, and in the case of an individual or a group exercising self-defense, it must be impossible for them to report the wrongful conduct to independent legal authorities. Fourth, a declaration of war must be given to a non-Muslim state. Sixth, the principle of

148 Malekian, p. 137.

149 For example, America’s war on Afghanistan and Iraq after the September 11th attack on New York would be classified as an unlawful reprisal. This is not to say that its war could not have been lawful if there had been a “definite sign” that another attack was about to happen; if it was definitely impossible to seek any other alternative such as negotiations [the idea that ‘there’s no talking with crazy terrorists, period’ is rejected by Islamic international criminal law]; and if it had observed the rule of proportionality should negotiations have failed and seized the attack once that identified criminal act which it sought to avoid was eliminated [an all-out war to break the spirit of individuals or nations is not allowed]. Recall also, that even after the Prophet would position his army for a defensive war, he always taught that Muslims should never make the first strike because an enemy might change her mind and desist.
proportionality must be adhered to. Finally, a defensive attack must cease if the wrongful conduct is either corrected or somehow prevented.\textsuperscript{150}

When interpreting Quranic verses, the historical context under which they were revealed must be considered. Quranic verses containing phrases such as ‘fight,’ ‘attack’ and ‘disbelievers’ were revealed during times of crisis, when pagan Arabs persecuted Muslims, and Jews constantly violated agreements of mutual alliance. A war must be motivated by justice and justice alone; wars fought by the Prophet were fought as a last resort, to establish liberty of conscience. Such a defensive war is depicted in the Quran as an unwanted obligation which God commanded Muslims to fight after many years of persecution.

\textit{Warfare is ordained for you, though it is hateful unto you; but it may happen that ye hate a thing which is good for you, and it may happen that ye love a thing which is bad for you. Allah knoweth, ye know not; (2:216); And what is the matter with you that you do not fight in the cause of Allah and for those weak, ill-treated and oppressed among men, women and children whose only cry is: ‘Our Lord rescue us from this town whose people are oppressors, and raise for us from you one who will protect us (4:75). Thus, God does not forbid you from being good to those who have not fought you over religion or driven you from your homes, or from being just towards them. God loves those who are just. God merely forbids you

\textsuperscript{150}Malekian, p. 137. For examples of situations of war in which the Prophet was involved, refer to the wars of Mustaliq; Khaibar; Hunain; Banu-Quraizah; Mecca.
from taking as friends those who have fought you over religion and driven you from your homes and who supported your expulsion (60:8-9).

B. War Crimes. Even in the very narrow exception under which a nation can resort to armed struggle, Islamic law governing the conduct of war must be observed. Thus, where an aggressor stops his hostilities, the other side must cease fighting immediately.\footnote{Verse (8:61) instructs: \textit{But if the enemy incline towards peace, do thou (also) incline towards peace, and trust in Allah: for He is One that heareth and knoweth (all things).}} Unlimited war is simply not permitted, and a strict principle of proportionality must be observed (\textit{Fight in the path of God [the path of justice and equality] against those who fight against you, but do not transgress. God does not love transgressors} (2:190);\footnote{Wherever the Quran commands the fighting “in the way of Allah” it is not, as many non-Muslims and perhaps some Muslims interpret, fighting in order to establish Islam. The Quran explicitly forbids compulsion in religion. Since Allah (God) is about justice and equality, fighting in Allah’s path is fighting for justice and equality. It should be made clear, also, that the oppressiveness of a particular regime is not to be determined based on the values of Islam; Muslims are commanded to share the message of Islam through friendly means and to effect social and political change through education and moral reformation; it is only when the peaceful efforts of the Prophet to deliver the message (he would send messengers to the rulers) were fought with brutal violence by the rulers of the people to whom he attempted to reach (rulers would refuse to let the people know about the message and would either degrade the messengers or kill many of them) did Muslims use armed struggle against such rulers. The Prophet himself was commanded to merely deliver the message to all humanity—not to impose it. (21:107-109: (O Prophet?) “We have not sent you except to be a mercy to all mankind: Declare, ‘Verily, what is revealed to me is this, your God is the only One God, so is it not up to you to bow down to Him?’ But if they turn away then say, ‘I have delivered the Truth in a manner clear to one and all, and I know not whether the promised hour (of Judgment) is near or far.’}}...if then any one acts aggressively against you, inflict injury on him according to the injury he has inflicted on you, and fear God, and know that God is with those who refrain from doing evil deeds and are righteous ones, 2:194).

All internationally recognized war crimes appear to fall within the Islamic international criminal law system. Under the Islamic system there is more emphasis on the criminality of acts against the natural environment and animals. The environment is
to be used in equitable and reasonable measure. Thus, unnecessary killing of animals during war is a crime. Similarly, poisonous weapons are prohibited. This is based on two reasons: first, the Islamic law of armed conflict requires the ‘bravery’ of the soldiers in the actual fight. Second, poisonous weapons are “against the moral aspects of human dignity and are consequently against divine law.”

Another difference is that all types of sexual abuse constitute war crimes. It would also appear that treachery during the conduct of war is prohibited under Islamic international criminal law, for the Prophet had said, “Fight ye all in the path of God... Yet never commit breach of trust nor treachery nor mutilate anybody nor kill any minor or woman.”

The rule of proportionality as described by the Quran and as understood by jurists (injury only in exactitude to the injury suffered) along with the Quranic injunction against harming of civilians and the environment and the requirement of bravery in the actual fight appear in complete contradiction with the current model of warfare. Dropping bombs from airplanes on ground soldiers or military ‘targets’ passes neither the proportionality test nor the bravery in the actual fight test nor the injunction against the harming of civilians, the environment and the infrastructure.

