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

MOHAMED ELEWA BADAR*

Abstract

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

Key words
duress (ikrah); Islamic jurisprudence (fiqh); Islamic law (Shari’a); Islamic legal maxims (al-Qawa'id al-Fiqhiyyah); mens rea; presumption of innocence; principle of legality; superior orders

The time has come, perhaps, to discard or limit the visionary goal of ‘one law’ or ‘one code’ for the whole world and to substitute for it the more realistic aim of crystallizing a common core of legal principles. 1

I. INTRODUCTION

Numerous scholars have debated the formation, functioning, and practice of the International Criminal Court (ICC). One of the most contentious of these debates is on the issue of the general principles of law that can be applied by the Court in various cases. During the Rome negotiations, Islamic states supported the existence of an international criminal-justice institution. However, they also viewed it with

---

* Lecturer in International and Comparative Criminal Law and Co-Director, Centre for International and Public Law, Brunel Law School, Brunel University, London. Former Judge and Senior Prosecutor, Egyptian Ministry of Justice (1997–2006). PhD, NUI, Galway, Ireland; LL M, NUI, Galway; Bachelors of Law and Police Sciences, Police Academy, Police College, Egypt [mohamed.badar@brunel.ac.uk]. The author greatly appreciates the efforts of his research assistant Polona Florijančič, LL M, Brunel Law School.

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

It has been noted by scholars that there is a tendency towards viewing Islamic law as a static or non-progressive legal system, whose main principles are derived from religious texts.³ Most Western scholarly debates centre on Islamic criminal law on a basic level without an in-depth grasp of the subject. This has been thought to be due to a lacuna in the available English literature on Islamic criminal law that ‘cries to be filled’.⁴ It has also been argued that it is almost impossible for Islamic law to be compared to the Western legal system, because the legal systems of almost all Islamic states are based on the principles of Shari’a, making the path to the creation of a dialogue between Islamic law and international institutions virtually non-progressive.⁵

The aim of this paper is to find out whether it is viable for the ICC to adopt principles of international criminal law from the Islamic legal system. As it is obviously impossible to cover every aspect of Islamic law and its counterpart in the ICC Statute, the scope of this paper is limited to some fundamental principles of Islamic criminal law and its compatibility with international criminal-law principles, namely the principle of legality, the presumption of innocence, the concept of mens rea, and the standards used by Muslim jurists for determining intention in murder cases. Other general defences such as duress and superior orders are also included in this paper.

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

2. ISLAMIC LAW (SHARI’A)

Islamic law (Shari‘a) has its roots deeply embedded in the political, legal, and social aspects of all Islamic states and it is the governing factor of all Islamic nations.⁶ It is often described by both Muslims and Orientalists as the most typical manifestation of the Islamic way of life – the core and kernel of Islam itself.⁷ Other commentators deem this an exaggeration and do not believe Islam was meant to be as much of a law-based religion as it has often been made out to be.⁸ In any case, Islamic

---

law, one of the recognized legal systems of the world,⁹ is a particularly instructive example of a ‘sacred law’ and differs from other systems so significantly that its study is indispensable in order to appreciate adequately the full range of possible legal phenomena.¹⁰

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

It is no secret that most Islamic nations are viewed as being non-progressive, especially with respect to their national legal systems and implementation of criminal laws.¹³ On the other hand, the Islamic states view the West and East as being unethical, immoral, and unduly biased towards the religious, cultural, and political aspects of Islam itself.¹⁴

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

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

---

¹⁰ Schacht, supra note 7, at 2.
¹² Layish, ibid.
¹⁵ This number includes Palestine, which is not yet considered a state under international law. For more information on the OIC, see www.oic-oci.org/page_detail.asp?p_id=52.
¹⁶ In 2004, the OIC made submissions on behalf of Muslim states regarding proposed reforms of the UN Security Council to the effect that ‘any reform proposal, which neglects the adequate representation of the Islamic Ummah in any category of members in an expanded Security Council will not be acceptable to the Islamic countries’; see UN Doc. A/59/425/S/2004/808 (11 October 2004), para. 56, quoted in M. A. Baderin (ed.), International Law and Islamic Law (2008), xv.
their laws are to be subject to the Shari‘a; therefore, their constitutional courts decide on whether a given law is in conformity with the Shari‘a and can also review the manner in which other national courts interpret and apply the laws to ensure conformity.\textsuperscript{18} The third category of states proclaims the direct applicability of the Shari‘a. According to one commentator, the majority of Muslim states fall between the two poles of ‘purist’ Saudi Arabia and ‘secular’ Turkey.\textsuperscript{19} Most states have been selective in determining which Shari‘a rules apply to their national legislations.\textsuperscript{20} As a consequence of colonialism and the adoption of Western codes, Shari‘a was abolished in the criminal law of some Muslim countries in the nineteenth and twentieth centuries but has made a comeback in recent years, with countries like Iran, Libya, Pakistan, Sudan, and Muslim-dominated northern states of Nigeria reintroducing it in place of Western criminal codes.\textsuperscript{21}

2.2. Sources of Islamic law: Shari‘a and Fiqh

Islam is a way of life akin to a system that regulates the believer’s life and thoughts in line with a certain set of rules.\textsuperscript{22} The term ‘Islamic law’ covers the entire system of law and jurisprudence associated with the religion of Islam. It can be divided into two parts, namely the primary sources of law (Shari‘a in the strict legal sense) and the subordinate sources of law with the methodology used to deduce and apply the law (Islamic jurisprudence or fiqh).\textsuperscript{23}

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

Shari‘a is derived directly from the Qur‘ān and the Sunnah, which are considered by Muslims to be of divine revelation and thus create the immutable part of Islamic law, while fiqh is mainly the product of human reason. ‘Muslim jurists throughout history have not been concerned with establishing a particular field or science or even theory – to them the divine sources are comprehensive enough to encompass any possible human action, conduct or transaction.’\textsuperscript{27} However, it is important to mention that in contrast to the belief of the Sunni, the Shi‘a believe that divine

