

**A Comparative Study of the Compatibilities and Incompatibilities between
the Rome Statute and Islamic Law, with Special Reference to Saudi Arabia**

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Abstract

The Rome Statute of the International Criminal Court (the ICC or the Court) was adopted in 1998 with the expectation that it would be ratified by a majority of states. Nonetheless, there has been reluctance among some Arab and Muslim countries to ratify the Rome Statute. The Kingdom of Saudi Arabia is one such country. Saudi Arabia has questioned the rights held by the Security Council to refer cases to the Court. It has also argued that the right of the Prosecutor of the Court to initiate the investigation of cases within the jurisdiction of the Court might violate a member state's right to sovereignty over its own territory. These issues of contention have been discussed in some previous research by writers interested in international criminal law. However, some commentators have suggested that Islamic law itself is not compatible with modern international law.

This study seeks to investigate compatibilities and incompatibilities between international criminal law (the Rome Statute) and Islamic law. It uses a comparative approach in an attempt to find commonalities and differences. The focus is placed on general principles and jurisdictions. This is because principles and jurisdictions are considered at the top of the legal pyramid of both legal systems, and the rest of the provisions fall under those principles/jurisdictions. Moreover, the general principles of law reflect the true picture of human rights.

The study aims to examine whether the absence of ratification by some Muslim countries was because of the non-conformity of the Rome Statute with Islamic law. The study makes clear that there is compatibility between the principles and jurisdiction of the Rome Statute and Islamic law. This study is the first of its kind to undertake such an investigation.

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Glossary¹

al-Umūr bi Maqāsidihā: 'An act should be judged in accordance with the intention of the offender.'

bugháh: Rebellion.

dar-al-ahd: The land of truce.

dár al-ḥarb: The land of war.

dar-al-Islam: The land of peace.

dhimmi: A non-Muslim person who lives in a Muslim state and is granted protection because he pays tax.

diyah: Blood money.

fatwá: A religious view issued by a qualified jurist.

fiqh: The jurisprudence of Islam.

ḥajj: The Pilgrimage.

Ḥanafí: A school of legal thought.

Ḥanbalí: A school of legal thought.

ḥirábah: Armed robbery.

hudúd: Fixed punishments from the Quran and Sunnah.

istiḥsán: Juristic preference.

ijmá': Consensus.

ijtihad: The principal tool of independent interpretation of the main sources of *Sharí'ah*.

jizyah: Tax paid by non-Muslims living in Muslim territories under a Muslim governor. (There is no consensus between jurists with regard to this definition.)

madhhab: Schools of thought.

maqāṣid al-Sharí'ah: The objectives of *Sharí'ah*.

maslahah mursalah: Public interest.

¹ For the glossary, the researcher has used 'Arabic transliterations' according to the IJMES Guide, Cambridge University Core <<https://www.cambridge.org/core/journals/international-journal-of-middle-east-studies/information/author-resources/ijmes-translation-and-transliteration-guide>> accessed 28 March 2020.

musta'min: A person fighting against a Muslim state, who gives up fighting and is then granted protection.

Majlis a-Shura: The Council of consulting of The Kingdom of Saudi Arabia.

Málikí: A school of legal thought.

mu'ahid: A non-Muslim who lives in a Muslim state. He or she is granted protection under Islamic law.

qadhf: Fornication.

qişáş: Retaliation.

qiyás: Analogy.

Quran: The Holy Book of Islam.

rajm: Punishment by stoning.

riddah: Apostasy.

sariqah: Theft.

Sháfi'í: A School of legal thought.

Sharí'ah: The Right Path of Allah.

sharb al-khamr: Drinking alcohol.

siyar: The path of the Prophet Mohammed and his four Caliphs in times of peace and war.

siyasat a- Sharí'ah: The policies of Sharí'ah.

shūra: Consultation.

Sunnah: The traditions of the Prophet Mohammed.

ta'zír: Discretionary punishment in Islamic law.

úşúl al-fiqh: The roots of law, the body of principles, and the investigative methodologies through which practical legal rules are developed from their foundational sources (see Oxford Dictionary).

urf: Customs.

zakáh: The obligatory tax that every Muslim must pay.

ziná': Adultery.