C. Crimes Against Humanity. What constitutes a crime under Islamic international criminal law is based on natural and moral law. For this reason, the legislation of certain rules on a domestic and international level and the acceptance of these regulations is not necessarily needed. Furthermore, since Islam emphasizes the individual’s place in the world, all pornography is considered an international crime according to Islamic law, whereas only child pornography is a crime according to Western international law.

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153 Malekian, p. 75.

154 All Pornography is considered an international crime according to Islamic law, whereas only child pornography is a crime according to Western international law.

155 Malekian, p. 177.
human community, a crime against a single person is considered a crime against the entire humanity. The Quran explains that whosoever takes an innocent life, it is as if he has killed the whole of humanity; and whosoever saves one innocent soul, it is as if he has saved the whole of humanity (5:32). The killing of civilians violates fundamental principles of divine law and is thus a crime against humanity. While, as was previously discussed, the principle of legality has long been established in the system of Islamic international criminal law, acts may constitute a crime against humanity regardless of whether or not the actor is aware of their criminalization. This is because the Islamic system basis its legal sanctions on both the principle of legality and the natural and moral wrong of criminal conduct. As Malekian explains,

...according to the Islamic theory it is not the awareness and information about the criminalization of an act which prevents the commission of related criminal conduct, it is rather the nature and the ill characterization of an act which provides the necessary information as to whether or not it constitutes a criminal conduct in accordance with the principles of legality”.

D. Genocide. Although Islamic international criminal law does not speak of the kind of genocide mentioned in the Genocide Convention, it does prohibit the killing of members of groups. The term “genocide” was coined in 1943 by Raphael Lemkin using the combination of the Greek word genos (race or tribe) and the Latin -cide (killing).

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156 Malekian, p. 78.

According to Kittichaisaree, "There was no specific reference to the term "genocide" in the Nuremberg Charter, but it did appear in the indictment and was referred to by the Prosecution from time to time. What is now known as genocide was in fact prosecuted by the Nuremberg Tribunal under the heading of crimes against humanity." In actuality, the international categories of 'crimes against humanity,' 'war crimes,' and 'genocide' all fall into one category of crimes under Islamic law. Since "it is the intention of killing, causing serious bodily harm, destroying or imposing forcible measures upon the members of any group which constitutes a crime," a person can be punished whether the crime was committed in whole or in part against a national, ethnic, or religious group of persons.\(^{159}\)

As Kittichaisaree reaffirms, "While other crimes against humanity require the civilian population to be targeted as part of a widespread or systematic attack, genocide requires the specific intent to destroy, in whole or in part, a national, ethnical, racial, or religious group of persons."\(^{160}\) Furthermore, the victim of the crime need not belong to the same nationality as one of the conflicting parties, for it is "the motive of ill-action which gives rise to the concept of crime and not the existence or non-existence of various elements enumerated in the Genocide Convention."\(^{161}\)

It is interesting to note that the current Genocide Convention definition does not acknowledge cultural genocide (that is, the destruction of the language and culture of a

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\(^{158}\) Id.

\(^{159}\) Malekian, p. 91. An ethnic group is one whose members share a common language and culture, while a religious group is a group whose members share the same religion, denomination or mode of worship, or common beliefs. See Kittichaisaree, p. 69-70.

\(^{160}\) Kittichaisaree, p. 68.

\(^{161}\) Id. at 92.
group) as a crime. Similarly, the extermination of a group on political grounds does not constitute an act of genocide, according to the Genocide Convention. Therefore, although killing all the communists in a country is extermination, is it necessarily genocide? The Genocide Convention also chose to exclude political, cultural, as well as economic genocide because these terms are all ill-defined. The Convention therefore confines itself to the physical destruction of groups to which persons belong to.

E. Discrimination/Apartheid. The Islamic international criminal system defines discrimination much more broadly than does the international criminal law system. As in the case of genocide, whether the crime of discrimination is committed against a group or a single individual is irrelevant. As Malekian explains,

The logic behind this philosophy from Islamic international criminal law is that in order to determine whether or not an act of discrimination or apartheid has been committed, one must refer to the purpose and aim of the criminal act and against whom it was committed and not to the number of individuals or the group of individuals against whom the criminal activities were carried out (96).

Discrimination or apartheid constitutes a crime against the social divine principles of equality. Part of the Prophet’s Farewell Sermon reads:

...O people, do fear Allah concerning the women...verily your Lord is one and your father is one. All of you belong to Adam and Adam is of earth. Behold, there is no superiority for an Arab over a non-Arab and for a non-Arab over an Arab; nor for a red-coloured over a black-coloured and for


163 Cassese, p. 96-97.
a black-skinned over a red-skinned except in piety. Verily the noblest among you is he who is the most pious... O people! Listen and obey though a mangled Abyssinian slave is your ruler so long as he executes (the ordinances of) the Book of Allah\textsuperscript{164}

The \textit{Quran} further explains: \textit{O people, We have created you male and female, and have made you nations and tribes that ye may know one another. The noblest of you, in the sight of Allah, is the best in conduct...}, (49:13). Furthermore, all humans have an inherent right to enjoy an equal standard of life; all types of social and institutional priority between humans is discriminatory. An example of discrimination under Islamic international criminal law would be a body like the United Nations, where a minority enjoys a higher voice than the majority. According to Malekian,

When one speaks of the criminalization of apartheid and discrimination under Islamic international criminal law, one does not need to decide whether the state in which such activities are carried out is Muslim or non-Muslim. This is because in Islamic law it is the spirit of human beings which is identified with dignity and not necessarily the system of law.\textsuperscript{165}

Having established that all humans are inherently equal in worth and dignity, Islamic philosophy recognizes that God has not distributed God’s gifts equally (whether they be material or physical or intellectual). There is “unnatural inequality” and there is “natural inequality.” Unnatural inequality is that which is the result of one class (or race or group) of people being privileged over another through ideologies which serve their interest and

\textsuperscript{164} There are many versions to this Sermon; even though the variations are slight and the essence of the message is clear, it can make a difference. See Appendices for one version, also available at http://www.stanford.edu/~jamila/Sermon.html

\textsuperscript{165} Malekian, p. 78.
seek to perpetuate their power. Islamic law recognizes that to demand equality in all situations can result in injustice. A law which discriminates between people in order to restore the balance of equality (such as affirmative action) is thus allowed under Islamic philosophy. Indeed, while the dignity of people is equal, when it comes to the social context, it is equity which is constantly demanded.