\textsuperscript{18} M. C. Bassiouni, The Shari‘a and Post-Conflict Justice (2010), 15 (on file with the author).
\textsuperscript{23} M. A. Baderin, International Human Rights and Islamic Law (2005), 32–4. Some scholars use the terms ‘Islamic law’, Shari‘a, and/or fiqh interchangeably. For example, Kamali considers Shari‘a to also include fiqh; see Kamali, supra note 8.
\textsuperscript{25} F. Robinson, Atlas of the Islamic World since 1500 (1982), 320.
\textsuperscript{27} Zahraa, supra note 5, at 171.
revelation continued to be transmitted after the Prophet’s death to the line of their recognized religious leaders (imams). They thus consider as part of the divine revelation the pronouncements of their imams, whom they believe infallible.29

2.2.1. Qur‘an
The Qur‘an is considered by Muslims to be the embodiment of the words of God as revealed to the Prophet Muhammad through Angel Gabriel. It is the chief source of Islamic law and the root of all other sources.30 However, it is far from being a textbook of jurisprudence and is rather a book of guidance on all aspects of the life of every Muslim:31 ‘We have sent down to thee the Book explaining all things, a Guide, a Mercy, and Glad Tidings to Muslims’ (Qur‘an, 16:89).

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

The Qur‘an is an indivisible whole and a guide that must be accepted and followed in its entirety.35 It was revealed, a few verses at a time, over a period of 23 years, ending with the death of Prophet Muhammad in 632 CE. To properly understand its legislation, one has to take into consideration the Sunnah as well as the circumstances and the context of the time of the revelation.

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

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

28 Kamali, supra note 8, at 88.
29 Ibid.
30 Alarefi, supra note 26, at 709–10.
32 6239 verses (Bassiouni, supra note 18); 6235 verses (Kamali, supra note 8); 6666 (I. Abdal-Haqq, ‘Islamic Law: An Overview of Its Origin and Elements’, (2002) 7 Islamic Law and Culture 27).
33 There are 80 legal verses according to Coulson (infra note 57), 120 according to Bassiouni (supra note 18), 350 according to Kamali (supra note 8), 500 according to Ghazali, and 800 according to Ibn Al-Arabi, while, according to Shawkani, any calculation can only amount to a rough estimate.
34 El-Awa, supra note 31, at 146.
35 Kamali, supra note 8, at 22.
36 El-Awa, supra note 31, at 153.
37 Kamali, supra note 8, at 18.
Messenger gives you, take; and what he has forbidden you, leave alone’ (Qurʾān, 59:7).

The Qurʾān authorizes the Prophet Muhammad to make legal decisions in response to developments in the Muslim community and delegates to him the task of explaining the judgements of the Qurʾān.\textsuperscript{38} Judge between them according to what God has revealed, and do not follow them in their vain desires.’ Qurʾān (5:49); ‘No, by your Lord, they are not (truly) believers until they make you the judge of the disputes that arise among them, and find no resistance in their- selves to what you decide but accept (it) with complete submission. (Qurʾān, 4:65)

2.2.3. Fiqh

When an issue is not specifically addressed in either the Qurʾān or the Sunnah, the Prophet mandated the use of sound reasoning in reaching a judgment.\textsuperscript{39} When appointing a judge to Yemen, the Prophet asked him:

According to what shalt thou judge? He replied: According to the Book of Allah. And if thou findest nought therein? According to the Sunnah of the Prophet of Allah. And if thou findest nought therein? Then I will exert myself to form my own judgement.

[The Prophet replied] Praise be to God Who had guided the messenger of His Prophet to that which pleases His Prophet.\textsuperscript{40}

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

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

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

\begin{footnotesize}
\begin{enumerate}
\item El-Awa, supra note 31, at 147.
\item Abdal-Haqq, supra note 32, at 35.
\item M. H. Kamali, \textit{Principles of Islamic Jurisprudence} (2006), 469.
\item Kamali, supra note 8, at 40–1.
\item Bassiouni, supra note 18, at 10.
\item Abdal-Haqq, supra note 32, at 55.
\end{enumerate}
\end{footnotesize}
consensus be absolute and universal; however, in practice, it has often been claimed also for rulings on which only a majority consensus existed.  

2.2.3.2. Analogical deduction by individual reasoning (qiyas). Qiyas is the extension of Shari’a value or ruling from an original case to a new case, not found in the Qur’ān, the Sunnah, or a definite ijmā’, because the new case has the same effective cause as the original one. An example of qiyas is the extension of the prohibition of wine to a prohibition of any drug that causes intoxication, because the prevention of the latter is the effective purpose of the original prohibition.  

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

2.3. Categories of crime in Islamic criminal law

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

The first category is hudūd crimes. These crimes are penalized by the community and punishable by fixed penalties as required in the Qur’ān and the Sunnah. Both crime and punishment are precisely determined with some flexibility for the judge, depending upon the intent of the accused and the quality of the evidence. Mostly, there are seven recognized hudūd crimes: ridda (apostasy); baghi (transgression); sariqa (theft); haraba (highway robbery); zena (illicit sexual relationship); qadhf (slander); and shorb al-khamr (drinking alcohol). It has been argued that these matters cover the most vital areas of collective life (in the following order of priority: religion, life, family, intellect, wealth) and require collective commitment to these values as law. In these offences, it is the notion of Man’s obligation to God rather than to his fellow man that predominates. The state owes the right to Allah to implement the hudūd.  