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Part One
Preamble

Chapter One Background

1.1 Introduction

The Rome Statute of the International Criminal Court (ICC) was adopted by the international community in 1998 to prohibit international crimes and prosecute those who have committed such crimes.¹ However, there is still reluctance among some Muslim/Arab countries to ratify this Statute. This is because some Muslim/Arab countries do not agree with the rights of the Security Council to refer cases to the Court as well as the right of the Prosecutor of the Court to initiate the investigation of cases within the jurisdiction of the Court based on his own appreciation.² Thus, most Muslim/Arab countries remain outside the ICC. One of these countries is the Kingdom of Saudi Arabia, which relies on *Shari'ah*/Islamic law (both Islamic criminal law and Islamic international law are parts of Islamic law).³ However, Islamic law has been described by some as not constituting legitimate law

¹ The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Rome (15 June-17 July 1998). Official Records. Volume II <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> accessed 26 May 2017. The Rome Statute of the International Criminal Court (1998) entered into force in July 2002 UNTS 2187 (the Rome Statute).

² See Articles 13,15, and 16 of the Rome Statute. See also the Arab Group's statement by the representative of Sudan on behalf of Arab States. Further, The UN Diplomatic Conference concluded in Rome with a decision to issue an International Criminal Court Press Release L/2889 <<http://www.un.org/press/en/1998/19980720.l2889.html>> accessed 13 April 2017; see UN A/CONF.18/13 (Vol. 11) Summary Record of the Plenary Meetings and of the Meetings of the Committee of the Whole. The six Islamic countries that have now ratified the Rome Statute are Jordan, Tunisia, Afghanistan, Djibouti, Comoros, and Palestine. This study uses terms of both Muslim countries and Islamic states based on the context; it will not engage in the discussion that makes a distinction between these terms. The view of Arab countries with regard to the ICC will be discussed in chapter two.

³ *Shari'ah* has been defined as an 'umbrella of rules, regulations, values and normative framework covering all aspects and spheres of life for Muslims'. Islamic law is a term that refers to wider sources as well as *Shari'ah*, but *Shari'ah* itself derives from two main sources, the Quran and the Sunnah. 'Islamic law covers the entire system of law and jurisprudence associated with the religion of Islam.' Islamic criminal law has been defined as 'the control of commission of the crimes so as to protect the rights and interests of the public and ensure peace in the society'. Islamic international law (*siyar*) covers both the rules and justifications for resorting to war, and it regulates operations and conduct in war. See Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016) 22; Mashood A Baderin *International Human Rights and Islamic Law* (Oxford Monographs in International Law 2005) 32; Anwar Ullah Chowdhury, *The Criminal Law of Islam* (A. S. Noordeen 2002) 1; Ahmed Al-Dawood, *The Islamic Law of War Justification and Regulations* (Palgrave Macmillan 2011) 4. See further discussion in chapter three. It is important to note that when the researcher mentions Islamic law, he refers to the sources of Islamic law. When he mentions Islamic criminal law, he refers to the principles of law and prohibited crimes and their punishments. When he also mentions Islamic international law, he refers to the rules governing the conduct of war.

because it contains some principles that are not compatible with modern international law.⁴

Arguments of incompatibility are often raised by those who debate the pros and cons of international law and Islamic law. One such argument claims that there cannot be harmonisation between Islamic law and international criminal law because there are different applications of Islamic law in different Muslim countries, and this creates different levels of incompatibility.⁵ Another argument asserts that Islamic law is not a comprehensive legal system because it is based on God's commands and prohibitions.⁶ Furthermore, Huntington claims that Islam is 'a religion of the sword' and he predicts continual conflict between the West and Islam, which will never develop into non-violent conflict or difference.⁷ Spencer argues that Islam is a 'totalitarian ideology', in which all personal, social, and political spheres of human life are controlled by Islam.⁸ Davis also describes Islam as a religion that 'actively seeks the subjugation and destruction of everything that is not itself'.⁹

International criminal law, and in particular the Rome Statute, and Islamic law differ in terms of the main sources of law. The principal source of Islamic law is the 'divine commands' of Allah.¹⁰ However, the sources of the Rome Statute are the Statute itself and other international conventions such as the Geneva Conventions, The Convention on the Prevention and Punishment of the Crime of Genocide, and the International Covenant on Civil and Political Rights,¹¹ all

⁴ See for example; Maurits Berger, 'Islamic Views on International Law' in Meerts Paul (ed), *Culture and International Law* (Hague Academic Coalition, The Hague 2008) 107; Michael Kelly, 'Islam and International Criminal Law: A Brief (In) Compatibility Study' (2010) *Peace International Review* 105.