Two specific issues are worthy of discussion in relation to equity and discrimination: the status of women and the status of non-Muslims. (i) **Women in Islam:**

There is no doubt that the Quran and Sunnah speak of women as inherently equal to men. Men and women are born from a single soul (Quran: 4:1: O mankind! Reverence your Guardian-Lord, who created you from a single soul and from it created its mate...Reverence Allah, through Whom you demand your mutual (rights), and reverence the wombs (that bore you)...., and they are, according to the Prophet, the twin halves of each other. The Quran further explains, *They (your wives) are your garment and you are a garment for them* (2:187). The Quran and Hadeeth recognized the soul and sexuality of women. The Quran moreover stresses the need to protect female infants because during the period of the *Jahiliya* (Age of Ignorance), prior to the introduction of Islam into Arabia, female infants were considered a social as well as an economic burden by the Pagan Arabs, and thus female infanticide was a common practice. However, Islam

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condemned female infanticide and promised a reward for those who educate their
daughters, do not insult them, or favor their sons over them.\footnote{167}

The relationship of husband and wife is described as one of mutual rights, mutual
peace, love and compassion. Consider the following Quranic verses: \textit{And among [God’s] Signs is this, that [God] created for you mates from among yourselves that you may dwell in tranquility with them, and [God] has put love and mercy between your (hearts) (30:21); O you who believe! You are forbidden to inherit women against their will. Nor should you treat them with harshness…live with them on a footing of kindness and equity. If you take a dislike to them, it may be that you dislike a thing through which Allah brings about a great deal of good (4:19).} Mutual consent between husband/wife is recognized (2:233) and arbitration in the case of conflict is recommended (4:35). In the case of irreconcilable differences, divorce is allowed. However, while the Quran speaks of a ‘no-fault’ divorce, some Muslim countries (aided by some jurists) have made it virtually impossible for a woman to obtain a divorce.

Some Muslim jurists also discriminate against the testimony of females. At a
time when women were not familiar with the business world, the following Quranic verse
 came down: \ldots\textit{when you contract a debt for a fixed term, you should put it in writing…and let two men from among you bear witness to all such documents. But if two men are not available, there should be one man and two women to bear witness so that if...}\\
\footnote{167 The Quran has warned against the killing of female infants, explicitly declaring \textit{Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin (17:31).} Another verse reads: \textit{When news is brought to one of them of the birth of a female child, his face darkens and he is filled with inward grief! With shame does he hide himself from his people, because of the bad news he has had! Shall he retain it on (sufferance and) contempt, or bury it in the dust? Ah! What an evil (choice) they decide on. The penalty for killing infants is severe: And when the female infant buried alive is asked for what crime she was killed...And when the hell is kindled up... Then shall each soul know what it has put forward (81:8-14).}
one of the women forgets (anything), the other may remind her... (2:282). This verse is self-explanatory; the rationale behind the need for two female witnesses is specified. Yet Muslim jurists have agreed on rules that completely disqualify the testimony of women in all cases that are listed under Hadd. In other cases a woman’s testimony will be allowed but two females are needed for every one male. Finally, in political cases women’s testimony is allowed without restriction. No rationale is offered; yet when a scholar is pushed, he will offer something to the effect of women being emotional.

These rules find no support in the Quran or the Sunnah, but rather have [largely unarticulated] rationales that live in the minds of some men. The goal of the above mentioned verse is to protect financial transactions and do justice to the parties involved. In many Muslim societies this verse is still relevant; yet to demand it in cases where it is clear that it will lead to injustice (at a time when more women are involved in business) defeats its purpose. There is only one other Quranic verse which speaks of women’s testimony, and that verse allows for her testimony to invalidate that of a male in cases where she is accused of adultery by her husband (24:6-11).

Similarly, there are disagreements among religious scholars as to whether women can be judges (as opposed to jurists) and to what extent. No Quranic verses prohibit women from being full participants in their society; if anything, there is evidence to the contrary. In regards to female judges, the Quran commands all believers—not all men—to judge fairly (4:58). Even more, the Quran states that both men and women have an equal responsibility to communicate the message of Islam and to promote justice and oneness; thus, how is it possible that when it comes to the most crucial means of advancing these objectives—judgeship and religious and political leadership—women
It is common knowledge that women in early Islam, including the Prophet’s wives and daughter and granddaughter, transmitted much of the religion, gave sermons to women and men, and even taught male scholars. At least two of the founders of the four Sunni schools of law were educated by females. Yet a woman-phobia in parts of the Islamic world has propagated the idea that the voice of a woman promotes sin. Nevertheless, the fact that there are serious disagreements on these issues, and the presence of respected male jurists who do not believe Islam restricts women from being judges or leaders, goes to further show that the Quran and Hadeeth do not prohibit women from full participation in society; instead, evidence to the contrary abounds. Women in early Islam used to debate with the Prophet himself, were appointed to public offices, headed Islamic provinces, held the sword and fought and died alongside the Prophet, some engaged in the business of trade, initiated their own marriage proposals, and indeed, appear to have been more assertive than many Muslim women are today.