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

46 Ibid., at 228–9.
47 ‘Refutations of the validity of qiyas are to be found in Imami Shi‘i collections of reports, all available Shi‘i works of īsāl al-fiqh, polemics against Sunni thought and not infrequently in works of furū’ al-fiqh: R. M. Gleave, ‘Imami Shi‘i Refutations of Qiyas’, in Weiss, supra note 44, at 267.
48 Kamali, supra note 41, at 267. The Ulama (Muslim jurists) are in unanimous agreement that the Qur’ān and the Sunnah constitute the sources of the original case, but there is some disagreement as to whether ijmā’ constitutes a valid source for qiyas; see Kamali, ibid., at 268.
49 Ibid., at 267.
50 Ibid.
53 Kamali, supra note 8, at 161.
56 El-Awa, supra note 31, at 157.
58 Nyazee, supra note 55, at 18.
there are four *hudūd* offences: adultery, theft, drunkenness, and defamation, while Ibn Rushid and Al Gazali (Shafi’i school) claim there are seven: apostasy, rebellion, adultery, theft, highway robbery, drunkenness, and defamation.\(^{59}\)

The second category consists of *qisas* and *diyya* crimes. In Islamic law, the punishment prescribed for murder and the infliction of injury is named *qisas*, that is, inflicting on the culprit an injury exactly equal to the injury he/she inflicted upon his/her victim. The right to demand retribution or compensation lies with the victim or, in cases of homicide, the victim’s next of kin.\(^{50}\) Sometimes, the relationship between this person and the offender can prevent retaliation.\(^{61}\) *Qisas* and *diyya* crimes fall into two categories: homicide and battery.\(^{62}\) These crimes are thus treated in Islamic law as private, not public, offences.\(^{63}\)

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

*Ta’azir* is used for three types of cases:

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

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

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

---

60 Rules establishing the next of kin vary according to different schools; see Peters, *supra* note 21, at 45.
61 Ibid., at 48.
63 Coulson, *supra* note 57, at 124.
65 Ibid., at 213.
normative practice in the second half of the ninth century for jurists to adopt a single doctrine. When prominent jurists began to have loyal followers who would apply exclusively their doctrine in courts of law, the so-called ‘personal schools’ emerged and only a few of these leaders were raised to the level of founder of a ‘doctrinal school’, what is referred to in Islamic law as the madhhâb. When they emerged, the doctrinal schools did not remain limited to the individual doctrine of a single jurist, but possessed a cumulative doctrine in which the legal opinions of the leading jurists were, at best, praeium inters partes.

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

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

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

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

---

69 Ibid.
70 Ibid. Those jurists are Abu Hanifa, Ibn Abi Layla, Abu Yusuf, Shaybani, Malik, Awza‘i, Thawri, and Shafi‘i.
71 Ibid., at 157.
72 Ibid., at 156.
73 Ibid.
74 Bassiouni, supra note 18.
75 Rahim, supra note 24, at 73–110.
76 Peters, supra note 21, at 6.
77 Ibid. Nevertheless, Saudi qadis, as a rule, follow the Hanbali School.
law can be contrary to the sacred religion of Islam’, but restricts the application of the Hanafi jurisprudence in Article 130 only to cases ‘when there is no provision in the Constitution or other laws regarding the ruling on an issue’. In Saudi Arabia, on the other hand, Hanbali legal rules constitute the laws of the kingdom. In Iran, the constitution states that laws and regulations must be based on Islamic criteria, which, in practice, is covered by the Shari’a, fiqh, and fatwa, and by the doctrine of the Ja’fari fraction of Islam.

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

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

‘Legal maxims’ (al-qawā’id al-fiqhīyah) is a term applied to a particular science in Islamic jurisprudence. Islamic legal maxims, similar to their Western counterparts, are theoretical abstractions in the form, usually, of short epithetic statements that are expressive of the nature and sources of Islamic law and encompass general rules in cases that fall under their subject. They are different from āsul al-fiqh (roots and sources of Islamic jurisprudence) in that the maxims are based on the fiqh itself and represent rules and principles that are derived from the reading of the detailed rules of fiqh on various themes. One of the main functions of the Islamic legal maxims is to depict the general picture of goals and objectives of the Islamic law (maqāsid al-Shari‘ah).

Today, legal maxims become ‘sine qua non’ for any Islamic jurist and

---


80 Ibid., at 871.


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

84 James Stephen notes that the authority for this maxim is Coke’s Third Institute, in which it is cited with a marginal note ‘Regula’ in the course of his account of the Statute of Treasons. Stephen admits that he does not know where Coke quotes it from; see J. F. Stephen, A History of the Criminal Law of England (1883), 94; Pollock and Maitland traced it correctly back to St Augustine, where the maxim reads ‘Reum non facit nisi mens rea’ and certainly contained no reference to an actus: F. Pollock and W. Maitland, The History of English Law before the Time of Edward I (1923), 476.


86 Kamali, supra note 8, at 143.

87 Kamali, supra note 4, at 78.
judge to master a certain level of rules (al-qawā‘id) in order to be able to dispense Islamic verdicts and to pass accurate judgment.\(^8\) As Imam al-Qarafi (d. 684 AH) affirms:

> These maxims are significant in Islamic jurisprudence. . . . By it, the value of a jurist is measured. Through it, the beauty of Fiqh [Islamic jurisprudence] is shown and known. With it, the methods of Fatwa [legal verdict or opinion] are clearly understood. . . . Whoever knows Fiqh with its maxims (qawā‘id) shall be in no need of memorizing most of the subordinate parts [of Fiqh] because of their inclusion under the general maxims.\(^9\)

Legal maxims aid judges in comprehending the basic doctrines of Islamic law on any contentious issue. For instance, the Islamic legal maxim that calls upon judges to avoid imposing hudūd and other sanctions when beset by doubts as to the scope of the law or the sufficiency of the evidence is frequently referenced and applied by judges of the Abu Dhabi Supreme Court of the United Arab Emirates.\(^9\) It has been noted that 'exploring this opportunity would also give scholars, judges and jurists of Islamic law the ability to deliver sound and just legal judgments'.\(^9\)

It is difficult to trace the precise dates for the emergence of the legal maxims (al-qawā‘id al-fiqhiyah) as a distinctive genre of roots of Islamic jurisprudence (īsāl al-fiqah). Suffice to say that al-qawā‘id al-fiqhiyah has gone through three stages of development.\(^9\) The first stage can be traced back to the seventh century (610–632) as the Prophet of Islam was endowed with the use of precise yet comprehensive and inclusive expressions (jawāmi‘ al-kalim).\(^9\) Despite the fact that the term qawā‘id (plural of qa‘id) was not explicitly mentioned in the expressions of the Prophet, the prophetic hadīths are full of expressions of legal maxims. For instance, the hadīth lā darar walā dirār (‘let there be no infliction of harm nor its reciprocation’); innamā al-a‘māl bil-niyyāt (‘acts are valued in accordance with their underlying intentions’); and al-bayyinah ‘alā al-muddawna wa al-yamin ‘alā man ankar (‘the burden of proof is on the claimant and the oath is on the one who denies’) are a few of those prophetic hadīths that emerged as Islamic legal maxims.