⁵ Kelly (n 4) 1.

⁶ Max Rodenbeck, 'Islam Confronts its Demons' (2004) *The New York Review of Books* 14; see also Steven C Roach, 'Arab States and the Role of Islam in the International Criminal Court' (2005) 53 *Political Studies Association* 134; Kaltner, J, *What Non-Muslims Should Know, Revised and Expanded* (Augsburg Fortress, Publishers 2016) 16.

⁷ Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster Paperbacks, New York 2003) 263.

⁸ Robert Spencer (ed), *The Myth of Islamic Tolerance* (Prometheus Books, New York 2005) 13.

⁹ Gregory Davis, *Religion of Peace? Islam's War Against the World* (World Ahead 2006) 4.

¹⁰ The Quran 5:3. Allah says, 'This day I have perfected for you your religion and completed My favor upon you and have approved for you Islam as religion'. See also Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford Monographs in International Law 2005); Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Volume 5, Brill Leiden, Boston 2011) 36.

¹¹ See Article 21 of the Rome Statute. See also the International Covenant on Civil and Political Rights (1966), entered into force on 23 March 1976; The International Covenant on Economic Social and Cultural Rights of 16 December 1966, entered into force on 3 January 1976; The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force on 12 January 1951; The Geneva Convention (I) for the

of which may contribute to constituting some international general principles of law as recognised by civilised nations.¹² Both legal systems, namely the Rome Statute and Islamic law, stem from different sources. These may share mechanisms for interpreting laws, as we will see in chapter three of this study.

The Rome Statute is based on universal principles derived from international conventions of human rights and the different national legislation of member states.¹³ The principles of human rights are much broader than the principles stipulated in part 3 of the Rome Statute. However, the criminal principles of the Rome Statute are: a) *nullum crimen sine lege*, namely the principle of 'no crime without law';¹⁴ b) *nulla poena sine lege*, namely 'no punishment without law';¹⁵ c) non-retroactivity, which means 'no punishment will be applied before the law is enacted and has entered into force';¹⁶ and d) the principle of individual criminal responsibility.¹⁷ The other principles are codified in different parts of the Statute. These include *ne bis in idem*, namely a person shall not be tried twice for the same criminal conduct.¹⁸ The principle of presumption of innocence is codified in part six of the Statute.¹⁹ The principle of equality

Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31, entered into force on 21 October 1950; The Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, 75 UNTS 85, entered into force on 21 October 1950; The Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, entered into force on 21 October 1950; and The Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War, 12 August 1949, 75 UNTS 287, entered into force on 21 October 1950. See also Robert Cryer (ed), *An Introduction to International Criminal Law and Procedure* (Cambridge 2007) 153.

¹² Article 38 of the Statute of the International Court of Justice provides the source of the international law. It provides that '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto'. See for more information: Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn, Oxford University Press 2014) 166; Rene David and John Brierly, *Major Legal Systems in the World Today* (London Stevens and Sons 1978) 421; J C Ochoa, 'The Settlement of Disputes Concerning States arising from the Application of the Statute of the International Criminal Court: Balancing Sovereignty and the Need for an Effective and Independent ICC' (2007) *International Criminal Law Review* 1.

¹³ The Rome Statute part 3 of General Principles of Criminal Law.

¹⁴ *Ibid* Article 22.

¹⁵ *Ibid* Article 23.

¹⁶ *Ibid* Article 24.

¹⁷ *Ibid* Article 25.

¹⁸ *Ibid* Article 20.

¹⁹ Article 66 of the Rome Statute, part six.

before the law has been stipulated in several international conventions.²⁰ Islamic criminal law has similar general principles, as we will see in chapter four of this study through examination and analysis in order to uncover compatibilities and incompatibilities. The general principles of the Rome Statute are supported by most states, including the United States of America, European countries, African states, and Muslim and Arab states.²¹ Indeed, some Arab and Muslim states have participated in, and positively support the existence of, the International Criminal Court.²²