(ii) Status of non-Muslims: Differences are to be tolerated, for the Quran says: ...had God willed, [God] could have made you one community, but [God] may try you by that which [God] has given you; so vie one with the other in good works; unto God ye will all return, and [God] will then inform you of that wherein you differed (5:47-8). Special reverence is given to the “People of the Book” (those who follow the Scriptures), but Islam also recognizes the right of any group to live in an Islamic state and to govern themselves so long as they do not attack Muslims. There are many verses that speak well


169 The Quran itself speaks favorably of Queen of Sheba and her judgment. See Quran: 27:32-5.
of the People of the Book, and there are others that criticize them. There is no contradiction here, for it is made clear that ...*There is from among them a party on the right course; but many of them follow a course that is evil* (5:66). Nor is evilness found only among Christians and Jews, for Quranic verses and Hadeeth speak just as critical of Muslims. The Quran criticizes Muslims who are not “mu’mins” (believers), describes them as ‘hypocrites,’ and promises them punishment if they do not repent; similarly, the Imam Ali said that “*There will come a day when the mosques are thriving on the outside, but are corrupted in their guidance. There will come a day when those who build mosques and those who attend them are the most evil on earth.*”

The point here is that non-Muslims living in an Islamic state are not only to be tolerated but also treated justly. This principle was established in the Quran and also in what is arguably the world’s oldest written Constitution—the Medina Charter. This was a pact and a “mini-constitution” that was initiated by the Prophet. It transformed the chaotic society of al-Madina, which was multi-ethnic and multi-religious, into a city-state. Consider also one of the few model Islamic governments—Al-Andalus, Spain. Under this government non-Muslims were not only tolerated but also were at their height in prosperity. Churches and Synagogues with Arabic and Quranic inscriptions stand in Spain to this day; a Jewish renaissance also took place under this rule. According to the

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171 The full translated text of the Medina Charter is available in the Appendices.

172 For more on Al-Andalus, see the following links:
http://www.twbookmark.com/authorslounge/articles/2002/may/article15066.html;
Quran and actual practice of the early Islamic State, non-Muslims can have their own courts;\textsuperscript{173} also, jurists agree that non-Muslims can be judges in Islamic courts if they are willing to apply Islamic law. Non-Muslims also served in the Islamic military and were appointed to high-level political positions in the early Islamic State. However, as there is no separation between state and religion, many argue the head of the Islamic state is supposed to also be the religious leader of the Muslim masses; as such, non-Muslims would be unable to obtain this office.\textsuperscript{174}

F. Slavery. At the time the message of Islam came, slavery was a world-wide acceptable institution. What the idea of slavery was based upon, however, was not necessarily the same all over. In Arabia, before Islam and before the implementation of an Islamic government, slaves were the prisoners of war, whereas in other parts of the world slavery was lawful at all times. Slavery was not based on theories of racial or ethnic inferiority; instead, all Arab tribes had slaves from each other as a result of tribal warfare. In the early years of Islam, but before the establishment of an Islamic government, slavery continued but was restricted. Slaves were obtained in the course of legitimate war; private razes, kidnappings or sale of infants by their parents had no legal sanction.\textsuperscript{175} The taking of war prisoners as slaves was seen as a means of preventing further bloodshed and a way of communicating to them the message of Islam. Still, it was the Prophet's tradition and teaching to release those captured during war and to do so

\textsuperscript{173} \textit{If then they have recourse unto thee, judge between them or disclaim jurisdiction...but if thou judgest, judge between them with equity...} (5:42).

\textsuperscript{174} The following site provides a well-written document on “The Status of Non-Muslims in Islam:” \url{http://www.sharif.org.uk/rule.htm}

\textsuperscript{175} Malekian, p. 88.
without taking any reward. Even before the establishment of the Islamic government, the Muslims had to release the slaves of the disbelievers by giving ransom. After the Islamic state was established, no one was allowed to keep slaves; furthermore, Arabian Muslims abolished slavery from some parts of the world by setting free slave subjects of great kings.\footnote{Id. at 83.}

What it meant to be a slave in early Islam was radically different than what it meant in other parts of the world. As explained, "slavery as practiced in Greece, Rome or modern America was a condition of rightlessness which had no parallel in Islamic law...the master's authority was not unlimited...Further, the slave had equal rights before the criminal law" and killing a slave resulted in capital punishment.\footnote{Id. at 85.} Slaves had a legal right to eat and be clothed of the same food and clothes as the master, to earn money, hold property in their own right, and have a family. Expiation for certain crimes required the guilty to release some slaves (4:92; 2:177); slaves were integrated into society through God's recommendation of intermarriage between them and the free (2:221); income from taxation was to be used to pay masters in order to release their slaves. Muslims were commanded that all are created equal and submission was only to God. Without an explicit prohibition, the Quran abolished slavery by eliminating its social causes and prescribing means of emancipation.

**G. Torture.** The Islamic international criminal law system takes on a broader concept of torture. Malekian defines it as "the enforcement of unlawful and immoral measures by force which are not acceptable in Islamic theory and are against the spiritual dignity of
the victim as they are imposed by physical or psychological force”.

What distinguishes the concept of torture here from that found in international criminal law is that the above described act constitutes torture whether or not the actual act of torture causes any form of physical or psychological suffering. The explanation for this is that Islamic law does not define an act as torture based on the tolerance of the victim; rather, the theory is that the spiritual dignity of persons is to be respected at all times regardless of the one’s strength. The Universal Islamic Declaration of Human Rights includes the following article on torture:

No person shall be subject to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests (Principle VII)

H. Crimes Against Internationally Protected Persons. It was recognized in the practice of Prophet Muhammad that those who came to negotiate or deliver messages enjoyed immunity during the mission. Because each individual by himself is a unit, protections and immunities in this system can be granted to envoys of populations or groups who do not have ‘international personality’ under international law. Immunity for diplomats is due to the framework of Islamic law which provides aman (‘safety’) to

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178 Malekian, p. 103.