The second stage at which al-qawā‘id al-fiqhiyah began to gain popularity was in the middle of the fourth century of Hijrah (ninth century AD) and beyond when the idea of imitation (al-taqlīd) emerged and the spirit of independent reasoning (ijtihād)\(^9\) was on the edge of extinction.\(^9\) At this stage, legal maxims became recognized as a distinct subject from usūl al-fiqh.\(^9\) The first visible work on Islamic legal maxims,

\(^{88}\) Zakariyyah, supra note 82, at 58–9.
\(^{89}\) A. Al-Qarafi, al-Furūq, Vol. 1, 3, quoted in Zakariyyah, supra note 82, at 59.
\(^{90}\) Appeal No. 36, Penal Judicial Year 5, Session 9/1/1984; Appeal No. 40, Penal Judicial Year 6, Session 18/1/1985; Appeal No. 32, Penal Judicial Year 13, Session 15/1/1992; Appeal No. 42, Penal Judicial Year 8, Session 1986; Appeal No. 43, Penal/Shari‘a Judicial Year 18, Session 4/5/1996.
\(^{91}\) Zakariyyah, supra note 82, at 59–60.
\(^{92}\) Ibid.\(^\text{(*)}\)
\(^{93}\) Ibid., at 38.
\(^{94}\) Ijtihād (independent reasoning) literally means legal methods of interpretation and reasoning by which a mujtahid derives or rationalizes law on the basis of the Qur’an, the Sunnah, and/or consensus.
\(^{95}\) Zakariyyah, supra note 82, at 42.
\(^{96}\) Ibid.
usūl al-Karkhī, was written by Hanafi’s jurist, Ibn al-Hassan al-Karkhī. This was followed by other significant contributions by jurists from other madhāhib (legal schools), namely the Shafe’i’s, the Hanbali, and the Maliki schools.

The Islamic legal maxims reach the stage of maturity around the thirteenth century AH/eighteenth century AD. According to one commentator, ‘one of the distinctive features of this stage is the establishment of maxims as a separate science in Islamic jurisprudence, while at the same time the formula of their codification was standardized’.

The Mejell-i Ahkam Adliyye, an Islamic law code written by a group of Turkish scholars in the late nineteenth century, is said to present the most advanced stage in the compilation of the Islamic legal maxims.

Islamic legal maxims are divided into two types. The first are those that reiterate the Qur’ān and the Sunnah, whereas the second are those formulated by the jurists. The former carry greater authority than the latter. The most expansive collection of legal maxims is known as al-qawā‘id al-fiqhiyyah al-asliyyah or al-qawā‘id al-fiqhiyyah al-kulliyah (‘the normative/basic legal maxims’). This kind of maxim stands as the pillars of usūl al-fiqh; they could be applied broadly to the entire corpus of Islamic jurisprudence; each of these maxims has supplementary maxims of a more specified scope; and there is consensus among the legal schools over them. The five generally agreed-upon maxims are as follows: (i) al-umūr bi-maqāsīdihā (‘acts are judged by their goals and purposes’); (ii) al-yaqīn lā yazālū bil-shak (‘certainty is not overruled by doubt’); (iii) al-mashaqqatu tajlib al-taysīr (‘hardship begets facility’); (iv) al-dararu yuzāl (‘harm must be eliminated’); and (v) al-‘ūdatu muḥākamatun (‘custom is the basis of judgment’).

The maxim ‘certainty is not overruled by doubt’ has several sub-maxims, one of which reads ‘knowledge that is based on certainty is to be differentiated from manifest knowledge that is based on probability’ (yufarraqu bayn al-cilmī idhā thabata zahirān we baynahu idhā thabata yaqīnān). Two examples are illustrative in this regard:

When the judge adjudicates on the basis of certainty, but later it appears that he might have erred in his judgment, if his initial decision is based on clear text and consensus, it would not be subjected to review on the basis of a mere probability.

This maxim also applies where a:

missing person (mafqūd) of unknown whereabouts is presumed to be alive, as this is the certainty that is known about him before his disappearance. The certainty here shall prevail and no claim of his death would validate distribution of his assets among

98 Kamali, supra note 41, at 142–4.
99 Zakariyah, supra note 82, at 55.
101 Zakariyah, supra note 82, at 55.
102 M. A. Barikati, Qawā‘id al-Fiqh(1961), 142, quoted in Kamali, supra note 8, at 145 (emphasis added).
his heirs until his death is proven by clear evidence. A doubtful claim of his death is thus not allowed to overrule what is deemed to be certain.103

4. Principle of legality and non-retroactivity

One of the rare provisions set out as a non-derogable norm in all of the major human rights instruments is the *nullum crimen sine lege* rule.104 Article 22 of the ICC Statute confirms the core prohibition of the retroactive application of the criminal law together with the other two major corollaries of this prohibition, namely the rule of strict construction and the requirement of *in dubio pro reo*.105 The prohibitions of retroactive offences together with the prohibition of retroactive penalties, *nulla poena sine lege*,106 form the ‘principle of legality’.

