

April 2006

Of War and Peace: The Hudaibiya Model of Islamic Diplomacy

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Smith, Perry S. (2006) "Of War and Peace: The Hudaibiya Model of Islamic Diplomacy," *Florida Journal of International Law*: Vol. 18: Iss. 1, Article 2.

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OF WAR AND PEACE: THE HUDAIBIYA MODEL OF
ISLAMIC DIPLOMACY

*Perry S. Smith**

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I. INTRODUCTION

In May 1994, the late Yasir Arafat, commenting on the existing Palestinian/Israeli peace accord, stated: “I see this agreement as being no more than the agreement signed between our Prophet Muhammad and the Quraysh in Mecca.”¹ This is a reference to the Treaty of Hudaibiya, a ten-year peace treaty concluded between Muhammad and the Quraysh in A.D. 628.² Controversial allegations of a technical breach of this treaty by the Quraysh led to Muhammad’s invasion and conquest of Mecca in A.D. 630.³ Arafat repeatedly made references to the Treaty of Hudaibiya.⁴

1. Daniel Pipes, *Lessons from the Prophet Muhammad’s Diplomacy*, 6 MIDDLE E.Q. (1999), available at <http://www.meforum.org/article/480> (last visited Dec. 19, 2005).

2. *Id.*
3. *Id.*
4. *Id.*

The Treaty of Hudaibiya was back in the news in late 2003 when it was mentioned prominently in a controversial speech given by then Malaysian Prime Minister Mahathir Mohamad to the Islamic Summit Conference on October 16, 2003. In recommending a united Muslim response to Israel, he explicitly recounted the circumstances surrounding the Treaty of Hudaibiya.⁵

These references to the Treaty of Hudaibiya, apparently receiving wide support in the Islamic world,⁶ provoked a firestorm of controversy between Western observers and Muslims. Many Western historians question the appropriateness of Muhammad's response to the Quraysh's breach of the treaty, and some observers contend that the Treaty of Hudaibiya was virtually a sham agreement that Muhammad entered into in order to gain time and strength for a final invasion of Mecca.⁷ Many Muslim defenders contend that the Quraysh clearly breached the treaty and that Muhammad was fully within his rights to treat the treaty as abrogated.⁸

The implications of Arafat's and Mohamad's comments make many Western observers shudder. If the formation and observance of the Treaty of Hudaibiya is used as a model of Islamic diplomacy, it may be argued that at best the technical breach of an Islamic treaty justifies a massive retaliation, and that at worst the treaty is merely a sham agreement. The issue, simply put, is whether Islamic treaties can be relied upon in any

5. Hon Dato Seri Dr. Mahathir Bin Mohammad, Prime Minister of Malaysia, Opening of the Tenth Session of the Islamic Summit Conference at Putrajaya Convention Centre, Putrajaya, Malaysia (Oct. 16, 2003), at <http://www.bernama.com/oicsummit/speechr.php?id=35&cat=BI> (last visited Dec. 19, 2005).

6. Daniel Pipes, *Back in the News: The Treaty of Hudaibiya*, at <http://www.danielpipes.org/blog/106> (last visited Dec. 19, 2005); see also John F. Schmidt, *Islamic Peace Treaties* (noting the lack of any criticism of Arafat's comments in Islamic publications), at http://inalienable-rights.org/Islamic%20Peace%20Treaties_1.htm (last visited Dec. 19, 2005); see also Aaron Lerner, *Malaysian PM's Proposal to Follow Hudaibiyah Model & "Geneva Initiative,"* at <http://www.kokhavivpublications.com/2003/israel/10/0310191705.html> (last visited Dec. 19, 2005) (noting the "warm reception" in the Islamic world to Malaysian Prime Minister Mohamad's proposal to follow the Hudaibiya model of Islamic diplomacy).

7. See Mortimer B. Zuckerman, *Israel Catches Its Breath*, U.S. NEWS & WORLD REP., June 10, 1996, at 106. "The Israelis have a historic question: Is Arafat a true peacemaker, or does he believe his own rhetoric when he echoes the doctrine of the prophet Muhammad of making treaties with enemies while he is weak, violating them when he is strong?"; see also, Lerner, *supra* note 6 (quoting Representative Jim Saxton, New Jersey: "[H]ow can anyone trust an agreement compared to the Treaty of Hudaibiya enacted by the Prophet Muhammad, in which a treaty lasts as long as political expediency dictates [?]").

8. See, e.g., Shaykh Prof. Abdul Hadi Palazzi, *The Truth About the Treaty of Hudaibiyah*, at <http://www.rb.org.il/Fellowship%20Islam-Israel/commentary/islam23.htm> (last visited Dec. 19, 2005).

substantive way in the context of modern conceptions of international law and diplomacy.

This Article analyzes the Treaty of Hudaibiya as a model of Islamic diplomacy and what in the West would be referred to as “public international law.” The Article first explores the lessons of *Shari’ah* regarding the subject matter, formation, and observance of Islamic treaties.

The Article next explores the Treaty of Hudaibiya in detail. Areas of exploration include the historical setting of the treaty, the specific treaty terms, and the events leading to the treaty’s abrogation and Muhammad's invasion of Mecca.

The Article continues by analyzing the Treaty of Hudaibiya in the critical light of the modern public international law of war and diplomacy. The customary international law of war and diplomacy, as well as international treaties and conventions, are examined as a means to illustrate theoretical deficiencies in the Hudaibiya model of Islamic diplomacy in the context of modern public international law.

Finally, the Article proposes an alternative model of Islamic diplomacy and international relations based on adherence to both the requirements of *Shari’ah* and the precepts of the modern public international law of war and diplomacy. The model addresses treaty subject matter, treaty formation, protection of diplomats, treaty observance, and the use of force.

It should be noted at the outset that this Article does not seek to ascertain or analyze the motivations or moral propriety of Muhammad’s actions at Hudaibiya. The issues analyzed in this article are strictly legal ones. Morality is not the issue. Further, this analysis does not focus, except for historical perspective, on the legality of Muhammad's actions under principles of Islamic law as it existed at the time of Mecca’s conquest. As will be seen, a cogent argument can be made that Muhammad was well within his rights in treating the Treaty of Hudaibiya as abrogated, upon both Qur’anic principles and upon custom, because of the Quraysh’s breach.⁹ Rather, this Article addresses the question of whether the events played out at Hudaibiya and Mecca form the basis for an appropriate model of Islamic diplomacy in the light of modern conceptions of international law.

9. See discussion *infra* Part III.

II. DIPLOMACY IN *SHARI'AH*—A CONCEPTUAL FRAMEWORK

A. Legitimacy of Treaties

1. Duty To Fulfill Contracts

Shari'ah (Islamic sacred law) consists of the Qur'an¹⁰ and the *Sunnah*. The *Sunnah* consists of the statements, ways and traditions of the prophet Muhammad. It is reported in a compilation of recollections called the *ahadith* (singular *hadith*).¹¹ The subject of diplomacy is discussed extensively in both the Qur'an and the *Sunnah*.

The duty to fulfill treaty obligations derives from both the Qur'an and *Sunnah*.¹² These roots in *Shari'ah* result in the fact that, for Muslims, a contract is not merely a secular undertaking.¹³ Rather, it constitutes "both a religious and a legal obligation."¹⁴ According to the ancient Arab proverb

10. THE QUR'AN, THE ETERNAL REVELATION VOUCHSAFED TO MUHAMMAD, THE SEAL OF THE PROPHETS (Muhammad Zafrulla Khan trans., Olive Branch Press 1997) [hereinafter QUR'AN]. Also, various translations of the Qur'an employ different verse numbering systems. QUR'AN, *supra*, at viii-ix. Every chapter of the Qur'an, except for the ninth, begins with, "In the name of Allah, Most Gracious, Ever Merciful." *Id.* Khan's translation, among others, numbers this invocation as the first verse of each chapter. *Id.* The translations most commonly cited in the literature do not, however. This Article cites the verse numbers most commonly occurring in the literature. Thus, with the exception of the ninth chapter, each verse number cited in this Article will be one short of the verse number given to the same verse in Khan's translation. For example, verse 2:258 in Khan's translation is referred to in this Article as verse 2:257.

11. See generally *Jan v. Dad*, 16 ALL PAK. LEGAL DECISIONS 558 (1964) (providing an extensive explanation of the role played by the *ahadith* in Islamic law).

12. See C.G. WEERAMANTRY, ISLAMIC JURISPRUDENCE, AN INTERNATIONAL PERSPECTIVE 140 (St. Martin's Press 1988).

On the basis of the fundamental Islamic concept of honouring of contracts and of good faith in their observance, the Islamic international lawyers built up principles on the observance of treaties. These were elaborated in the light of the many agreements entered into by the first Islamic state under the guidance of the Prophet and hence constituted a body of Sunna[h] principles in addition to those set out in the Qur'an.

Id.

13. Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 TEX. INT'L L.J. 499, 519 (1995).