179 Id.

180 See Appendices for the abbreviated text of The Universal Islamic Declaration of Human Rights.

181 Malekian, p. 110.
all those who have an internationally protected position; it is also based on the Muslim’s belief that special respect is due those who are invited.\textsuperscript{182} In accordance with the practice of the Prophet, an envoy is immune during the time of his visit even if he is a criminal of the state to which he is sent.\textsuperscript{183}

The Prophet taught that envoys must be given full freedom of prayer and religious rites (the Prophet allowed the delegation of the Christians of Najran to celebrate a service in the Mosque of the Prophet).\textsuperscript{184} Only in ‘extraordinary’ cases may envoys be detained (the Prophet detained the plenipotentiaries of Mecca until the Muslim ambassador detained in Mecca returned safe to Hudaibiya where the Prophet was camping). Furthermore, the property of envoys is exempt from import duties in Muslim territory if reciprocated. Protection and immunity during the trip also extends to any other persons who happen to accompany the protected persons. Thus, one who aids another or attempts or threatens to violate such privileges may be guilty of a crime against an internationally protected person.

I. Hostage Taking and Prisoners of War. Hostage taking of innocent civilians is forbidden in Islamic law because the end does not justify the means. The taking of those who are fighting you or aiding the enemy as prisoners-of-war, however, is legitimate. The

\textsuperscript{181} Id. at 111.

\textsuperscript{182} In one—perhaps exaggerated—instance in the early twentieth century, Russian envoys who sought asylum in a religious tomb close to Teheran after they had raped Persian women were safely returned to their country. I have not researched this topic enough to decide whether or not Islamic law would require such deference. Furthermore, “the concern for legality has forced the Muslim jurists to admit that if a crime is committed, even against a Muslim, who is the subject of the Muslim state, by a foreigner in a foreign land, and this foreigner later comes peacefully to the Muslim state, he would not be tried by the Islamic tribunals…” (Malekian, 104). This would seem to produce a much more restricted exercise of jurisdiction than international law would otherwise allow.

\textsuperscript{184} Malekian, p. 111.
relevant Quranic verse regarding prisoners of war is: *So when you encounter the unbelievers in a battle, smite at their necks until when you have slaughtered them and consequently have overcome them, then you imprison them, and afterwards either set them free as a favour or taking some ransom until they lay down their arms, this is a just Law of God for war mongers*…(47:4). Ransom is allowed as a means of decreasing the risk of killing prisoners by revenge. A Muslim state is required to set aside an income for the ransom. The Quran further recommends the gratuitous release of prisoners of war once hostilities end (9:60) and a Muslim state must provide ransom for its own.

Quarter is also to be given to enemy combatants. The Quran directs, *And if anyone of the polytheists seeks your protection, then protect him so that he may hear the word of Allah, and afterward convey him to his place of safety…that is because they are a folk who know not* (9:6). Quarter may be requested from the authorities of the state or it may be considered by the authorities without prior request, and, according to Malekian, it may be conditional (such as the receipt of payment). If any Muslim gives quarter it will be valid upon the state so long as it is not contradicted by the commander of the army. According to Malekian, unlike the person seeking asylum, there is no absolute right to quarter (153).
Chapter V.

The Conclusion

Despite the many contributions that Islamic international criminal law has made, and despite its existence in some form prior to the system of Western international criminal law, Orientalists, such as Bernard Lewis and Joseph Schacht, deny the contributions of Islamic law to society. Their goal is to discredit Islam and Muslims and to show Islamic law as nothing more than an uncivilized code administered by arbitrary laymen. The Hadd punishments and the shortcomings of Islamic society in its treatment of women (which by the way is not so foreign to the rest of the world) is portrayed as all there is of Islamic law. These writers speak of Islamic law without knowledge of either Islamic law or Muslim society; they also like to speak of qualities of Islamic law which are present in Western law in a deprecating manner (for example, unlike the civilized development of common law through precedent, Islamic law’s use of precedent is ‘holding on to the past’ and backward).

The “fundamentalists,” on the other hand, criticize the Orientalists, but their fear of a Western war on Islam drives them to hold on to Islam so much so that they begin to portray it as static; thus, they usually do Islam a great disservice and serve to reinforce the claim of the Orientalists. Finally, the Muslim “Reformists” are trying to show that the “Fundamentalists” have misconstrued and distorted Islam. Yet there is something quiet unsettling about their rhetoric, for these writers (or many of them) appear to be concerned not in clarifying Islam per se, but rather in making Islam ‘fit’ into the Western model; the citation to Quran and Sunnah is often (perhaps due to a lack of juristic knowledge of Islam) taken out of context. The rhetoric is one of “an Islamic
reformation” as if it is Islam that needs to be reformed—not Muslim society. From their analysis, one gets the idea that the superiority of the Western system has been presumed, especially when it comes to the institution of punishment. Some are more honest than others, blatantly stating that Islam has to change. These writers only reinforce the Fundamentalist’s view that Islam is under attack, and appear to work within “the Orientalist gaze.” Furthermore, they alienate many Muslims.

This work offers an alternative to the various views that have been examined. This alternative would seem to be a discourse which recognizes not just the past contributions of Islamic international criminal law but also its potential to contribute to international law now. Far from being static, Islamic law has stood the test of over 1,400 years, and has been able to adjust to different times all while preserving its message; furthermore, among the Sunni Muslims alone there are four different legal schools; similarly, there are three Shia legal schools. Not only are there inter-group differences but also intra-group differences as well. A comparison of Shaybani’s *Siyar* and other early Islamic writings with current Islamic international law shows that Islamic law is very much a part of the social and political context.