In Islamic law, there is no place for arbitrary rule by a single individual or a group.107 In fact, long before the Declaration of the Rights of Man, which, in 1789, first proclaimed the legality principle in Western law, the Islamic system of criminal justice operated on an implicit principle of legality.108 Evidence of this principle can be found in the following Qur’ānic verses:

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

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

Islamic law includes a number of legal maxims that complement this principle, such as: ‘the conduct of reasonable men (or the dictate of reason) alone is of no consequence without the support of a legal text’, which means that no conduct can be declared forbidden (*harām*) on the ground of reason alone or on the ground of the act of reasonable men; rather, a legal text is necessary.109 Another maxim declares that ‘permissibility is the original norm’ (*al-asl, fi’l-ashyā’ al-ibāhah*), which implies that all things are permissible unless the law has declared them otherwise.110 *Shari’a* also establishes the rule of non-retroactivity, unless it is in favour of the accused:111 ‘Say to the Unbelievers, if (now) they desist (from Unbelief), their past would be

---

104 W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 403, with reference to universal and regional human rights instruments together with relevant provision (Art. 99) in the third Geneva Convention of 1949 Relative to the Treatment of Prisoners of War and Arts. 2(c) and 6(c) the two Additional Protocols to the 1949 Geneva Conventions Relating to the Protection of Victims of International and Non-International Armed Conflict, respectively.
106 Art. 23 of the ICC Statute.
107 Kamali, *supra* note 8, at 180.
111 Kamali, *supra* note 8, at 188.
forgiven them; but if they persist, the punishment of those before them is already (a matter of warning for them) (Qur’an, 8:38).

This principle is also mirrored in the tradition of the Prophet. When ‘Amr b. al-‘Ass embraced Islam, he pledged allegiance to the Prophet and asked whether he would be held accountable for his previous transgressions. To this, the Prophet replied: ‘Did you not know, O’Amr, that Islam obliterates that which took place before it?’

Similarly, the Prophet refrained from punishing crimes of blood or acts of usury that had taken place prior to Islam:

Any blood-guilt traced back to the period of ignorance should be disregarded, and I begin with that of al-Harith ibn ‘Abd al-Muttalib; the usury practised during that period has also been erased starting with that of my uncle, al-‘Abbas ibn ‘Abd al-Muttalib.

*Hudūd* crimes are firmly based on the principle of legality, as the crimes themselves, as well as the punishments, are precisely determined in the Qur’an or the Sunnah. *Qisas* crimes are bound to specific procedures and appropriate penalties in the process of retribution and compensation and thus also show their basis in the principle of legality. More problematic are *ta’azir* crimes, which, according to some schools of thought, give very broad discretionary powers to the khalifa (ruler) and to the *qadi* (judge) regarding what they punish and how. While *ta’azir* crimes are, for that reason, viewed by Western scholars as clearly violating the principle of legality, Muslim scholars have mostly defended the wide discretion given to the judges, claiming that this is merely a safeguard that serves to balance the principle of legality and thus avoid the problem of its potential inflexibility.

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

5. PERSUMPTION OF INNOCENCE

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

It requires, inter alia, that when carrying out their duties, (1) the members of a court should not start with the preconceived idea that the accused has committed the offence

---

112 Muslim, Sahih Muslim, Kitab al-Iman, Bab al-Islam yahdim ma qablah wa kadha al-hijrah wa al-haji; Abu Zahrah, al-Jartmah, 343, in Kamali, supra note 8, at 188.

113 Kamel, supra note 108, at 159.

114 Ibid., at 161.


117 Ibid., at 157; M. S. El-Awa, supra note 31; Benmelha, supra note 64, at 213.

118 See also Bassiouni, supra note 18, at 56.
charged; (2) the burden of proof is on the prosecution, and (3) any doubt should benefit the accused.\(^{119}\)

Under Islamic law, no one is guilty of a crime unless his guilt is proved through lawful evidence.\(^{120}\) One of the sub-maxims of the maxim ‘certainty is not overruled by doubt’ is the maxim that reads: ‘The norm [of Shari’ah] is that of non-liability’ \((al-aslu bara’at al-dhimmah)\). The Prophet is reported to have said ‘everyone is born inherently pure’.\(^{121}\) According to the legal principle of \(istishâb\), recognized by the Shafi’i and Hanbali schools, there is a presumption of continuation of a certain state, until the contrary is established by evidence.\(^{122}\) Therefore, an accused person is considered innocent until the contrary is proven. In the words of Kamali, ‘to attribute guilt to anyone is treated as doubtful. Certainty can . . . only be overruled by certainty, not by doubt’.\(^{123}\) The Prophet is reported to have said:

> The burden of proof is on him who makes the claim, whereas the oath [denying the charge] is on him who denies.\(^{124}\)

> Had Men been believed only according to their allegations, some persons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof.\(^{125}\)

and

Avoid condemning the Muslim to hudûd whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs, it is better that he errs in favour of innocence (pardon) than in favour of guilt (punishment).\(^{126}\)

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

During the time of the Muslim polity’s fourth caliph ‘Alî, Medina’s patrol found a man in the town ruins with a blood-stained knife in hand, standing over the corpse of a man who had recently been stabbed to death. When they arrested him, he immediately confessed: ‘I killed him.’ He was brought before ‘Alî, who sentenced him to death for the deed. Before the sentence was carried out, another man hurried forward, telling the executioners not to be hasty. ‘Do not kill him. I did it,’ he announced. ‘Ali turned to the condemned man, incredulously. ‘What made you confess to a murder that you did not commit?!’ he asked. The man explained that he thought that ‘Alî would never take his word over that of the patrolmen who had witnessed a crime scene, he was a butcher who had just finished slaughtering a cow. Immediately afterward, he needed to relieve himself, so entered into the area of the ruins, bloody knife still in hand. Upon return, he


\(^{120}\) Abû Yusuf, Kitâb al-Kharaj, 152, in Kamali, \textit{supra} note 8, at 181.

\(^{121}\) Baderin, \textit{supra} note 23, at 103.


\(^{123}\) Kamali, \textit{supra} note 8, at 145–6.


\(^{126}\) Al Turmuzi, No. 1424; Al Baihagi, No. 8/338; Al Hakim, No. 4384, in Bassiouni, \textit{supra} note 18, at 40.