14. *Id.*

“Al-‘Aqd Shari’at Al-Muta’aqdin,” “the contract is the Shari’ah of the parties.”¹⁵

The Qur’an is quite explicit in its requirement that contracts be performed. For example, verses 8:55-56 provide: **“Worse than the beasts, in the sight of Allah, are those who have rejected the Signs of Allah and do not believe; those with whom thou makest a covenant, then they break their covenant every time and are not mindful of their obligation to Allah.”¹⁶**

2. Equivalence of Public and Private Contracts

Historically, Islamic law has not differentiated between public and private contracts in terms of the duty to perform a contract obligation.¹⁷

Moslem Law does not distinguish between a treaty, a contract of public or administrative law and a contract of civil or commercial law. All these types are viewed by Moslem jurists as agreements or pacts which must be observed, since God is a witness to any contract entered into by individuals or by collectivities; under Moslem law, any valid contract is obligatory, in accordance with the principles of Islam and the Law of God, as expressed in the [Qur’an]. . . .¹⁸

The Qur’an explicitly recognizes the validity of treaties. For example, verse 8:72 states:

Those who have believed and migrated and striven with their belongings and their persons in the cause of Allah, and those who have given them shelter and help, are friends one of another. But you are under no obligation towards those who have believed and have not migrated, until they migrate. Nevertheless, if they seek

15. *Id.*

16. QUR’AN, *supra* note 10, at 170; *see also id.* at 18 (verse 2:100: “Has it not been that every time they make a covenant, a party of them throws it aside? In truth most of them have no faith.”); *see also id.* at 28 (verse 2:177: “Righteousness is not that you turn your faces to the East or the West”); *see also id.* at 99 (verse 5:1: “O ye who believe, fulfil your compacts.”); *see also id.* at 173 (verse 9:4: “Warn the disbelievers of a painful chastisement . . .”); *see also id.* at 174 (verses 9:7-8: “How could there be a guarantee for the idolaters on the part of Allah and His Messenger”); *see also id.* at 267 (verse 17:34: “[F]ulfil every covenant, for you will be called to account for it.”).

17. Ford, *supra* note 13, at 519.

18. Saudi Arabia v. Arabian Am. Oil Co., 27 I.L.R. 117, 163-64 (1963) (Sausser-Hall, Bawadi/Hassan, Habachy, Arbs.).

your help in the matter of religion it is incumbent on you to help them except against a people between whom and yourselves there is a pact.¹⁹

Similarly, the *Sunnah* is replete with references to treaties between Muhammad and various factions.²⁰ Thus, clearly, Islamic law permits the

19. QUR'AN, *supra* note 10, at 172.

20. See USC-MSA Compendium of Muslim Texts, Times of the Prayers, vol. 1, bk. 10, no. 576 [hereinafter Times of the Prayers], at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/010.sbt.html> (last visited Dec. 19, 2005) ("There was a treaty between us and some people, and when the period of that treaty had elapsed the Prophet divided us into twelve (groups) . . ."); see USC-MSA Compendium of Muslim Texts, Virtues and Merits of the Prophet (pbuh) and His Companions, vol. 4, bk. 56, no. 781, at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/056.sbt.html> (last visited Dec. 19, 2005); see also USC-MSA Compendium of Muslim Texts, Peacemaking, vol. 3, bk. 49, no. 865 [hereinafter Peacemaking], <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/049.sbt.html> (last visited Dec. 19, 2005) ("Narrated Sahl bin Abu Hathma: Abdullah bin Sahl and Muhaiyisa bin Mas'ud bin Zaid went to Khaibar when it had a peace treaty (with the Muslims)."); *id.*, vol. 3, bk. 49, no. 867 ("Go to this man (i.e. Al-Hasan) and negotiate peace with him and talk and appeal to him . . ."); see also USC-MSA Compendium of Muslim Texts, Military Expeditions led by the Prophet, vol. 5, bk. 59, no. 351 [hereinafter Military Expeditions], at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/059.sbt.html> (last visited Dec. 19, 2005) ("Narrated Al-Miswar bin Makhrama: . . . Allah's Apostle had made a peace treaty with the people of Bahrain and appointed Al-'Ala' bin Al-Hadrami as their ruler."); see also USC-MSA Compendium of Muslim Texts, To Make the Heart Tender, vol. 8, bk. 76, no. 433, at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/076.sbt.html> (last visited Dec. 19, 2005) (the same report); see also USC-MSA Compendium of Muslim Texts, Prophetic Commentary on the Qur'an, vol. 6, bk. 60, no. 179 [hereinafter Prophetic Commentary], at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/060.sbt.html> (last visited Dec. 19, 2005) ("No pagan shall perform Hajj after this year and none shall perform the Tawaf around the Ka'ba in a naked state[] . . . except those pagans with whom you (Muslims) have a treaty."); see also USC-MSA Compendium of Muslim Texts, Divorce, vol. 7, bk. 63, no. 210, at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/063.sbt.html> (last visited Dec. 19, 2005) ("the others were those with whom the Prophet made a treaty, and neither did the Prophet fight them, nor did they fight him"); see also USC-MSA Compendium of Muslim Texts, Good Manners and Form, vol. 8, bk. 73, no. 106, at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/073.sbt.html> (last visited Dec. 19, 2005) ("Narrated 'Asim: I said to Anas bin Malik, 'Did it reach you that the Prophet said, 'There is no treaty of brotherhood in Islam?''" Anas said, 'The Prophet made a treaty (of brotherhood) between the Ansar and the Quraish in my home.'"); see also USC-MSA Compendium of Muslim Texts, One-Fifth of Booty to the Cause of Allah, vol. 4, bk. 53, no. 387 [hereinafter One-Fifth of Booty], at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/053.sbt.html> (last visited Dec. 19, 2005) ("Narrated Abu Humaid As-Saidi: We accompanied the Prophet in the Ghazwa of Tabuk and the king of 'Aila presented a white mule and a cloak as a gift to the Prophet. And the Prophet wrote to him a peace treaty allowing him to keep authority over his country."); *id.* vol. 4, bk. 53, no. 398 ("Narrated Sahl bin Abi Hathma: 'Abdullah bin Sahl and Muhaiyisa bin Mas'ud bin Zaid set out to Khaibar, the inhabitants of which had a peace treaty with the Muslims at that time . . ."); see also USC-MSA Compendium of Muslim Texts, Tribute, Spoils, and Rulership, bk. 19, no.

head of state (the *Imam* or Caliph) to enter into treaties binding the Islamic state.²¹

3. The Constitution of Medina

The first treaty in Islam is commonly referred to as the Constitution of Medina.²² It elucidates the principles governing the Islamic state in its embryonic stage.²³ The Constitution sets forth an agreement concerning the governing relations among numerous Arab tribes.²⁴ It places central importance on the unity of the *ummah* (Muslim citizenry) and dictates that disputes among the parties be resolved by Muhammad.²⁵ The treaty states, in pertinent part:

In the name of God, the Merciful, the Compassionate! This is a writing of Muhammad the Prophet between the believers and Muslims of (Meccan) Quaraysh and Yathrib and those who follow them and are attached to them and who crusade (*jahadu*) along with them . . .²⁶

36. No one of them (? those belonging to the *ummah*) may go out (to war) without permission of Muhammad (peace be upon him) . . .²⁷

3000, at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud/019.sat.html> (last visited Dec. 19, 2005) (“The Prophet fought with the people of Khaybar, and captured their palm-trees and land, and forced them to remain confined to their fortresses. So they concluded a treaty of peace providing that gold, silver and weapons would go the Apostle of Allah . . .”); *id.*, bk. 19, no. 3022 (“Abyad [of the Saba] . . . concluded a treaty of peace with the Apostle of Allah [PBUH] to give seventy suits of cloth, equivalent to the price of the Yemeni garments known as al-mu’afir, to be paid every year on behalf of those people of Saba’ who remained at Ma’arib.”); *see also* USC-MSA Compendium of Muslim Texts, The Office of the Judge, bk. 24, no. 3587, at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud/024.sat.html> (last visited Dec. 19, 2005) (“The Prophet [PBUH] said: Conciliation between Muslims is permissible. The narrator Ahmad added in his version: ‘except the conciliation which makes the lawful unlawful and the unlawful lawful.’ Suyalman ibn Dawud added: ‘The Apostle of Allah [PBUH] said: “Muslims are on (stick to) their conditions.”’); *see also*, Bassiouni, *infra* note 41, at 615 (“The Prophet also said in . . . a [h]adith: ‘The Muslims are bound by their obligations, except an obligation that renders the lawful unlawful, and the unlawful lawful.’”).

21. P.M. HOLT, *EARLY MAMLUK DIPLOMACY* 4 (E.G. Brill 1995).

22. AFZAL IQBAL, *DIPLOMACY IN ISLAM* 18 (Institute of Islamic Culture 1977).

23. *Id.*

24. *Id.* at 15.

25. *Id.* at 16, 18-19.

26. *Id.* at 14.

27. IQBAL, *supra* note 22, at 17.

42. Whenever among the people of this document there occurs any incident (disturbance) or quarrel from which disaster for it (the people) is to be feared, it is to be referred to God and to Muhammad, the Messenger of God (God bless and preserve him). God is the most scrupulous and truest (fulfiller) of what is in this document.²⁸

The Constitution of Medina indisputably establishes the validity of treaties in Islamic law, while at the same time emphasizing the priority of the Muslim *ummah* and the final authority of Muhammad.