The International Criminal Court has jurisdiction over international crimes. International crimes are defined and codified within Article 5 of the Statute. The jurisdiction comprises: a) war crimes; b) crimes against humanity; c) the crime of genocide; and d) crimes of aggression. These crimes are covered in Part 2 of the ICC Statute in Articles 5 to 10, and in The Elements of the Crimes.²³ Furthermore, prohibited acts of genocide are covered in Article 6, while Article 7 covers prohibited criminal acts of crimes against humanity, and Article 8 covers war crimes in internal conflicts or international conflicts. These international crimes are discussed in the study. Chapter five discusses war crimes, chapter six focuses on crimes against humanity, and chapter seven discusses genocide crime. However, a discussion of the crime of aggression and the subject of jihad, as it is recognised in Islamic law, will not be undertaken in this thesis. The crime of aggression is a specific crime that differs from the other three core crimes (war crimes, crimes against humanity, and genocide) because it deals with the rules that govern resorting to armed force (*jus ad bellum*) rather than the regulation of the conduct of hostilities during armed conflict (*jus in bello*) and respect for the laws of humanity during

²⁰ Articles 22, 23, and 24 of the Rome Statute may reflect the notion of this principle in their application. In The Universal Declaration of Human Rights (1948), Article 19 provides that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

²¹ See Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, UN A/CONF.18/13 (Vol. 11) Summary Record of the Plenary Meetings and of the Meetings of the Committee of the Whole <<http://legal.un.org/icc/rome/proceedings/contents.htm>> accessed 6 October 2019. See also Pierre Saland, 'International Criminal Law Principles' in Roy S Lee, *The International Criminal Court The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 196.

²² Steven C Roach, 'Arabic States and the Role of Islam in the International Criminal Court' (2005) 53 *Political Studies* issue 1,144.

²³ The Elements of Crimes adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May and 11 June 2010 (International Criminal Court publication, RC/11).

peacetime.²⁴ Also, to date, there has not been a modern-day prosecution for the crime of aggression. While the Nuremberg and Tokyo tribunals adjudicated crimes against peace—the World War II equivalent of aggression—these trials were contentious for their political nature and one-sidedness.²⁵ This thesis will not discuss the concept of jihad, mainly because there is no equivalent concept in international criminal law. The concept of ‘jihad’ is a broad subject and has a political aspect.²⁶ Thus, the current study will omit a discussion about the crime of aggression and jihad because there is limited space in this study. Other researchers may wish to examine and analyse these subjects in detail in order to achieve valuable results.

The Rome Statute criminalizes conduct in three main categories: war crimes, crimes against humanity, and genocide. Islamic international law can be seen to recognize similar categories of crime. The jurisdiction of both legal systems prohibits the killing of innocent people whether in peacetime or in international or internal conflicts. For instance, prohibiting the killing or injuring of individuals, particularly women and children, during a war, or in a state of peace.²⁷ Islamic international law is broader than the provisions of the Rome Statute. Article 7 of the Rome Statute stipulates that any attack against humanity must be widespread or systematic to be distinct from ordinary crimes,²⁸ while Islamic international law seeks to deter any attack against humanity, whether or not the crime is widespread or systematic.²⁹

While this thesis seeks to uncover commonalities between Islamic law and international criminal law as codified in the Rome Statute, there is a big difference between both legal systems of law when it comes to punishments.

²⁴ See Coalition of International Criminal Court website
<<http://www.coalitionfortheicc.org/>>accessed 6 October 2019

²⁵ Ibid.

²⁶ For more information about jihad, see for example Shaheen Sardar Ali and Javaid Rehman, ‘The Concept of Jihad in Islamic International Law’ (2005) *Journal of Conflict & Security Law* 321; Ahmed Al-Dawoody, *The Islamic Law of War Justifications and Regulations* (Palgrave Macmillan 2011); Mohammad Abu-Nimer, ‘A Framework for Non-Violence and Peacebuilding in Islam’ (2000-2001) *Journal of Law and Religion* 15 (1/2) 217; Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine* ((Brill, Martinus Nijhoff Publishers 1966); Ibrahim Shinhata, *Islamic Law and the World Community* (Harvard International Law Journal 1962); Wahben al-Zuhili, *Athār al-harb fi al-Islam*, (5th edn, Dar Al-fiker Syria 2012) 33 (Arabic source); Mohammed Cherif Bassiouni (ed), *Jihad and Its Challenges to International and Domestic Law* (Springer, 2010); Niaz A Shah, ‘The Use of Force under Islamic Law’ (2013) 24 (1) *The European Journal of International Law* 343.