\(^{127}\) S. S. S. Haneef, \textit{Homicide in Islam} (2000), 120.
came across the dead man, and stood over him in concern. It was then that the petrol
arrested him. He figured that he could not plausibly deny having committed the crime
of murder. He surrendered himself and confessed to the ‘obvious,’ deciding to leave the
truth of the matter in God’s hands. The second man offered a corroborating story. He
explained that he was the one who had murdered for money and fled when he heard
the sounds of the patrol approaching. On his way out, he passed the butcher on the
way in and watched the events previously described unfold. But once the first man was
condemned to death, the second man said that he had to step forward, because he did
not want the blood of two men on his hands.\(^\text{128}\)

Having realized that the facts surrounding the above case had become doubtful
without a fail-safe means to validate one story over the other, the fourth caliph ‘Al¯ı
released the first man and pardoned the second.\(^\text{129}\)

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

\section*{6. \textit{Mens Rea}}

For the first time in the sphere of international criminal law, and unlike the Nurem-
berg and Tokyo Charters or the Statutes of the Yugoslavia and Rwanda Tribunals,
Article 30 of the Rome Statute of the International Criminal Court provides a general
definition for the mental element required to trigger the criminal responsibility of
individuals for serious violations of international humanitarian law. This provision
is in line with the Latin maxim \textit{actus non facit reum nisi mens sit rea}. But Article 30
goes still further, assuring that the mental element consists of two components: a
volitional component of intent and a cognitive element of knowledge.\(^\text{131}\)

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

\begin{footnotes}
\footnote{128} Quoted in I. A. Rabb, ‘Islamic Legal Maxims as Substantive Canons of Construction: \textit{Hudūd – Avoidance in

\footnote{129} Ibíd., at 66.

\footnote{130} Tellenbach, \textit{supra} note 115, at 930.


\footnote{132} Zakariyah, \textit{supra} note 82, at 64.

\footnote{133} Ibíd., at 64.

\footnote{134} Ibíd., at 65.}

\end{footnotes}
is Oft-Returning, Most Merciful’ (Qur’ān, 33:5). This stand is further affirmed by the Sunnah of the Prophet:

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

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

and

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

Yet, the general rule in Shari’a is that a man cannot be held responsible for a mere thought. In Islam, a good thought is recorded as an act of piety and a bad thought is not recorded at all.¹³⁸ According to Imam Abou Zahra, an eminent scholar, the criminal intent is the intent to act wilfully, premeditatedly, and deliberately, with a complete consent about its intended results.¹³⁹ Intentional crimes must meet three conditions: premeditation, a free will to choose a certain course of action, and the knowledge of the unlawfulness of the act.¹⁴⁰ The difference between intentional and unintentional results is in the degree of punishment.

The established jurisprudence of the Supreme Federal Court of the United Arab of Emirates (UAE) recognizes different degrees of mental states other than the one of actual intent. Most notably, the UAE adheres to Malik’s school of thought, according to which, in murder cases, it is not a condition sine qua non to prove the intent of murder on the part of the defendant; it is sufficient, however, to prove that the act was carried out with purpose of assault and not for the purpose of amusement or discipline. A practical example is set forth in one of Malik’s jurisprudence sources: ‘if two people fought intentionally and one of them was killed, retaliation (qisas) should be imposed on the person who survived.’¹⁴¹

6.1. Standards used for determining intention in murder cases

Because the intention of a person is difficult to determine, Muslim jurists do not envisage an exploration of the psyche of the killer, or any extensive examination of behaviour patterns or the gradation of the relationship between the killer and the victim.¹⁴² Instead, they consider the objects used in the crimes described by the relative hadiths as external standards that are likely to convey the inner working of the offender’s mind and thus distinguish between ‘amd (intentional) and shibh al-’amd (quasi-intentional).¹⁴³

¹³⁵ Al-Bukhari, Sahih, hadith no. 1, Muslim, Sahih, hadith no. 1599.
¹³⁶ Sahih al-Bukhari; Vol. 9, at 65, quoted in Y. Y. Bambale, Crimes and Punishment in Islamic Law (2003), 7.
¹³⁷ Ibid.
¹⁴⁰ Ibid., at 106.
¹⁴¹ Supreme Federal Court of the UAE, Appeal 52, judicial year 14, hearing 30 January 1993.
¹⁴³ Nyazee, supra note 55, at 98.
In drawing analogies from relevant hadiths, the majority of Muslim scholars concluded that the mens rea of murder is found when the offender uses an instrument that is most likely to cause death or is prepared for killing, such as a sword, a spear, a flint, or a fire.\textsuperscript{144} Abu Hanifa excluded all blunt instruments, such as a wooden club, from the list of lethal weapons and claimed they testify to quasi-intention, irrespective of the size of the instrument or the force applied.\textsuperscript{145} However, he does not exclude an iron rod, relying on the words of the Qur'an: ‘We sent down Iron, in which is (material for) mighty war’ (Qur'an, 57:25).\textsuperscript{146}

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

The overall balance between using subjective and objective criteria in determining intent thus tips decidedly in favour of reliance on objective evidence,\textsuperscript{149} which seemingly becomes a constituent element of the crime in itself, replacing the actual intent. Accordingly, Hanafi Ibn Mawdud al-Musili defines intentional killing as ‘deliberately striking with that which splits into parts, such as a sword, a spear, a flint, and fire’,\textsuperscript{150} and Hanbali Ibn Qudama deems intentional any homicide committed with an instrument ‘thought likely to cause death when used in its usual manner’.\textsuperscript{151}

7. Duress and Superior Orders

The ICC Statute recognizes two forms of duress as grounds for excluding criminal responsibility, namely duress\textsuperscript{152} and duress of circumstances.\textsuperscript{153} The latter form is treated by English courts as a defence of necessity.\textsuperscript{154} The elements of the two forms are almost identical. Unlike the jurisprudence of the ICTY, the ICC allows the defence of duress to murder that runs contrary to Islamic law (Shari'a), as will be discussed later in this section.