B. Conduct of Diplomacy

1. *Sifaraa* (Islamic missions)

Islamic missions are defined by the concept of *sifaraa*. In linguistic terms *sifaraa* refers to peacemaking, or in the alternative, travel.²⁹ In practice and usage, the term refers to sending an accredited envoy on a specific mission.³⁰ As has been previously noted, the legitimacy of *safaraa* is established by the Qur'an and the *Sunnah*.³¹ Muhammad employed envoys to communicate with many rulers, including Al-Hareth Al Ghassany, Al-Muqawqas, the king of the Copts, An-Najaashy, King of Abyssinia, Heraclius, Emperor of Rome, Khosrau, King of Persia,³² and the governors of Damascus and Alexandria.³³

Envoys were instructed to act respectfully and tactfully in their duties: "The spirit of sympathy, tact and judgment governed the Prophet's standing instructions to his envoys . . . Their directions were to work with

28. *Id.* at 17-18.

29. Hassan bin Muhammad Safar, *The Characteristics and Objects of Prophetic Missions* ([S]afaaraat), at <http://www.habous.gov.ma/dorrous/eng/1996/erdars08.htm>.

30. *Id.*

31. See discussion *supra* Part II.A.

32. Safar, *supra* note 29; see also USC-MSA Compendium of Muslim Texts, *The Book of Jihad and Expedition*, bk. 19, no. 4380 [hereinafter *The Book of Jihad*], at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/019.smt.html> (last visited Dec. 19, 2005) ([Abu Safyan narrated] "the letter of the Messenger of Allah . . . was handed over the Hiraql (Cesar), the Emperor of Rome The letter was brought by Dihya Kalbi who delivered it to the governor of Busra[.] The governor passed it on to Hiraql . . .").

33. IQBAL, *supra* note 22, at 89.

patience and avoid severity, to give good tidings to the people and not to incite hostility towards their mission."³⁴

2. Receipt of Delegations

In contradistinction, Muhammad received numerous delegations. Among these were delegations from Ta'if, regarding their willingness to embrace Islam,³⁵ from the Christians of Najran, in a religious discourse concerning the divinity of Christ,³⁶ from Banu Sa'd, regarding Muhammad's claim to be an apostle,³⁷ and from Banu Tayyi', Banu Tamim, Banu Hanifa, and the kings of Himyar, regarding various matters.³⁸

Afzal Iqbal, in his book *Diplomacy in Islam*, describes the tenor of these receptions as follows:

Generous treatment was, however, accorded to envoys. Together with their staff they enjoyed full personal immunity. They were not to be killed nor in any way molested or maltreated. Even if the envoy, or any of his company was a criminal convicted by the state to which he was accredited, he was not to be treated otherwise than as an envoy. Envoys were accorded full freedom of prayer and religious rites.³⁹

3. Exchange of Envoys

The Qur'an explicitly envisions the exchange of envoys as a means of resolving diplomatic disputes. Verses 27:23-45 set out in significant detail the peace negotiations between Solomon and Biquis, Queen of Sheba.⁴⁰ In these negotiations, the exchange of envoys was viewed as a normal part of the diplomatic process.⁴¹

34. *Id.* at 86.

35. *Id.* at 66-69.

36. *Id.* at 69-72.

37. *Id.* at 72-73.

38. IQBAL, *supra* note 22, at 73-82.

39. *Id.* at 64. See also WEERAMANTRY, *supra* note 12, at 142 ("It was also a part of the Islamic tradition to show honour and regard to foreign envoys.")

40. See QUR'AN, *supra* note 10, at 370-72 (verses 27:23-45).

41. M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609, 610 (1980).

The Qur'an recites that Solomon had received a delegation bearing gifts from Bilqis.⁴² Solomon considered this an attempt at bribery:⁴³

[Bilqis stated:] I have decided to send them gifts and will see what answer the envoys bring back. When the embassy came to Solomon, he said: Do you seek to win my favour by adding to my wealth? Surely that which Allah has bestowed on me is better than that which He has bestowed on you. It seems to me you take pride in your gifts. Hudhud, do thou go back to them and tell them I shall invade them with a force which they shall not be able to withstand, and we shall drive them out in disgrace after they have lost their authority.⁴⁴

4. *Aman* (Safe Conduct) and Asylum

The principle of *aman* (safe conduct) for non-Muslims is guaranteed in the Qur'an.⁴⁵ It is a trust⁴⁶ to be performed in accordance with verses 8:27-28 of the Qur'an.

The principle of *aman* is also referenced in the *Sunnah*:

If a man among you whether from the remotest or nearest place gives another man [who is not from among you, i.e., a Muslim] safe conduct [*aman*], or waves to him by hand as meaning security, the man because of his signal is given security until he hears God's word. If he accepts it, he is your brother in religion but if he rejects it, then take him back to his secure place.⁴⁷

The concept of *aman* is separate and distinct from diplomatic immunity. *Aman* does not confer immunity from criminal prosecution, as does

42. See QUR'AN, *supra* note 10, at 370-72 (verses 27:23-44).

43. *Id.*

44. *Id.* at 371 (verses 27:35-37).

45. Bassiouni, *supra* note 41, at 613.

46. QUR'AN, *supra* note 10, at 166 (verses 8:27-28); see also *id.* at 82 (verse 4:58: "Allah commands you to make over the trusts to those best fitted to discharge them and that when you judge between the people, you do it with justice . . .).

47. Bassiouni, *supra* note 41, at 614.

diplomatic immunity.⁴⁸ Nevertheless, it remains an important principle in Islamic international relations.⁴⁹

Asylum for non-Muslims is specifically approved in the Qur'an.⁵⁰ Verse 9:6 states: "If any one of the idolaters seeks asylum with thee, grant him asylum so that he may hear the Word of Allah; then convey him to a place of security for him, for they are a people who lack knowledge."⁵¹ The concept of asylum extends to Muslim political refugees as well.⁵²

C. Treaty Abrogation

The Qur'an recognizes the right to abrogate a treaty in the event of breach. As will be seen, this is a crucial consideration in analyzing Muhammad's observance of the Treaty of Hudaibiya. "Shouldst thou apprehend treachery from a people who have made a pact with thee, terminate the pact in a manner that should occasion no prejudice to either side. Surely, Allah loves not the treacherous."⁵³ The *Sunnah* also provides specific examples of remedies for the breach of treaties.⁵⁴

D. Peacemaking

The Qur'an specifically approves of peacemaking. Verses 8:60-61 state:

48. *Id.* at 613-14.

49. See WEERAMANTRY, *supra* note 12, at 141 (noting that "[s]afe conduct of envoys and foreigners was a well-know Islamic institution called *aman*.").

50. QUR'AN, *supra* note 10, at 173.

51. *Id.*

52. See WEERAMANTRY, *supra* note 12, at 142-43.

53. QUR'AN, *supra* note 10, at 170 (verse 8:58).

54. USC-MSA Compendium of Muslim Texts, *Witr Prayer*, vol. 2, bk. 16, no. 116, at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/016.sbt.html> (last visited Dec. 19, 2005) ("the Pagans broke the treaty . . . So Allah's Apostle recited Qunut for a period of one month asking Allah to punish them."); *Military Expeditions*, *supra* note 20, vol. 5, bk. 59, no. 422 ("those who had concluded the treaty with Allah's Apostle violated the treaty (and martyred all the seventy men). So Allah's Apostle said Al-Qunut after Bowing (in the prayer) for one month, invoking evil upon them."); *One-Fifth of Booty*, *supra* note 20, vol. 5, bk. 53, no. 391 ("Narrated 'Abdullah bin 'Amr: The Prophet said, 'Whoever killed a person having a treaty with the Muslims, shall not smell the smell of Paradise though its smell is perceived from a distance of forty years.'"); *Military Expeditions*, *supra* note 20, vol. 4, bk. 59, no. 362 ("Narrated Ibn Umar: Bani An-Nadir and Bani Quraiza fought (against the Prophet violating their peace treaty), so the Prophet exiled Bani An-Nadir and allowed Bani Quraiza to remain at their places (in Medina) taking nothing from them till they fought against the Prophet again.").