It is evident that Islam is able to regulate meaningful and practical conduct between nations, regardless of their theological beliefs. Islam is able to respect the rules and regulations which allow states and individuals to maintain their necessary universal relations. Moreover, through the application of Islamic international criminal law, the Islamic system is able to enforce the prohibition of certain illegal activities which constitute illegal crimes under international law. The character of Islamic law is one of universality, based on equal application with an emphasis on justice.
It is apparent from the preceding chapters that although there is a general view, particularly in the West, that Islamic law is incompatible with the ideals of international human rights, and that human rights cannot be realized within the framework of Islamic law, the fact is that there is indeed a human rights discourse within Islamic law. Although there are differences in scope and application between the two legal systems, these differences can be meaningfully discussed so as to enhance the understanding and application of international human rights. In the end, while Muslim states have the sovereign right to apply Islamic law within their own jurisdictions, the protection of human rights as a sacred veil needs to be acknowledged universally.

The apparent shortcomings of Muslim society and some Islamic jurists cannot be hushed; however, the criticism needs to come more from within the Muslim community than from without. Such a discourse would also recognize the limits of change from an Islamic perspective; in other words, while it is possible to change an Islamic rule that was arrived at through consensus, many Muslims will resist to the utmost against anyone who wants to change a rule that is clearly stated in the Quran or the sunnah. Finally, this discourse would recognize that one basic right under international human rights is the right to practice one’s religion, and while Muslims can compromise with non-Muslims on international issues by entering into agreements, they have the right to govern their own private lives under an Islamic system.


[http://www.saudiembassy.net/Issues/HRights/IssuesRig.asp](http://www.saudiembassy.net/Issues/HRights/IssuesRig.asp)

“Islamic Criminal Justice: Is it Barbaric?”
[http://www.islamonline.net/fatwa/english/FatwaDisplay.asp?fFatwaID=60870](http://www.islamonline.net/fatwa/english/FatwaDisplay.asp?fFatwaID=60870)


“Islamic Criminal Law.”
[http://saif_tripod.com/explore/crime/islamic_criminal_law.htm](http://saif_tripod.com/explore/crime/islamic_criminal_law.htm)

MSA-USC Hadith Database.

The Vienna Convention on the Law of Treaties

APPENDICES

The Universal Declaration Of Human Rights*

Article 1
Right to Equality

Article 2
Freedom from Discrimination

Article 3
Right to Life, Liberty, Personal Security

Article 4
Freedom from Slavery

Article 5
Freedom from Torture and Degrading Treatment

Article 6
Right to Recognition as a Person before the Law

Article 7
Right to Equality before the Law

Article 8
Right to Remedy by Competent Tribunal

Article 9
Freedom from Arbitrary Arrest and Exile

Article 10
Right to Fair Public Hearing

Article 11
Right to be Considered Innocent until Proven Guilty

Article 12
Freedom from Interference with Privacy, Family, Home and Correspondence

Article 13
Right to Free Movement in and out of the Country

Article 14
Right to Asylum in other Countries from Persecution

Article 15
Right to a Nationality and the Freedom to Change It
Article 16
Right to Marriage and Family

Article 17
Right to Own Property

Article 18
Freedom of Belief and Religion

Article 19
Freedom of Opinion and Information

Article 20
Right of Peaceful Assembly and Association

Article 21
Right to Participate in Government and in Free Elections

Article 22
Right to Social Security

Article 23
Right to Desirable Work and to Join Trade Unions

Article 24
Right to Rest and Leisure

Article 25
Right to Adequate Living Standard

Article 26
Right to Education

Article 27
Right to Participate in the Cultural Life of Community

Article 28
Right to a Social Order that Articulates this Document

Article 29
Community Duties Essential to Free and Full Development

Article 30
Freedom from State or Personal Interference in the above Rights

* This is an abbreviated version of the Universal Declaration of Human Rights. For the full text, see www.un.org/overview/rights.html
The Universal Islamic Declaration Of Human Rights*

Article I
Right to Life

Article II
Right to Freedom

Article III
Right to Equality and Prohibition Against Discrimination

Article IV
Right to Justice

Article V
Right to Fair Trial

Article VI
Right to Protection Against Abuse of Power

Article VII
Right to Protection Against Torture

Article VIII
Right to Protection of Honor and Reputation

Article IX
Right to Asylum

Article X
Rights of Minorities

Article XI
Right to Participate in Public Affairs

Article XII
Right to Freedom of Belief, Thought and Speech

Article XIII
Right to Freedom of Religion

Article XIV
Right to Free Association

Article XV
The Economic Order and the Rights Evolving Therefrom

Article XVI
Right to Protection of Property
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Article XVIII
Right to Social Security

Article XIX
Right to Found a Family

Article XX
Rights of Married Women

Article XXI
Right to Education

Article XXII
Right of Privacy

Article XXIII
Right to Freedom of Movement and Residence

* This is an abbreviated version of the Universal Islamic Declaration of Human Rights. For the full text, see www.alhewar.com/ISLAMDECL.html
The Medina Charter\textsuperscript{185}

622 C.E.

In the name of God the Compassionate, the Merciful.

(1) This is a document from Muhammad the prophet (governing the relations) between the believers and Muslims of Quraysh and Yathrib, and those who followed them and joined them and labored with them.

(2) They are one community (umma) to the exclusion of all men.

(3) The Quraysh emigrants according to their present custom shall pay the bloodwit within their number and shall redeem their prisoners with the kindness and justice common among believers.