In international criminal law, the defence of superior orders is often confounded with that of duress, but the two are quite distinct. For superior orders to be a valid defence before the ICC, three conditions have to be established: the defendant must be under a legal obligation to obey orders of a government or a superior; the defendant

\textsuperscript{144} Haneef, supra note 127, at 1.
\textsuperscript{145} Nyazee, supra note 55, at 99; Haneef, supra note 127, at 35.
\textsuperscript{146} Nyazee, supra note 55, at 99.
\textsuperscript{147} Al-Tahawi, Sharih Ma'ani al-Athar, Vol. 3, 186, quoted in Haneef, supra note 127, at 36.
\textsuperscript{148} Haneef, supra note 127, at 36.
\textsuperscript{149} Powers, supra note 142, at 42 and 48.
\textsuperscript{150} Ibid., at 49.
\textsuperscript{151} Art. 31(1)(d)(i) of the ICC Statute.
\textsuperscript{152} Art. 31(1)(d)(ii) of the ICC Statute.
\textsuperscript{153} See R. v. Conway, [1988] 3 All ER 1025, Court of Appeal, Criminal Division; R. v. Martin, [1989] 1 All ER 652, Court of Appeal, Criminal Division.
must not know that the order was unlawful; and the order must not be manifestly unlawful.\textsuperscript{155}

In Islamic law, duress (\textit{ikrāh}) is a situation in which a person is forced to do something against his will.\textsuperscript{156} The \textit{Qur’ān} acknowledges such a situation and prescribes thus: ‘Save him who is forced thereto and whose heart is still content with Faith’ (\textit{Qur’ān}, 16:106). The Prophet is reported to have said: ‘My \textit{Ummah} will be forgiven for crimes it commits under duress, in error, or as a result of forgetfulness.’\textsuperscript{157}

Under duress, the person commits a criminal act not as an end in itself, but as a means to save himself from being injured. If the threat concerns persons other than the person under compulsion, the Maliki consider it duress, some Hanafis do not, while the Shafe‘i and other Hanafis believe it to be duress only if the threat relates to the father, son or other close relative.\textsuperscript{158}

Islamic law recognizes two kinds of duress:

1. Duress imperfect – a kind of duress that does not pose a threat to the life of the agent. For example, the (threat of) confinement for a certain period or subjecting the agent to physical violence that does not pose a threat to his life. This kind of duress has no force in crimes.\textsuperscript{159}

2. Duress proper – a kind of duress in which the life of the agent is threatened. Both the consent and the choice of the agent are neutralized. Under duress proper, certain forbidden acts will not only cease to be punishable, but will become permissible. These relate to forbidden edibles and drinks. Other acts, such as false accusation, vituperation, larceny, and destroying property of another, will remain unlawful, but punishment will be invalidated.\textsuperscript{160} However, murder or any fatal offence are unaffected by duress and will not become either permissible acts, or subject to lenient penalty.\textsuperscript{161}

In the latter situation of duress, \textit{Shari‘a} disapproves of both courses of action that the person under duress can choose from. It prohibits doing harm to others as well as endangering one’s own safety. In this situation, two legal maxims apply: ‘one harm should not be warded off by its like (another harm)’ and, when this is inevitable, one should ‘prefer the lesser evil’.\textsuperscript{162} Therefore, if a person has to choose between causing mild physical harm or being killed and he chooses the former, his action is justified.\textsuperscript{163} In the case of murder, however, both evils are equal, as no person’s life is more precious than another’s.\textsuperscript{164}

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

---

\textsuperscript{155} Art. 33 of the ICC Statute.
\textsuperscript{156} Nyazee, supra note 55, at 144.
\textsuperscript{157} Ibn Majah, al-Sunan, op. cit. hadith no. 2045, in Zakariyah, supra note 82, at 73.
\textsuperscript{158} Peters, supra note 21, at 23.
\textsuperscript{160} Ibid., at 300–3.
\textsuperscript{161} Ibid., at 298.
\textsuperscript{162} Zakariyah, supra note 82, at 178–83.
\textsuperscript{163} Abu-Zahra, supra note 139, at 379.
\textsuperscript{164} Zakariyah, supra note 82, at 73; Oudah, supra note 159, at 306.
money (diyat) on the ground that duress introduces an element of doubt.\(^{165}\) Within Hanifa’s school, there are three different opinions:

1. \(qisās\) must be borne by the forced person, for it is he who actually carried out the criminal act;
2. neither the person who inflicts duress nor the person under duress shall be punished by \(qisās\), as the person who inflicts duress is merely an inciter, while the person under duress, neither has the criminal intent, nor is he satisfied with the result of the act and only blood money should be paid by the person who compels;\(^{166}\)
3. \(qisās\) should be borne by the person who inflicts, as the person under duress is just a puppet or a tool of murder at the hands of the one who threatens him. For a person it is lesser evil to choose the death of another than his own. This does not mean however that he will be blameless in the next world, because his sin shall be forgiven by God on the day of judgement.\(^{167}\)

In so far as the defence of superior orders is concerned, ‘Islam confers on every citizen the right to refuse to commit a crime, should any government or administrator order him to do so.’\(^{168}\) The Prophet is reported to have said: ‘There is no obedience in transgression; obedience is in lawful conduct only;’\(^{169}\) ‘There is no obedience to a creature when it involves the disobedience of the Creator.’\(^{170}\) The order of a competent authority that implies punishment of death, grievous injury, or imprisonment for the disobedient will be treated as duress.\(^{171}\) However, if the order is given by an official who does not have the necessary powers, it will only be treated as duress if the person under his command is sure that if he fails to carry out the order, the means of duress will be applied to him or that the official in question is in the habit of applying such measures when his orders are defied.\(^{172}\) In other cases, no offender may seek to escape punishment by saying that the offence was committed on the orders of a superior; if such a situation arises, the person who commits the offence and the person who orders it are equally liable.\(^{173}\)

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

Similarly to Article 27 of the ICC Statute (irrelevance of official capacity), in Islamic law, there is no recognition of special privileges for anyone and rulers are not above the law. Muslim jurists have unanimously held the view that the head