Make ready for them whatever you can of armed strength and of mounted pickets at the frontier, whereby you may daunt the enemy of Allah and your enemy and others beyond them whom you know not, but whom Allah knows. Whatever you spend in the way of Allah, it shall be repaid to you in full and you shall not be wronged. Then if they should be inclined to make peace, do thou incline towards it also, and put thy trust in Allah.⁵⁵

III. THE TREATY OF HUDAIBIYA—FORMATION AND OBSERVANCE

A. Treaty Formation

1. Setting

In the early days of Islam, the pagan, polytheistic Quraysh tribe controlled Muhammad's home city of Mecca.⁵⁶ The Quraysh leaders viewed Muhammad as a threatening figure, for his monotheistic religion stood in direct opposition to the Quraysh's role as the leader of the various Arab pagan tribes.⁵⁷ Muhammad was forced to flee Mecca to Medina in 622 A.D.⁵⁸ In Medina, he quietly gathered strength, possibly sufficient to compete with or even defeat the Quraysh forces.⁵⁹

In 628 A.D. Muhammad, after receiving a revelation, organized an 'umra (pilgrimage)⁶⁰ to Mecca.⁶¹ His purpose was to cleanse the Ka'ba, the

55. QUR'AN, *supra* note 10, at 170 (verses 8:60-61).

56. Pipes, *supra* note 1.

57. *Id.*

58. *Id.*

59. *Id.*

60. An 'umra is an optional, but highly meritorious, pilgrimage to Mecca to perform rituals at the Ka'ba and elsewhere. It is to be distinguished from the *hajj*, the mandatory, once in a lifetime pilgrimage, to be performed during a specified time period. See USC-MSA Compendium of Muslim Texts, Glossary of Terms and Concepts, at <http://www.usc.edu/dept/MSA/reference/glossary.htm> (last visited Apr. 30, 2006).

61. See USC-MSA Compendium of Muslim Texts, Minor Pilgrimage, vol. 3, bk. 27, no. 6, at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/027.sbt.html> (last visited Dec. 19, 2005) ("Narrated Qatada: I asked Anas how many times the Prophet had performed 'Umra. He replied, 'Four times. 1. 'Umra of Hudaibiya in Dhi-l-Qa'da when the pagans hindered him; 2. 'Umra in the following year in Dhi-l-Qa'da after the peace treaty with them (the pagans) . . ."). YAHYA EMERICK, THE LIFE AND WORK OF MUHAMMAD 233 (Alpha 2002).

ancient shrine of Abraham, of its many pagan idols.⁶² However, the Quraysh held absolute control over the city.⁶³

Muhammad wished to enter Mecca peacefully, but the Quraysh military was suspicious.⁶⁴ The Quraysh decided to neither allow the Muslims entry into the city nor to engage them in battle.⁶⁵

The main Quraysh military set out to find Muhammad, but took a mistaken path.⁶⁶ However, other Quraysh scouts found Muhammad's camp, and representatives of the parties met at a field named Hudaibiyah, outside of Mecca.⁶⁷ There, the Treaty of Hudaibiyah was forged.⁶⁸

2. Negotiation

The negotiating history of the Treaty of Hudaibiya illuminates the *Sunnah's* recognition of treaties, exchange of envoys, and *aman*. The negotiation of the Treaty of Hudaibiya is recounted in detail in Sahih Bukhari.⁶⁹ Budail bin Warqa-al-Khuza'i of Tihama advised Muhammad that the Quraysh would wage war against him and prevent him from visiting the Ka'ba.⁷⁰ Muhammad replied:

We have not come to fight anyone, but to perform the 'Umra. No doubt, the war has weakened Qura[y]sh and they have suffered great losses, so if they wish, I will conclude a truce with them, during which they should refrain from interfering between me and the people (i.e., the Arab infidels other than Qura[y]sh), and if I have victory over those infidels, Qura[y]sh will have the option to embrace Islam as the other people do, if they wish; they will at least get strong enough to fight.⁷¹

62. EMERICK, *supra* note 61, at 233.

63. *Id.*

64. *Id.* at 234-35.

65. *Id.* at 234-35.

66. *Id.* at 235.

67. EMERICK, *supra* note 61, at 235-38.

68. *Id.*

69. Muslims widely regard this compilation of *ahadith*, the work of Bukhari over sixteen years, as one of the most authentic renditions of the *Sunnah*. USC-MSA Compendium of Muslim Texts, Introduction to Translation of Sahih Bukhari, at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/sbtintro.html> (last visited Dec. 20, 2005).

70. USC-MSA Compendium of Muslim Texts, Conditions, vol. 3, bk. 50, no. 891 [hereinafter Conditions], at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/050.sbt.html> (last visited Apr. 30, 2006).

71. *Id.*

Thus, Muhammad seemingly contemplated the possibility of future hostilities with the Quraysh even as he was proposing a truce with them. Budail bin Warqa-al-Khuza'i passed this information on to the Quraysh.⁷²

Urwa bin Mas'ud served as an envoy of the Quraysh.⁷³ He visited Muhammad and engaged him in a heated exchange.⁷⁴ However, he was impressed by the devotion of Muhammad's companions, and upon returning to his people, advised them that "[n]o doubt, he has presented to you a good reasonable offer, so please accept it."⁷⁵ Two more Quraysh representatives then spoke to Muhammad.⁷⁶ Finally, Suhail bin Amr, representing the Quraysh, asked Muhammad to conclude the peace treaty with them.⁷⁷

The period of negotiation was not without considerable tension.⁷⁸ At one point Muhammad sent an emissary to the Quraysh, who killed the camel upon which the emissary rode.⁷⁹ Later the Quraysh assembled a force to attack the Muslims.⁸⁰ The Quraysh soldiers were captured, and battle was avoided.⁸¹

Muhammad chose to ignore the incident and proceed with the peace process.⁸² This decision is the subject of verse 48:24 of The Qur'an: "He it is Who held back their hands from you and held back yours hands from them in the Valley of Mecca, after He had granted you victory over them. Allah knew all that you did."⁸³ Following this, Othman ibn Affan, later to become the third Muslim Caliph, was employed as an envoy to the Quraysh.⁸⁴ When rumor reached Muhammad that Othman had been killed, negotiations were broken off and Muslim forces prepared for attack.⁸⁵ However, the Quraysh reported that Othman was safe and that his inviolate status as an emissary was being honored.⁸⁶ This report led to the reopening of negotiations.⁸⁷

72. *Id.*

73. IQBAL, *supra* note 22, at 27-28.

74. *Id.*

75. Conditions, *supra* note 70, vol. 3, bk. 50, no. 891.

76. *Id.*

77. *Id.*

78. *Id.*

79. IQBAL, *supra* note 22, at 28.

80. *Id.* at 29.

81. *Id.*

82. *Id.*

83. QUR'AN, *supra* note 10, at 515; IQBAL, *supra* note 22, at 29, 149 n.16.

84. Bassiouni, *supra* note 41, at 611.

85. *Id.*; *see also* IQBAL, *supra* note 22, at 29-30.

86. Bassiouni, *supra* note 41, at 611.

87. *Id.* at 26

3. Terms

The specific terms of the Treaty of Hudaibiya, executed by Suhayl ibn 'Amr on behalf of the Quraysh and by Muhammad on behalf of the Muslims, were as follows:

With Thy name, O God! This is what was agreed upon between Muhammad, son of 'Abdullah, and Suhayl, son of 'Amr.

They both agreed to put down fighting on the part of people for ten years, during which period the people were to enjoy peace and refrain from fighting with each other.

And whereas whoever of the companions of Muhammad comes to Mecca in Hajj or 'Umra pilgrimage, or in quest of the bounty of God (i.e. commerce . . .), enroute [sic] to Yemen or Ta'if, such shall be in security regarding his person or property. And whoever comes to Medina, from among the Quraysh, enroute [sic] to Syria or Iraq . . . seeking the bounty of God, such shall be in security regarding his person and property.

And whereas whoever comes to Muhammad from among the Qurayshites without the permission of his guardian (*maula*), he (i.e. the Prophet) will hand him over to them; and whoever comes to the Quraysh from among those who are with Muhammad, they will not hand him over to him.

And that between us is a tied-up breast (i.e. bound to fulfil [sic] the terms), and that there shall be no secret help violating neutrality, and no acting unfaithfully.

And that whosoever likes to enter the league of Muhammad and his alliance may enter into it; and whosoever likes to enter the league of the Quraysh and their alliance may enter it.

And that thou (Muhammad) shalt return from us (Quraysh) in this year and enter not in our midst; and that when it is the coming year, we shall go out from thee and thou shalt enter with thy companions and stay there three nights, with thee being the weapon of the rider: having swords at the side; thou shalt not enter with what is other than them (swords).

And that the animals of sacrifice (brought by thee) will be slaughtered where we found them (i.e. in Huda[i]biya), and thou shalt not conduct them to us (in Mecca).

[Probably Seal of Muhammad and Seal of Suhayl]

WITNESSES:

Muslims: Abu Bakr, 'Umar, 'Abd al-Rahman ibn 'Auf, 'Abdullah ibn Suhayl ibn 'Amr, Sa'd ibn Abi Waqqas, Muhammad ibn Maslamah, etc.

Meccans: Mikrad ibn Hafs, etc.

SCRIBE AND WITNESS: 'Ali ibn Abi Talib.⁸⁸

4. Duration

The Treaty of Hudaibiya was specifically limited to a ten-year term.⁸⁹ Interestingly, this fact led a number of medieval Islamic scholars to declare, speaking generally, that treaties with unbelievers should be limited to a ten-year term.⁹⁰ There is disagreement in the literature as to whether the treaty may be renewed for a single ten-year period, or for multiple ten-year periods.⁹¹ The Hanafi and Maliki schools of Sunni jurisprudence hold that the duration of a treaty with unbelievers should be limited to a three-year or four-year term, absent exceptional circumstances.⁹²

An exception to these rules was made in the case of Jews and Christians ("People of the Book") living within the *dar al-Islam* (Islamic territory).⁹³ Treaties with peoples of these faiths could be perpetual.⁹⁴

88. IQBAL, *supra* note 22, at 30-35. The treaty was executed in duplicate, with each party retaining one copy. *Id.* at 31.