²⁷ See Articles 6, 7, and 8 of the Rome Statute. For Islamic law, see for example, Farhad Malekian, ‘The Homogeneity of International Criminal Court with Islamic Jurisprudence’ (2009) 9 (4) *International Criminal Law Review* 595.

²⁸ Rome Statute, Article 7. See also Robert Cryer, Friman, Robinson and Wilmshurst (eds), *An Introduction to International Criminal Law and Procedure* (Cambridge 2007) 187.

²⁹ Malekian (n 27).

The maximum punishment in the Rome Statute is thirty years or a life imprisonment sentence in accordance with Article 77. In Islamic criminal law, the *hudúd* and *qisás* punishments (see chapter three for the explanation of these punishments and see chapter eight for more information about incompatibility) are stipulated in the main sources of Islamic law, namely the Quran and Sunnah. These differences are accepted as a given. The focus in this research is on mapping commonalities in substantive law; on general principles and crime definitions while being aware of differences in the area of punishment.

Saudi Arabia's reliance on *Sharí'ah*/Islamic law extends to its international dealings with the international community and its adherence to international treaties and conventions.³⁰ This means that any drive to establish and/or codify international laws requires a consideration of the perspectives of Islamic law. This process has encouraged dialogue between Muslim and non-Muslim countries, but it has also raised points of contention between Islamic law and international law.³¹ Problems of incompatibility can impact on maintaining international peace and security because Islamic law has been accepted by different Muslim countries that have different cultures and locations in the world.

The legal system of the Kingdom of Saudi Arabia relies on *Sharí'ah*/Islamic law in accordance with Article 1 of the Basic Law of Governance.³² This Article stipulates that 'The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, the Holy Quran, and the Sunnah (Traditions) of the Prophet'. Article 7 also stipulates that the 'Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunnah of the Prophet, which are the ultimate sources of reference for this Law and the other laws of the State'.³³ The legal

³⁰ The Basic Law of Governance of Saudi Arabia, issued by Royal Order No. (A/91) 27 Sha'ban 1412 H, 1 March 1992, published in Umm al-Qura Gazette No. 3397 2 Ramadan 1412 H, 5 March 1992. Article 7 stipulates that 'Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunnah of the Prophet (PBUH), which are the ultimate sources of reference for this law and the other laws of the State'. The Criminal Procedural Law is issued by Royal Decree Number (M/2) on 22/1/1435 H. The Kingdom of Saudi Arabia's commitment to international agreements and obligations is governed by Article 81 of the Basic Law because it reads 'The enforcement of this Law shall not prejudice whatever treaties and agreements with states and international organisations and agencies to which the Kingdom of Saudi Arabia is committed'. This article provides that the provisions of the Basic Law of Governance should not affect any international treaties that the Saudi Government has ratified. This article is discussed later in chapter eight.

³¹ Rene David and John Briery, *Major Legal Systems in the World Today* (London, Stevens and Sons 1978) 421.

³² Saudi Basic Law (n 30) Article 1.

³³ *Ibid* Article 7.

system of government in Saudi Arabia is a monarchy, according to Article 5 of the Basic Law of Governance.³⁴ The Government in the Kingdom of Saudi Arabia comprises three branches: the Judiciary, the Legislative Authority, and the Executive Branch, in accordance with Article 44 of the Basic Law of Governance.³⁵ The nature of domestic legislation in Saudi Arabia poses some problems of compatibility in respect of the Rome Statute because some of the rules are not compatible with the provisions of the International Criminal Court. For instance, Saudi Arabian domestic laws deny any interference in judicial procedures. Article 46 of Saudi Basic Law and Article 1 of Saudi Criminal Procedure Law provide that the judicial system is independent, and no authority or power affect the judicial system.³⁶ Any act or instruction, whether from an internal or external authority, is not acceptable at any level. This is intended to maintain respect for the rule of law but is inconsistent with Article 17 of the Rome Statute with respect to the right of the Court to start an investigation where a state is unable or unwilling to do so.³⁷ This situation may be classed as being at the prosecutorial discretion of the ICC, who can decide that the state is unable or unwilling.