\(^{166}\) Abu-Zahra, *supra* note 139, at 382; Oudah, *supra* note 159, at 299.
\(^{167}\) Abu-Zahra, *supra* note 139, at 382.
\(^{169}\) Sahih Muslim, Kitāb al-Amāmah, Bāb Wujūt Tā’at al-Umarā’ifi Ghayr al-Ma’siyah wa Tahrimuhā fi’il-Ma’siyah, hadith no. 39. This hadith is reported in both Bukhārī and Muslim.
\(^{170}\) Abū Dāwūd al-Siṣistānī, Sunan Abū Dāwūd, tr. Ahmad Hasan, hadith no. 2285.
\(^{171}\) Oudah, *supra* note 159, at 295.
\(^{172}\) Hasia Ibn Abideen, Vol. 5, at 112, in ibid.
\(^{173}\) Mawdūd, *supra* note 168, at 33.
of state and government officials are accountable for their conduct like everyone else.\textsuperscript{174} Equality before the law and before the courts of justice is clearly recognized for all citizens alike, from the most humble citizen to the highest executive in the land.\textsuperscript{175} A tradition was reported by Caliph Umar showing how the Prophet himself did not expect any special treatment: ‘On the occasion of the battle of Badr, when the Prophet was straightening the rows of the Muslim army, he hit the stomach of a soldier in an attempt to push him back in line. The soldier complained: “O Prophet, you have hurt me with your stick.” The Prophet immediately bared his stomach and said, “I am very sorry, you can revenge by doing the same to me.”’\textsuperscript{176} When a woman from a noble family was brought before the Prophet in connection with a theft and it was recommended that she be spared punishment, the Prophet made his stance on the equality of everyone before the law even clearer:

The nations that lived before you were destroyed by God, because they punished the common man for their offences and let their dignitaries go unpunished for their crimes; I swear by Him (God) who holds my life in His hand that even if Fatima, the daughter of Muhammad, had committed this crime, then I would have amputated her hand.\textsuperscript{177}

\section*{9. General Remarks and Conclusion}

Islamic law has developed over many centuries of juristic effort into a subtle, complex, and highly developed reality. Such a complexity does not, however, make Islamic law indeterminable.\textsuperscript{178} The differences between the jurists and schools of Islamic jurisprudence represent ‘different manifestations of the same divine will’ and are considered as ‘diversity within unity’.\textsuperscript{179} ‘Islamic law, like any other, has its “sources” (al-masadir); it also has its “guiding principles” (al-usul) that dictate the nature of its “evidence” (al-adilla); it equally employs the use of “legal maxims” (al-qawa'id) and utilizes a number of underlying “objectives” (al-maqasid) to underpin the structure of its legal theory.’\textsuperscript{180}

This study shows that Islamic legal maxims, the majority of which are universal, play a vital role in the process of judgment. Thus, the ‘presumption of innocence’, the most fundamental rights of the accused as enshrined in Article 66 of the ICC Statute, finds its counterpart in the Islamic legal maxim ‘certainty is not overruled by doubt’ and its sub-maxim ‘the norm of [Shari’\textquoteright a] is that of non liability’ – a very

\begin{flushright}
\textsuperscript{174} Kamali, \textit{supra} note 8, at 180.
\textsuperscript{175} Mawdūd, \textit{supra} note 168, at 32; cf. Abu Zahrah, \textit{Tanzim}, 34–5; Mutawallī, \textit{Mabādi}, 387; Ghazāwī, al-Hurriyyah, 26, in Kamali, \textit{supra} note 8, at 181.
\textsuperscript{176} Mawdūd, \textit{supra} note 168, at 32.
\textsuperscript{177} Ibid.
\textsuperscript{178} Baderin, \textit{supra} note 23, at 32–3.
\end{flushright}
explicit rule that obligates judges not to start the trial with the preconceived idea that the accused has committed the offence charged.

The second paragraph of Article 66 of the ICC Statute, which stipulates that the burden of proof is on the prosecution, is equivalent to the *hadith* of the Prophet that states: ‘The burden of proof is on him who makes the claim, whereas the oath [denying the charge] is on him who denies.’ But the practice of the ICC says otherwise. Our examination of the law of *mens rea* reveals that there are exceptions regarding the application of the default rule of intent and knowledge to the crimes within the *ratione materiae* of the ICC. The *Lubanga* Pre-Trial Chamber (PTC) has affirmed that the ICC Elements of Crimes can by themselves ‘provide otherwise’. The PTC considered that the fault element of negligence, as set out in the Elements of Crimes for particular offences, can be an exception to the intent and knowledge standard provided in Article 30(1) of the ICC Statute. In such situations, where conviction depends upon proof that the perpetrator had ‘reasonable cause’ to believe or suspect some relevant fact, the prosecution does not have much to do and the burden of proof, arguably, will lie upon the defendant – a practice that apparently conflicts with the above-mentioned *hadith*.

As far as the *mens rea* is concerned, the exclusion of recklessness as a culpable mental element within the meaning of Article 30 of the ICC runs in harmony with the basic principles of Islamic law that no one shall be held criminally responsible for *hudud* crimes (offences with fixed mandatory punishments) or *qisas* crimes (retaliation) unless he or she has wilfully or intentionally (‘*amān*) committed the crime at issue.

The approach followed by Muslim jurists in determining the existence of *mens rea* in murder cases warrants further consideration. They consider the objects used in committing the crime in question as external factors that are likely to convey the defendant’s mental state.

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

Based on this preliminary study and other scholarly works, there is no reason for the Islamic legal system, which is recognized by such a considerable part of the

---


world, not to be included in comparative studies to reveal to the international judge a more complete picture of legal systems from which he or she is to derive general principles of law. As Rudolph Schlesinger put it: ‘The time has come, perhaps, to discard or limit the visionary goal of “one law” or “one code” for the whole world and to substitute for it the more realistic aim of crystallizing a common core of legal principles.’ 183

183 Schlesinger, supra note 1, at 741; Ambos has noted that a purely Western approach must be complemented by non-Western concepts of crime and punishment, such as Islamic law, to establish and develop a universal system; see K. Ambos, ‘International Criminal Law at the Crossroads: From Ad Hoc Imposition to a Treaty-Based Universal System’, in C. Stahn and L. Van den Herik (eds.), Future Perspective on International Criminal Justice (2010), 161, at 177.