89. Pipes, *supra* note 1.

90. Ford, *supra* note 13, at 504.

91. *Cf. id.* (stating that a treaty can be renewed for a single ten-year period); HOLT, *supra* note 21, at 4 (stating that according to the Shafi'i School of Sunni Jurisprudence, a treaty may be renewed for multiple ten-year periods). The four major schools of thought in Sunni jurisprudence are: Hanafi; Malliki; Shafi'i; Hanbali. See generally MOHD. HAMEEDULLAH KHAN, *THE SCHOOLS OF ISLAMIC JURISPRUDENCE* (1991).

92. Ford, *supra* note 13, at 505 n.23.

93. *Id.* at 503 n.24.

94. *Id.*

B. Treaty Observance

1. Treaty Aftermath

In the aftermath of the Treaty of Hudaibiya Muhammad's followers were sorely disappointed.⁹⁵ They believed that the Muslims had bargained poorly.⁹⁶

The Quraysh, for their part, were uncertain about Muhammad's intentions despite his execution of the peace treaty. Abu Sufyan, who authorized the treaty on behalf of the Quraysh, stated: "[W]e have recently concluded a peace treaty with him [Muhammad] for a pe[r]iod and we do not know what he is going to do about it."⁹⁷ Further, the aftermath of the treaty's execution was not without incident. Upon a report that the Quraysh had murdered a Muslim, Muslim forces seized a group of Quraysh.⁹⁸ Muhammad pronounced: "'Let them go (so that) they may prove guilty of breach of trust more than once (before we take action against them).' So the Messenger of Allah (may peace be upon him) forgave them. On this occasion."⁹⁹

2. Invasion of Mecca

In the following year Muhammad and his followers performed the 'umra, and in so doing faithfully observed the Treaty of Hudaibiya.¹⁰⁰ The rituals lasted three days only, and when the Quraysh ordered the Muslims' exit from Mecca, they obeyed.¹⁰¹

95. See *One-Fifth of Booty*, *supra* note 20, vol. 4, bk. 53, no. 406; *Prophetic Commentary*, *supra* note 20, vol. 6, bk. 60, no. 367; *id.* vol. 6, bk. 60, no. 358 ("Narrated Anas: 'Verily, We have given you (O Muhammad) a manifest victory.' (refers to Al-Hudaibiya Peace treaty)").

96. See IQBAL, *supra* note 22, at 36:

On the face of it, the whole document reads like a treaty imposed by a conqueror who has won a clear victory in the battlefield. This, at least, was the feeling in the Muslim camp which was visibly dejected and disappointed. When the Treaty was being signed in Hudaibiya, there was nothing but deep disappointment in the Muslim camp, which, but for its unflinching loyalty to the Apostle, would have risen in protest against what was apparently a most humiliating arrangement.

97. *The Book of Jihad*, *supra* note 32, bk. 19, no. 4380.

98. *Id.* bk. 19, no. 4450.

99. *Id.*

100. *Peacemaking*, *supra* note 20, vol. 3, bk. 49, no. 864.

101. See *id.* ("Narrated Ibn 'Umar: . . . So, the Prophet performed the 'Umra in the following year and entered Mecca according to the treaty, and when he stayed for three days, the pagans ordered him to depart, and he departed."); *id.* vol. 3, bk. 49, no. 863 (the same report, worded

However, Muhammad's 'umra was not without political overtones. The Muslims arrived in Mecca circumspectly.¹⁰² He purposefully performed the ritual in a way to show the Quraysh his force.¹⁰³

Muhammad continued to quietly augment his power base by, among other things, forging an alliance with the powerful Banu Khuza'a tribe.¹⁰⁴ Meanwhile, the Quraysh too made alliances, most notably with the Banu Bakr tribe.¹⁰⁵

The Banu Khuza'a and Banu Bakr tribes had a long history of feuding.¹⁰⁶ In 629 A.D. members of the Banu Bakr tribe attacked a party of the Banu Khuza'a, resulting in several deaths.¹⁰⁷ Quraysh complicity was possible.¹⁰⁸ Upon learning of these events, Muhammad decided to attack Mecca.¹⁰⁹

The Quraysh sent a peace delegation to Muhammad, offering *qisas* (*diyat* for the dead Banu Khuza'a tribesmen), a customary Arabic recompense for homicide.¹¹⁰ Muhammad summarily rejected this offer of

slightly differently); One-Fifth of Booty, *supra* note 20, vol. 4, bk. 53, no. 408 (to the same effect); The Book of Jihad, *supra* note 32, bk. 19, no. 4403 (to the same effect).

102. See Military Expeditions, *supra* note 20, vol. 5, bk. 59, no. 556 ("Narrated Ibn Abi Aufa: When Allah's Apostle performed the 'Umra (which he performed in the year following the treaty of Al-Hudaibiya) we were screening Allah's Apostle from the infidels and their boys lest they should harm him.")

103. See *id.* vol. 5, bk. 59, no. 558 ("When the Prophet arrived (at Mecca) in the year of peace (following that of Al-Hudaibiya treaty with the pagans of Mecca), he (ordered his companions) to do Ramal in order to show their strength to the pagans and the pagans were watching (the Muslims) from (the hill of) Quaiqan.")

104. See EMERICK, *supra* note 61, at 245.

105. *Id.*

106. Pipes, *supra* note 1.

107. *Id.*

108. *Id.*

109. EMERICK, *supra* note 61, at 245.

110. Pipes, *supra* note 1. The Qur'an and *Sunnah* provide for three categories of crimes. *Tazir* crimes are crimes that are specifically mentioned in the Qur'an, or *Sunnah*, but for which no specific penalty is prescribed. Here punishment is left to judicial discretion. *Hadd* crimes are crimes specifically mentioned in the Qur'an, or *Sunnah*, but for which no specifically described penalties are set forth. *Qisa* crimes are crimes specifically mentioned in the Qur'an, or *Sunnah*, but for which the punishment is not direct state punishment but rather retaliation by the victim or his family. DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS LAW, POLICY, AND PROCESS 171 (3d ed. 2001). *Diyat*, sometimes referred to as "blood money," is compensation paid by the perpetrator of a *qisa* offense to the victim or his or her family in lieu of state punishment. See Rose Marie Karadsheh, *Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States*, 14 DICK. J. INT'L L. 243, 268 (1996) ("*Diyat* is . . . a separate punishment referring to a form of compensation or blood money, which is to be paid to a victim or the victim's family as reparation for an injury or murder."); Rachael Reune, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 EMORY INT'L L. REV.

peace and invaded Mecca.¹¹¹ The Quraysh, overwhelmed, surrendered Mecca without a fight.¹¹²

However, even in this war environment Muhammad observed the concept of sanctity.¹¹³ Prior to the invasion of Mecca Muhammad pronounced:

O Qura[y]sh! This is Muhammad, who has come to you with a force you cannot resist. He who enters Abu-Sufyan's house is safe and he who locks himself up is safe and he who enters the Mosque is safe. [The Prophet then declared amnesty for all Meccans who had fought and opposed him.]¹¹⁴

IV. MODERN PUBLIC INTERNATIONAL LAW—ANALYZING HUDAIBIYA

A. Performance of Treaties

1. Customary International Law

Pacta sunt servanda (“treaties are to be performed”) has been described as a custom-based norm, or alternatively, as a general principle of law and equity “derived from the specific character of the international

1523, 1538 (2000) (explaining the concept of *diyat*). *Diyat* has roots in both the Qur'an and *Sunnah*. See QUR'AN, *supra* note 10, at 28 (verse 2:178) (“O ye who believe, equitable retribution in the matter of the slain is prescribed for you: exact it from the freeman if he is the offender, from the slave if he is the offender, from the woman if she is the offender. If the offender is granted some remission by the heir of the slain person, the agreed penalty should be equitably exacted and should be handsomely discharged.”); *id.* at 86 (verse 4:92) (“It behooves not a believer to kill a believer unless it be by mistake. He who kills a believer by mistake shall free, or procure the freedom of, a believing slave, and provide blood-money to be handed over to the heirs of the person slain, unless they remit it as charity. If the person slain be of people hostile to you, though himself a believer, the offender shall free, or procure the freedom of, a believing slave. If he be of a people between whom and you is a pact, then blood-money payable to his heirs and the freedom of a believing slave shall both be due.”); USC-MSA Compendium of Muslim Texts, Blood Money (Ad-Diyat), vol. 9, bk. 83, <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/083.sbt.html> (setting forth 52 *ahadith* pertaining to the subject of *qisas* and *diyat*) (last visited Apr. 7, 2006).