(4-8) The B. 'Auf according to their present custom shall pay the bloodwit they paid in heathenism; every section shall redeem its prisoners with the kindness and justice common among believers. The B. Sa'id, the B. 'I-Harith, and the B. Jusham, and the B. al-Najjar likewise.

(9-11) The B. 'Amr b. 'Auf, the B. al-Nabit and the B. al-'Aus likewise.

(12)(a) Believers shall not leave anyone destitute among them by not paying his redemption money or bloodwit in kindness.

(12)(b) A believer shall not take as an ally the freedman of another Muslim against him.

\textsuperscript{185} Text is taken from A. Guillaume, \textit{The Life of Muhammad-- A Translation of Ishaq's Sirat Rasul Allah}, Oxford University Press, Karachi, 1955; p. 231-233.
(13) The God-fearing believers shall be against the rebellious or him who seeks to spread injustice, or sin or animosity, or corruption between believers; the hand of every man shall be against him even if he be a son of one of them.

(14) A believer shall not slay a believer for the sake of an unbeliever, nor shall he aid an unbeliever against a believer.

(15) God’s protection is one, the least of them may give protection to a stranger on their behalf. Believers are friends one to the other to the exclusion of outsiders.

(16) To the Jew who follows us belong help and equality. He shall not be wronged nor shall his enemies be aided.

(17) The peace of the believers is indivisible. No separate peace shall be made when believers are fighting in the way of God. Conditions must be fair and equitable to all.

(18) In every foray a rider must take another behind him.

(19) The believers must avenge the blood of one another shed in the way of God.

(20)(a) The God-fearing believers enjoy the best and most upright guidance.

(20)(b) No polytheist shall take the property of person of Quraysh under his protection nor shall he intervene against a believer.

(21) Whoever is convicted of killing a believer without good reason shall be subject to retaliation unless the next of kin is satisfied
(with blood-money), and the believers shall be against him as one man, and they are bound to take action against him.

(22) It shall not be lawful to a believer who holds by what is in this document and believes in God and the last day to help an evil-doer or to shelter him. The curse of God and His anger on the day of resurrection will be upon him if he does, and neither repentance nor ransom will be received from him.

(23) Whenever you differ about a matter it must be referred to God and to Muhammad.

(24) The Jews shall contribute to the cost of war so long as they are fighting alongside the believers.

(25) The Jews of the B. ‘Auf are one community with the believers (the Jews have their religion and the Muslims have theirs), their freedmen and their persons except those who behave unjustly and sinfully, for they hurt but themselves and their families.

(26-35) The same applies to the Jews of the B. al-Najjar, B. al-Harith, B. Sai'ida, B. Jusham, B. al-Aus, B. Tha'labab, and the Jafna, a clan of the Tha’labab and the B. al-Shutayba. Loyalty is a protection against treachery. The freedmen of Tha’labab are as themselves. The close friends of the Jews are as themselves.
(36) None of them shall go out to war save the permission of Muhammad, but he shall not be prevented from taking revenge for a wound. He who slays a man without warning slays himself and his household, unless it be one who has wronged him, for God will accept that.

(37) The Jews must bear their expenses and the Muslims their expenses. Each must help the other against anyone who attacks the people of this document. They must seek mutual advice and consultation, and loyalty is a protection against treachery. A man is not liable for his ally’s misdeeds. The wronged must be helped.

(38) The Jews must pay with the believers so long as war lasts.

(39) Yathrib shall be a sanctuary for the people of this document.

(40) A stranger under protection shall be as his host doing no harm and committing no crime.

(41) A woman shall only be given protection with the consent of her family.

(42) If any dispute or controversy likely to cause trouble should arise it must be referred to God and to Muhammad the apostle of God. God accepts what is nearest to piety and goodness in this document.

(43) Quraysh and their helpers shall not be given protection.

(44) The contracting parties are bound to help one another against any attack on Yathrib.
(45)(a) If they are called to make peace and maintain it they must do
so; and if they make a similar demand on the Muslims it must be carried
out except in the case of a holy war.

(45)(b) Every one shall have his portion from the side to which he
belongs.

(46) The Jews of al-Aus, their freedmen and themselves have the same
standing with the people of this document in purely loyalty from the
people of this document. Loyalty is a protection against treachery. He
who acquires ought acquires it for himself. God approves of this
document.

(47) This deed will not protect the unjust and the sinner. The man who
goes forth to fight and the man who stays at home in the city is safe
unless he has been unjust and sinned. God is the protector of the good
and God-fearing man and Muhammad is the apostle of God.
Prophet Muhammad’s Last Sermon

All praise be to Allah. We glorify Him and seek His help and pardon; and we turn to Him. We take refuse with Allah from the evils of ourselves and from the evil consequences of our deeds. There is none to lead him astray whom Allah guides aright, and there is none to guide him aright whom He leads astray. I bear witness that there is no god but Allah alone, having no partner with Him, and I bear witness that Muhammad is His bondman and His Messenger. I admonish you, O bondmen of Allah! to fear Allah and I urge you to His obedience and I open the speech with that what is good.

Ye people! Listen to my words: I will deliver a message to you, for I know not whether, after this year, I shall ever be amongst you here again. O people! verily your blood, your property and your honor are sacred and inviolable until you appear before your Lord, as this day and this month are sacred for all. Verily you will meet your Lord and you will be held answerable for your actions. Have I not conveyed the message? O Allah! Be my witness. He who has any trust with him, should restore it to the person who deposited it with him. Beware, no one committing a crime is responsible for it but he himself. Neither the son is responsible for the crime of his father, nor the father responsible for the crime of his son.

186 From <http://www.stanford.edu/~jamila/Sermon.html>
O people! Listen to my words and understand them. You must know that a Muslim is the brother of the Muslim and they form one brotherhood. Nothing of his brother is lawful for a Muslim except what he himself allows willingly. So you should not oppress one another. O Allah! have I not conveyed the message?