This conflict can be understood in the context of measuring the inability of domestic judiciary to deal with a case, or when the Court prosecutor wants to initiate an investigation by his or her powers but, at the same time, Saudi domestic authorities want to conduct the investigation. This may lead to a situation where the independence of the judiciary is compromised because conducting an investigation is one of the most important processes of exercising judicial power, even though the Court's jurisdiction would be classed as a complementary jurisdiction.³⁸ In addition, the Court's provisions do not stipulate who or what component has the power to assess when domestic justice is not unwilling or unable to carry out the investigation. The issues regarding Saudi domestic laws are discussed in chapter eight in this study.

³⁴ This Article provides that 'The system of governance in the Kingdom of Saudi Arabia shall be monarchical'.

³⁵ This Article provides that 'Authorities in the State shall consist of: Judicial Authority, Executive Authority, Regulatory Authority. These authorities shall cooperate in the discharge of their functions in accordance with this Law and other laws. The King shall be their final authority.'

³⁶ Saudi Basic Law Article 46, and Saudi Criminal Procedure Law (2013) Article 1. The latter was issued by Royal Decree No M/3 on 22/1/1435 H.

³⁷ See the Rome Statute Article 17.

³⁸ Paragraph 10 of the Rome Statute provides that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.'

Thus, this thesis addresses substantive laws that are the principles and jurisdiction of both the Rome Statute and Islamic law, as well as procedural issues of Saudi domestic laws. The procedural issues of Saudi domestic laws are: the right of the Court prosecutor to start the investigation by his or her appreciation, the extradition for prosecution of a Muslim accused by a non-Muslim court or state, political asylum, the right of a victim's family to initiate a law case in accordance with Islamic law provisions, and women serving as judges. The choice of substantive laws has been taken in order to examine and uncover the compatibility and incompatibility between the principles of law and jurisdiction, namely prohibited crimes, war crimes, crimes against humanity, and genocide. The choice of procedural issues of Saudi domestic laws has been made in order to examine provisions that may conflict with the Rome Statute. Saudi domestic laws rely on and apply the principles and jurisdiction of Islamic law provisions; thus, if there is compatibility between the principles of law and jurisdiction of both legal systems, reforms can be suggested by the researcher concerning the procedural issues of Saudi domestic laws. Such suggestions may then be considered by the Saudi government.

The principles of the Rome Statute and the principles of Islamic criminal law are discussed and analysed in this study. This approach requires thorough examination and analysis in order to identify compatibilities and incompatibilities between the principles of both legal systems. The reason is that looking at the compatibilities between Islamic criminal law and the Rome Statute can also elucidate the importance of Islamic law in the pursuit of international peace and security. In this thesis, important ideas of compatibility are addressed in relation to the general principles of law and the jurisdictions of both legal systems as part of an endeavour to prevent and prohibit international crimes such as war crimes, including crimes against humanity and genocide. Thus, this study undertakes a comparative approach between the jurisdictions of Islamic international law and international criminal law, namely the Rome Statute. This comparative approach helps the researcher to examine the provisions of both legal systems to extract the commonalities or differences. The researcher achieves this by discovering the functions of the legal systems in terms of applying the general principles of law and the prohibition of international crimes in order to preserve international peace and security.

Such a comparative approach focuses mainly on the general principles of law and the jurisdictions of both legal systems. This is because the principles

reflect the real picture of human rights. Moreover, the principles and jurisdictions are considered to be at the top of the legal pyramid in the Rome Statute and Islamic law. In addition, the rest of the provisions fall under the principles/jurisdictions. It is important now to outline the research questions that this study attempts to answer.

1.2 The Main Research Questions

In order to tackle the subject matter of the thesis, the following main research questions are posed.

- a) To what extent are the general principles and jurisdiction of Islamic law compatible or incompatible with the general principles and jurisdiction of the Rome Statute?
- b) To what extent are the provisions of Saudi Arabian domestic laws (The Basic Law and Criminal Procedures Law) compatible or incompatible with the provisions of the Rome Statute?

1.3 The Themes, Objectives, and Limitations of the Study

To answer the main research questions, the researcher has identified issues regarding substantive laws and procedural laws as mentioned earlier in order to limit the scope of the study.

The issues regarding substantive laws cover two main areas as follows. a) To analyse the sources of Islamic law and the Rome Statute in order to understand common mechanisms for the interpretation of both legal systems in theory and in practice. b) To undertake a comparative approach between the principles and jurisdiction of Islamic law to establish whether they are compatible or incompatible with the Rome Statute. The aim of this approach is to discover whether or not both legal systems share some commonalities and differences. The aim of the thesis is also to explore how Islamic international law and the Rome Statute deal with international crimes in relation to the crimes' definitions, elements, and punishments, as well as their roles in protecting humanity from the most heinous crimes.