111. Pipes, *supra* note 1.

112. EMERICK, *supra* note 61, at 246-47.

113. Bassiouni, *supra* note 41, at 611.

114. IQBAL, *supra* note 22, at 42-43.

community.”¹¹⁵ The obligation to perform the treaty in good faith is an essential part of this doctrine.¹¹⁶

2. Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties (“Treaties Convention”), concluded in 1969, was largely declaratory of customary international law.¹¹⁷ Treaties were initially considered to be formed by two or more sovereign states, but the argument has been advanced that the concept of a treaty may extend to any agreement between a state or states and one or more international organizations (i.e., “two or more subjects of international law”).¹¹⁸

Even a unilateral government statement can form the basis for a legally binding obligation if the government speaking intended to be bound by the statement and the statement was made publicly.¹¹⁹ No quid pro quo, consideration, or acceptance of the statement is required.¹²⁰

The Treaties Convention imposes upon the parties an obligation to perform the treaty obligations in good faith.¹²¹ Article 26, entitled *Pacta sunt servanda*, provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹²² Article 31 provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹²³

The Treaties Convention also limits the ability of a party to invoke a breach by the other party as a grounds for terminating the treaty by imposing a requirement of materiality.¹²⁴ Article 60(1) provides that “[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending

115. See INTERNATIONAL LAW 20, 121 (Lori F. Damrosch et al. eds., 4th. ed. 2001) [hereinafter INTERNATIONAL LAW].

116. See *id.* at 459.

117. *Id.* at 452.

118. *Id.* at 455.

119. See Nuclear Tests Case (Austl. & N.Z. v. Fr), 1974 I.C.J. 253, 457 (cited in INTERNATIONAL LAW, *supra* note 115, at 458).

120. *Id.*

121. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331, art. 26 [hereinafter Vienna Convention], available at <http://www.un.org/law/ilc/texts/treaties.htm> (last visited Dec. 20, 2005).

122. *Id.*

123. *Id.* art. 31.

124. *Id.* art. 60(1).

its operation in whole or in part.”¹²⁵ Article 60(3) defines a material breach as either: “(a) a repudiation of the treaty not sanctioned by the present convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”¹²⁶

Finally, Article 75 provides that “[t]he provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State’s aggression.”¹²⁷

The Quraysh’s connivance in a skirmish resulting in a very small number of casualties cannot reasonably be viewed as a “repudiation” of the entire peace treaty with the Muslims within the meaning of Article 60(3)(a). More substantial evidence of an intent to reject the peace accord should be required, at least by standards of modern public international law. Similarly, while the Quraysh’s actions are clearly at odds with the purpose of the treaty, in view of the very limited scope of the engagement they cannot reasonably be seen to violate a provision “essential to the accomplishment of the object or purpose of the treaty” within the meaning of Article 60(3)(b). In short, a very cogent argument can be made that the Quraysh’s breach of the Treaty of Hudaibiya cannot be viewed as material under the terms of the Treaties Convention. In such case, the Muslims would be entitled to reparations, but would not be entitled to abrogate the treaty.¹²⁸

B. Diplomatic Immunity

1. Customary International Law

Diplomats enjoy immunity under customary international law. This is an ancient principle so well entrenched in the international legal order that it scarcely requires citation of authority.¹²⁹

125. *Id.*

126. Vienna Convention, *supra* note 121, art. 60(3).

127. *Id.* art. 75.

128. *See id.* art. 60(1) (expounding the principle of materiality).

129. *See* INTERNATIONAL LAW, *supra* note 115, at 1283; Karl J. Irving, *The United Nations and Democratic Intervention: Is “Swords into Ballot Boxes” Enough?*, 25 DENV. J. INT’L L. & POL’Y 41 (1996) (“Norms of international relations that have become customary international law, such as diplomatic immunity . . . delimit state sovereignty.”); Ved P. Nanda, *Human Rights and Sovereign and Individual Immunities (Sovereign Immunity, Act of State, Head of State Immunity and Diplomatic Immunity)—Some Reflections*, 5 ILSA J. INT’L & COMP. L. 467, 477 (1999) (“One of

2. Vienna Convention on Diplomatic Relations

The Vienna Convention on Diplomatic Relations (the “Diplomatic Relations Convention”) contains specific protections for diplomats. Article 29 provides for the inviolability of the person of a diplomat.¹³⁰ He or she is not liable to any form of arrest or detention.¹³¹ Article 30 provides the same inviolability with respect to the diplomat’s private residence, papers, correspondence, and, subject to limited exceptions, his property.¹³² Article 31 provides that a diplomat is immune from the criminal jurisdiction of the receiving state.¹³³ He is also immune from its civil and administrative jurisdiction, except in specified cases of actions relating to private immovable property, or to succession where the diplomat is involved as executor, administrator, heir or legatee in a private capacity.¹³⁴

Article 37(2) of the Diplomatic Relations Convention provides immunity to members of the administrative and technical staff of the mission, as well as family members forming part of their household, if they are not nationals of or permanently resident in the receiving state.¹³⁵ This immunity is subject to a few enumerated exceptions.¹³⁶

Article 22 provides for the inviolability of the premises of the diplomatic mission, and imposes a duty on the receiving state to take all appropriate steps to protect the premises of the mission against any intrusion or damage.¹³⁷ Article 24 protects the archives and documents of the mission.¹³⁸ Article 27(2) provides for the inviolability of the official correspondence of the mission.¹³⁹ Article 27(5) protects diplomatic couriers.¹⁴⁰

the most ancient principles of customary international law, diplomatic immunity, is now enshrined in the 1961 Vienna Convention on Diplomatic Relations. . . .”).

130. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 29, available at <http://www.un.org/law/ilc/texts/diplomat.htm> (last visited Dec. 20, 2005).

131. *Id.*

132. *Id.* art. 30.

133. *Id.* art. 31(1).

134. *Id.*

135. Vienna Convention on Diplomatic Relations, *supra* note 130, art. 37(2).

136. *Id.*

137. *Id.* arts. 22(1), 22(2).

138. *Id.* art. 24.

139. *Id.* art. 27(2).

140. Vienna Convention on Diplomatic Relations, *supra* note 130, art. 27(5).

3. Vienna Convention on Consular Relations

The Vienna Convention on Consular Relations (“Consular Relations Convention”) provides specific protections for consular officers and consulates. These protections are drawn more narrowly than the protections provided by the Diplomatic Relations Convention. Article 41(1) provides that consular officers are immune to arrest or detention, except in the case of a “grave crime” and pursuant to a decision by the competent judicial authority.¹⁴¹ Article 41(2) provides that, subject to Article 41(1), consular officers shall not be committed to prison or other restriction except in the case of execution of a judicial decision of final effect.¹⁴² Article 43 immunizes consular officers and employees from judicial or administrative jurisdiction in respect of acts performed in the exercise of consular functions.¹⁴³

The Hudaibiya model of Islamic diplomacy substantially comports with the principles of the Diplomatic Relations Convention and the Consular Relations Convention. This conclusion is supported by both the treaty’s negotiating history and Muhammad’s conduct during the invasion of Mecca.¹⁴⁴

Again, in negotiating the Treaty of Hudaibiya, Muhammad employed two emissaries who traveled to Mecca on successive occasions to converse with the Quraysh.¹⁴⁵ These emissaries enjoyed immunity.¹⁴⁶ Similarly, the Quraysh emissaries were treated as inviolate.¹⁴⁷ Again, the concept of sanctity was recognized in the invasion of Mecca.¹⁴⁸

To sum, the Hudaibiya model of Islamic diplomacy does not recognize the requirement of a material treaty breach, and thus does not fully comport with principles of modern international law. However, the model does substantially comport with modern principles of diplomatic immunity.

141. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, art. 41 (1), available at <http://www.un.org/law/ilc/texts/consul.htm> (last visited Dec. 20, 2005).

142. *Id.* art. 41(2).

143. *Id.* art. 43.

144. See discussion *supra* Part III.

145. Bassiouni, *supra* note 41, at 609, 611.

146. *Id.* at 611.

147. See discussion *supra* Part III.A.2.

148. See *supra* text accompanying note 114.

C. *The Use of Force*

Assuming for the sake of discussion that under principles of modern international law the Muslims were entitled to treat the Treaty of Hudaibiya as abrogated, it is still necessary to determine the lawfulness of their invasion of Mecca. Modern principles regarding the use of force, including the principles of reprisal and self-defense, must be considered.

1. Customary International Law

a. Reprisal

The customary international law of reprisal is illustrated by a decision of an arbitration tribunal involving an incident occurring in 1914 in which a German official and two German officers from German Southwest Africa were killed at the Portuguese post of Naulilaa in Angola.¹⁴⁹ A linguistic misunderstanding led to the death of the Germans.¹⁵⁰ German Southwest Africa authorities responded by destroying certain forts and posts in Angola.¹⁵¹ The arbitration tribunal concluded that the deaths of the Germans were not the result of any act contrary to the law of nations, and that in any event the reprisals taken were “excessive and illegal reprisals out of all proportion to the act motivating them.”¹⁵² The tribunal specifically addressed the concept of reprisals:

Reprisals are an act of self-help . . . on the part of the injured state, an act corresponding after an unsatisfied demand to an act contrary to the law of nations on the part of the offending state . . . They would be illegal if a preliminary act contrary to the law of nations had not furnished a reason for them.¹⁵³

After the Quraysh’s breach of the Treaty of Hudaibiya, the Muslims made no demand of any kind for reparations.¹⁵⁴ Further, the reprisal taken, the invasion of Mecca, clearly was “excessive” and “out of all proportion to the act motivating it.”