Behold! all practices of paganism and ignorance are now under my feet. The blood-revenges of the days of ignorance are remitted. The first claim on blood I abolish is that of Ibn Rabilah Ibn Harith who was nursed in the tribe of Sad and whom the Hudhail killed. Usury is forbidden, but you will be entitled to recover your principal. Wrong not and you would not be wronged. Allah has decreed that there should be no usury and I make a beginning by remitting the amount of interest which Abbas b. Abd al-Muttalib has to receive. Verily it is remitted entirely.

O people! fear Allah concerning women. Verily you have taken them on the security of Allah and have made their persons lawful unto you by words of Allah. Verily you have certain rights over your women and your women have certain rights over you. It is incumbent upon them to honor their conjugal rights and not commit acts of impropriety which, if they do, you have authority to chastise them, yet not severely. If your wives refrain from impropriety and are faithful to you, clothe and feed them suitably. Behold! Lay injunctions upon women but kindly.

O people! Listen and obey though a mangled Abyssinian slave is your Amir if he executes the ordinances of the Book of Allah among you.
O people! Verily Allah has ordained for every man the share of his inheritance. The child belongs to the marriage-bed and the violator of wedlock shall be stoned. He who attributes his ancestry to other than his father or claims client-ship to other than his master, the curse of Allah, that of the angels, and the people will be upon him. Allah will accept from him neither repentance nor righteousness.

O people! Listen, O listen! Verily the Satan despairs of ever being worshipped in this land of yours, but he will be pleased even if you follow him in matters which you regard as trifles. Therefore, you abstain from obedience to Satan.

Verily, I have left amongst you the Book of Allah and the Sunnah of His Apostle which if you hold fast, you shall never go astray. And if you were asked about me, what would you say? They replied: We bear witness that you have conveyed the message and discharged your ministry.

O people! Verily the intercalation (of a prohibited month) aggravates infidelity. Thereby the unbelievers are led to wrong. For they make it lawful one year and forbid it in another year to be in conformity with the number (of months) which Allah declared to be unlawful; so they consider violable that which Allah declared to be inviolable and they consider inviolable what Allah declared to be violable.

Verily the time has revolved in its own way from the day when the heavens and the earth were created. The number of months to Allah is twelve of which four are sacred; three are consecutive--Dhil Qadah, Dhil Hijjah, Muharram, and Rajab which is between Jamadah and Shaban. So I apprise you that your lives, your property and your honor must be as sacred to one another as this sacred day, in this sacred month, in this sacred town.
And your slaves; see that you feed them with such food as you eat yourselves; and clothe them with the clothes that you yourselves wear. And if they commit a fault which you are not inclined to forgive, then part with them for they are the servants of Allah and are not to be chastised. Behold! Listen to me. Worship your Lord; offer prayers five times a day; observe fast in the month of Ramadan; make pilgrimage to the House (Kabah); pay readily the Zakat on your property and obey whatever I command you; only then you will get into heaven.

O people! Verily your Lord is one and your father is one. All of you belong to one ancestry of Adam, and Adam was created out of clay. There is no superiority for an Arab over a non-Arab and for a non-Arab over an Arab; nor for white over the black nor for the black over the white except in piety. Verily the noblest among you is he who is the most pious.

Behold the nearer ones of you should convey the message to the remoter ones. I have conveyed the message. Then looking up to the heaven, he said: O Lord! I have delivered the message and discharged my ministry.

O Lord! I beseech Thee, bear Thou witness unto it. It was at this time that the verse regarding the completion of religion was revealed to him: This day have I perfected for you your Faith, and completed My favor upon you. And I am well pleased with Al-Islam as your religion.
Prophet Muhammad’s Farewell Address\textsuperscript{187}

O people! lend an attentive ear to my words; for I know not whether I shall ever hereafter have the opportunity to meet you here. Do you know what today is? This is the sacred Day of Sacrifice. Do you know what month it is? This is the sacred month (Dhul-Hijjah). Do you know what place this is? This is the sacred town (Mina). So I inform you that your lives, properties and honor must be as sacred to one another as this sacred day of this sacred month, in this sacred town. Let those who are present take this message to those who are absent. You are about to meet your Lord, Who will call you to account for your deeds. As of this day all sums of interest are remitted, including that of Abbas ibn Abd al-Muttalib. Every night arising from homicide in pre-Islamic days is henceforth waived, and the first such right that I waive is that arising from the murder of Rabi'ah ibn al-Harith ibn Abd al-Muttalib.

O people! this day Satan has despaired of re-establishing his power in this land of yours. Nevertheless, should you obey him, even in what may seem to be trifling, it will be a matter of pleasure for him. Beware of him, therefore, for the safety of your religion.

\textsuperscript{187} Text available at <http://www.quraan.com/index.aspx>
O my people! you have certain rights over your wives, and your wives have
certain rights over you. Allah has entrusted them to your hands, so you must treat them
with all kindness. It is your right that they do not associate on intimate terms with any
one of whom you do not approve, and that they never commit adultery. All Muslims, free
or enslaved, have the same rights and responsibilities. No one is higher than another
unless he is higher in virtue.

O people, though an Abyssinian slave may become your Amir (Ruler), listen and
obey him, as long as he executes the Book of Allah among you.

O people! listen to what I say, and take it to heart. I leave you with the Book of
Allah, and the sunnah of His Prophet. If you follow them, you will never go astray. You
must know that every Muslim is the brother of another Muslim. You are equal. You are
members of one common brotherhood. It is forbidden for any of you to take from his
brother save what the latter should willingly give. Do not oppress your people.

O Lord! I have delivered Your Message.