149. 6 HACKWORTH, DIGEST OF INTERNATIONAL LAW 154-55 (1943), *reprinted in* INTERNATIONAL LAW, *supra* note 115, at 921.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 922.

154. *See* discussion *supra* Part III.B.

b. Self-Defense

The customary law of self-defense is illustrated by the famous *Caroline*.¹⁵⁵ An extensive review of *Caroline* is beyond the scope of this Article, but a brief overview is appropriate.

During an anti-British insurrection in Canada in 1837, the insurgents received aid from Americans across the border.¹⁵⁶ Canadian forces boarded a steamer in American territory in 1837 and attacked its occupants.¹⁵⁷ In the aftermath of the incident the American and British governments agreed that the requirements of self-defense might necessitate the use of force.¹⁵⁸ However, the Americans took the position that the Canadians' boarding of the steamer was not necessary as an act of self-defense, and further, even if such necessity could be established, the attack was not a suitably proportional response.¹⁵⁹ Daniel Webster, the U.S. Secretary of State, noted in a communication to the British Minister:

It will be for [the British government] to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.¹⁶⁰

The British side eventually apologized for the invasion of American territory.¹⁶¹ In response, Mr. Webster wrote:

The President sees with pleasure that your Lordship fully admits those great principles of public law . . . [R]espect for the inviolable character of the territory of independent states is the most essential foundation of civilization . . . Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-

155. *Caroline*, 2 Moore, Digest of International Law 412 (1906) (cited in INTERNATIONAL LAW, *supra* note 115, at 922-23).

156. INTERNATIONAL LAW, *supra* note 115, at 922. For a detailed factual background regarding the Caroline incident, see generally Maria Benvenuta Occelli, "Sinking The Caroline": Why The Caroline Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law, 4 SAN DIEGO INT'L L.J. 467 (2003).

157. INTERNATIONAL LAW, *supra* note 115, at 922.

158. *Id.*

159. *Id.* at 923.

160. *Id.* see also Occelli, *supra* note 156, at 474-75.

161. INTERNATIONAL LAW, *supra* note 115, at 922-23.

defense do exist, those exceptions should be confined to cases in which the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”¹⁶²

Thus, *Caroline* established a three-prong test for the use of force in self-defense: (1) the use of force must be necessary under the circumstances; (2) the response must be proportional and limited by that necessity; (3) the necessity of the use of force must be “instant, overwhelming and leaving no choice of means, and no moment for deliberation.”¹⁶³

The third prong of this formulation has been repeatedly attacked in the literature as being not reflective of customary international law, either at the time of *Caroline* itself or thereafter, or as having been misapplied.¹⁶⁴ However, the first and second prongs of the formulation, necessity and proportionality, have not seriously been challenged.

The invasion of Mecca in the aftermath of the Quraysh’s breach of the Treaty of Hudaibiya would not have been justified under modern customary international law as an act of self-defense. The very limited nature of the breach, and the Quraysh’s attempts to negotiate a peaceful settlement by the payment of *diyat*,¹⁶⁵ illustrate that there was no necessity for the invasion of Mecca and that such a response was entirely disproportional to the Quraysh’s breach of the treaty. Further, to the extent that *Caroline*’s requirement that the necessity of the use of force be “instant, overwhelming and leaving no choice of means, and no moment for deliberation”¹⁶⁶ remains vital, the Muslims’ invasion of Mecca fails this requirement as well.

2. Charter of the United Nations

The Charter of the United Nations contains specific provisions regarding the use of force.¹⁶⁷ Article 2(4) provides, in pertinent part: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United

162. *Id.* at 923.

163. *Id.*

164. See Occelli, *supra* note 156 (arguing that *Caroline* does not fully reflect customary law); see generally Timothy Kerley, *Raising the Caroline*, 17 WIS. INT’L L.J. 325 (1999) (arguing that the *Caroline* doctrine has been misapplied).

165. See *supra* text accompanying note 110.

166. See *Caroline*, *supra* note 155, at 923.

167. See generally INTERNATIONAL LAW, *supra* note 115, at 933-80.

Nations . . .¹⁶⁸ Article 2(3) requires nations to settle disputes by peaceful means.¹⁶⁹

The U.N. General Assembly has adopted the following definition of “aggression”: “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.”¹⁷⁰ Under this resolution, “the first use of force by a state in contravention of the U.N. Charter constitutes prima facie evidence of an act of aggression.”¹⁷¹ Acts qualifying as aggression include: (1) an invasion or attack by the armed forces of a state on the territory of another state; (2) bombardment; (3) blockade of ports or coasts; (4) an attack by the armed forces of a state on the land, sea or air forces, marine and air fleets of another state; (5) the use of armed forces of one state which are within the territory of another state; (6) a state allowing its territory to be used by another state to perpetrate an act of aggression; (7) the sending by or on behalf of a state of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another state.¹⁷²

Article 51 of the Charter provides for the right of a state or states to exercise individual or collective self-defense: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . .”¹⁷³ Again, the attack by the Banu Bakr against the Banu Khuza’a may well have reflected a purely private grievance.¹⁷⁴ To this extent it probably could not be deemed a use of force “against the sovereignty, territorial integrity or political independence” of the Banu Khuza’a. In any event, the Charter of the United Nations does not support the Muslims’ invasion of Mecca. Nothing in the Charter of the United Nations purports to modify the principles of customary international law requiring a necessary and proportional response.¹⁷⁵

168. U.N. CHARTER, art. 2, para. 4.

169. *Id.* art. 2, para. 3.

170. G.A. Res. 3314 (XXIX) (1974), G.A.O.R. 29th Sess., Supp. 31, at 42.

171. *Id.*

172. *Id.*

173. U.N. CHARTER, art. 51.

174. See Pipes, *supra* note 1; see also discussion *supra* Part III.B.2.

175. See generally *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986, I.C.J. 14, 103-23 (June 27) (*cited in* INTERNATIONAL LAW, *supra* note 115, at 955-61); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 141-46 (1991).

V. AN ALTERNATIVE MODEL OF ISLAMIC DIPLOMACY—MODIFYING HUDAIBIYA

A. *Islam and Modern International Law*

There is no necessary conflict between a nation's desire to emphasize its Islamic character and its participation in modern public international law. An outstanding example of this is Ottoman diplomacy in the late nineteenth and early twentieth centuries. For much of the nineteenth century the emphasis on the Ottoman Empire's Islamic character had little significant effect.¹⁷⁶ However, the empire's Islamic character was emphasized in Ottoman diplomacy to some extent under the rule of Sultan Abdulaziz (1861-1876) and to a much greater extent under the rule of Sultan Abdulhamid II (1876-1909).¹⁷⁷ Abdulhamid promoted pan-Islamic sentiment and maintained contacts with other Muslim states at odds with Western powers.¹⁷⁸ Muslims both inside and outside the empire frequently referred to him as "Caliph."¹⁷⁹

At the same time, supporting international law was a hallmark of Ottoman diplomacy. Roderic H. Davison, in *Imperial Legacy, The Ottoman Imprint on the Balkans and the Middle East*, states:

Ottoman foreign ministers and diplomats . . . referred frequently to [the] principle of nonintervention, and sometimes emphasized at the same time the sanctity of treaties. *Pacta sunt servanda*. The observance of international law, the upholding of treaties, and

176. Roderic H. Davison, *Ottoman Diplomacy and Its Legacy*, in *IMPERIAL LEGACY, THE OTTOMAN IMPRINT ON THE BALKANS AND THE MIDDLE EAST 190* (L. Carl Brown ed., Columbia University Press 1996) [hereinafter *IMPERIAL LEGACY*].

177. *Id.*

178. *Id.* ("The Porte was never able to come to the aid of Muslims abroad who petitioned for help against the Russians in Central Asia, or against the Dutch in Indonesia. But contacts were maintained, and the British, French, and Russian governments were always a little wary of treating the sultan-caliph in such a way as to rouse massive protest among the millions of Muslims in their empires. Abdulhamid consciously promoted Pan-Islamic sentiment.") See also *id.* at 270 ("Sultan Abdulhamid II promoted the concept of Pan-Islam as a counterbalance to nationalism, hoping to gain support among Muslims outside as well as inside the Ottoman Empire. Pan-Islam was a positive ideology in that it was intended to promote the welfare, common identity, and strength of the Muslim community; at the same time, Pan-Islam also gained support from the opposition to European and Christian imperialisms. To give this concept concrete expression Abdulhamid mandated in 1900 the building of the Hijaz Railroad, a holy railway designed to link the central Ottoman lands with the pilgrimage cities of Arabia, appealing for funds from Muslims around the world to help build the railway.")

179. *Id.*

nonintervention in the internal affairs of other states constitute the trinity of legal principles on which much of Ottoman diplomacy rested.¹⁸⁰

The substantial Islamic participation in the U.N. Charter, and Islamic observance of the various U.N. covenants and declarations, is further evidence of this fact. Admittedly, in many cases this participation is qualified by reservations or declarations asserting the primacy of *Shari'ah*.¹⁸¹ This will continue to be a point of contention. However, *Shari'ah* controls a very limited sphere of human endeavor,¹⁸² and, in the main, unqualified Islamic participation in modern international law remains substantial.

B. A Modern Model of Islamic Diplomacy

A "modern" model of Islamic diplomacy has a dual goal: (1) to be fully compliant with the constraints of *Shari'ah*; (2) to fully accord with the conceptions of modern public international law. The model addresses the subjects of treaty subject matter, treaty formation, protection of diplomats, treaty observance and the use of force.

180. *Id.*

181. The Cairo Declaration on Human Rights in Islam illustrates this problem. Article 24 provides that "all the rights and freedoms stipulated in this Declaration are subject to the Islamic *Shari'ah*." Cairo Declaration on Human Rights in Islam, *reprinted in* EDWARD LAWSON, *ENCYCLOPEDIA OF HUMAN RIGHTS* 176 (2d ed. 1996) (emphasis added). The text of the Cairo Declaration was later circulated as a document of the U.N. General Assembly (U.N. Doc. A/45/421) and of the World Conference on Human Rights held in Vienna, Austria in 1993. *Id.*

182. As noted by Justice Nasim Hasan Shah of the Supreme Court of Pakistan:

The commands of the Holy Qur'an that have been expressed in *nass* [clear edict] terms cover a very small field and by far the much larger activity has been left unspecified wherein the Lawgiver in the State is permitted (*mubah*) to do whatever is necessary for the common good. Indeed the Almighty, in this field, has left it to us Muslims to provide for whatever may be necessary in the circumstances, through additional legislation by the exercise of our *ijtihad* (independent reasoning) in consonance with the spirit of Islam.

Justice Nasim Hasan Shah, *Justice and Islam*, Paper presented at the Conference of the Islamic Philosophical Association of Pakistan, November 12, 1987, *reprinted in* 40 *ALL PAK. LEGAL DECISIONS* 1, 4 (1988).

1. Treaty Subject Matter

As previously noted, Islamic missions are defined by the concept of *sifaraa*.¹⁸³ Historically, the subject matter of Islamic missions have included: (1) dissemination of the Islamic *da'wa* (a call or invitation to the religion); (2) ransoming or exchanging prisoners; (3) lauding actions taken to solidify the Muslim *ummah*; (4) undertaking *jihad* and repelling foreign aggression; (5) negotiating peace agreements; (6) the conclusion of treaties of mutual interest.¹⁸⁴ However, in a modern model of Islamic diplomacy treaty subject matter is not limited to the historical categories described above, but rather embraces any subject matter not prohibited by *Shari'ah* or by modern public international law.

2. Treaty Formation

Although in theory oral contracts are enforceable in Islamic law,¹⁸⁵ the consistent practice is to reduce a treaty to writing.¹⁸⁶ The document should be signed or ratified by the head of state.¹⁸⁷ The document should be attested.¹⁸⁸

Islamic law recognizes a duty to perform a treaty in good faith regardless of formalities. Weeramantry, in his book, *Islamic Jurisprudence, An International Perspective*, notes:

The utmost good faith was required in the performance of a treaty, irrespective of formalities. Muslims were obliged to honour their treaties even with non-believers "to the end of their term" . . . and "not to break oaths after making them" . . . *Pacta sunt servanda* was the underlying doctrine. The Caliph Abu Bakr, in a proclamation to his soldiers, exhorted them as follows: Let there be no perfidy, no falsehood in your treaties with the enemy; be faithful in all things,

183. See discussion *supra* Part II.B.1.

184. *Id.*

185. Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 PACE INT'L L. REV. 1, 28 (2001); S.E. RAYNER, *THE THEORY OF CONTRACTS IN ISLAMIC LAW: A COMPARATIVE ANALYSIS WITH PARTICULAR REFERENCE TO THE MODERN LEGISLATION IN KUWAIT, BAHRAIN AND THE UNITED ARAB EMIRATES* 162 (1991) (noting that due to poor Arab literacy rates from the time of Muhammad to the present oral agreements were the norm, and carried the same probative value as those formally recorded).

186. See generally WEERAMANTRY, *supra* note 12, at 141.

187. *Id.*

188. See HOLT, *supra* note 21, at 32-151 (setting forth the text of 11 medieval Islamic treaties).

proving yourselves upright and noble and maintaining your word and promises truly.¹⁸⁹

3. Protection of Diplomats

The most positive aspect of the Hudaibiya model of Islamic diplomacy is that it substantially comports with modern public international law principles concerning the exchange of envoys, immunity of diplomats, safe conduct (*aman*), and sanctity in times of war.¹⁹⁰ Thus a modern model of Islamic diplomacy adopts and embraces these elements of the Hudaibiya model.

4. Treaty Observance

The first major flaw in the Hudaibiya model of Islamic diplomacy is the lack of any conception of the materiality of a treaty breach. A modern model of Islamic diplomacy draws upon the Qur'anic verses promoting peacemaking,¹⁹¹ the numerous examples of successful Islamic diplomacy,¹⁹² and explicitly recognizes the principle of materiality.

5. Use of Force

The second major flaw in the Hudaibiya model of Islamic diplomacy is the use of force in a situation where that force cannot be justified either as a valid act of self-defense or as a justified reprisal. From a strict viewpoint of Islamic law, Muhammad's conduct relative to the Treaty of Hudaibiya and the Quraysh's breach constitutes an important part of the *Sunnah* and may well authorize an unnecessary or excessive use of force. However, a modern model of Islamic diplomacy recognizes that, when viewed in the light of other examples of Islamic diplomacy in the *Sunnah*, including Muhammad's own conduct in forgiving an apparent minor breach of the peace with the Quaraysh,¹⁹³ and in the light of the many successful peacekeeping missions in Islamic diplomatic history, Muhammad's conduct at Hudaibiya should not be seen to require such a use of force.¹⁹⁴

189. WEERAMANTRY, *supra* note 12, at 141.

190. *See* discussion *supra* Part II.B.

191. *See* discussion *supra* Part II.D.

192. *See generally* HOLT, *supra* note 21; IQBAL, *supra* note 22.

193. *See* discussion *supra* Part III.B.1.

194. *Shari'ah* recognizes the following categories of conduct: obligatory; recommended; neutral, disapproved; forbidden. *See generally* BERNARD G. WEISS, THE SEARCH FOR GOD'S LAW: ISLAMIC JURISPRUDENCE IN THE WRITINGS OF SAYF AL-DIN AL-AMIDI 86 (1992).

VI. CONCLUSION

Shari'ah explicitly recognizes the legitimacy of treaties. The duty to faithfully perform the terms of a treaty is an extension of the Qur'anic admonition to faithfully fulfill the terms of a contract. In this regard, *Shari'ah* makes no distinction between public and private contracts with respect to their binding nature.

Further, *Shari'ah* explicitly recognizes *sifaraa* (Islamic missions), the receipt of delegations from Muslim and non-Muslim countries, the exchange of envoys to resolve diplomatic disputes, and the concepts of *aman* (safe conduct) and asylum. *Shari'ah* also recognizes the right to abrogate a treaty for the reasonable anticipation of breach, and specifically sponsors peacemaking. These are the fundamental principles of Islamic diplomacy.

The execution of the Treaty of Hudaibiya, the Quraysh's breach thereof, and Muhammad's subsequent invasion of Mecca, constitute a major episode in Islamic history and form an important part of *Shari'ah*. The Treaty of Hudaibiya has been relied upon as a model of Islamic diplomacy in classical Islamic legal theory.

Many aspects of the Hudaibiya model of Islamic diplomacy comport with principles of modern public international law. *Shari'ah*'s emphasis on the obligation to faithfully perform the terms of a treaty is equivalent to the doctrine of *pacta sunt servanda* ("treaties are to be performed").

The Hudaibiya model of Islamic diplomacy substantially comports with the principles of the Diplomatic Relations Convention and the Consular Relations Convention. The model recognizes the principles of diplomatic immunity, *aman* (safe conduct) and sanctity in wartime.

However, the Hudaibiya model of Islamic diplomacy does not recognize the requirement of a material breach to regard a treaty as having been abrogated by the opposing party. Further, it authorizes a retaliation that does not comport with principles of modern public international law regarding reprisal, self-defense, and the use of force. As such, it does not serve as an appropriate model for modern Islamic diplomacy.

A modern model of Islamic diplomacy seeks the dual purposes of comporting with the requirements of *Shari'ah* and with the principles of modern public international law. It adopts the traditional purposes of *sifaraa* as the fundamental bases for Islamic diplomacy. It adopts the traditional formalities of treaty formation, excepting the inflexible and unnecessary rule regarding treaty duration. It embodies *Shari'ah*'s conceptions regarding the conduct of diplomacy, including the exchange of envoys, *aman* and asylum. However, the model also explicitly embraces

the requirement of a material treaty breach before reaction, and embraces the principles of reprisal, self-defense and use of force as formulated in modern public international law.