The issues regarding procedural laws analyse the procedural issues of Saudi domestic laws and, in particular, those of the Basic Law of Governance and the Criminal Procedural Law. The purpose of this approach is to extract obstacles that Saudi Arabia may find in ratifying the Rome Statute. Moreover, in order to consider if the laws conflict with the provisions of the Rome Statute,

reforms are considered. The purpose here is to achieve compatibility between Saudi domestic laws and the Rome Statute provisions. The focus will be on Saudi Basic Law and Criminal Procedures Law. Basic Law is the most important state legislation in Saudi Arabia; all other domestic laws cannot conflict with it. Basic Law encapsulates the internal and external policies of Saudi Arabia. However, it will also be necessary to analyse domestic Criminal Procedures Law because this is the Saudi domestic equivalent of the Rome Statute. The Rome Statute is a comprehensive international criminal law that stipulates the main principles concerning the definition of crimes, their elements, punishments, and criminal responsibility.

The objectives to be achieved by this study can be outlined as follows.

a) To consider how both legal systems provide for and apply the general principles of law in order to achieve the basic values of human rights. In addition, to understand how both legal systems deal with international crimes, especially war crimes, crimes against humanity, and genocide.

b) To make recommendations that may be useful for those studying or working with the International Criminal Court and Islamic law. These recommendations may help to facilitate references to the perspective of Islamic law during a trial, where appropriate, according to Article 21 (1) (c) of the Rome Statute.³⁹

1.4 The Significance and Originality of the Study

Based on the main themes covered in this study, a contribution can be made from both a theoretical and practical perspective.

With respect to the theoretical contribution, two main points can be made. a) The study seeks to contribute to research about Islamic law by illustrating ambiguities that may exist surrounding the rules of Islamic law. b) Since the study refers to Saudi Arabia with special reference, it may assist other researchers who wish to explore the importance of possible amendments to domestic rules operating in an Islamic system of law and possible amendments to the Rome Statute.

With respect to practical matters, the following can be noted. a) The study should assist policymakers in the Kingdom of Saudi Arabia when they are

³⁹ This paragraph provides that 'Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards'.

looking to reform legal provisions for the ratification of the Rome Statute. b) It may encourage Muslim states that did not ratify the Rome Statute to become a state party to the Court.

This study is not the first to explore the relationship between the ICC and Arab or Muslim States.⁴⁰ However, it is the first study to undertake a comparative approach between Islamic law and the Rome Statute. Thus, the aim is to consider commonalities and differences between the compared legal systems, although a discussion about which laws are superior is not the aim of the study. This is because realising international peace and security is the goal of each legal system.

1.5 Methodology

1.5.1 Sources

In order to conduct this study and answer the research questions, the researcher has relied on main and secondary sources. Four main types of main source were consulted. First, all the core treaty texts, for example the Rome Statute 1998 which entered into force in 2002, The Charter of the United Nations (UN) 1945, and the various United Nations Treaties specifically related to the research question.⁴¹ Second, the main sources of Islamic law (the Quran and Sunnah). Third, Saudi domestic laws, in particular The Basic

⁴⁰ There are a plethora of studies covering the International Criminal Court. There are also many other studies that discuss the relationship between the Court and Arab and Muslim Countries, and the relationship between the provisions of the Rome Statute and Islamic international criminal law, including the following: Alobaidy, O 'The International Criminal Court: An Arabic Perspective in View of Islamic Law and the 1998 Rome Statute' (Washington University, School of Law 2000); Alharthi, M 'The Legal and Security Dimensions to the Relationship between Arabic States and International Criminal Court' (Naif Arab University for Security Sciences 2011); William A Schabas, 'The International Criminal Court and Non-Party States' (2010) 28 Windsor Y. B. Access Just. 1; Maged Adel, 'Arab and Islamic Sharia Perspectives on the Current System of International Criminal Justice' (2008) 8 (3) International Criminal Review Brill, Volume 8: Issue 3, 477 ; Mohamed Elewa Badar, 'Islamic Law (*Sharia*) and the Jurisdiction of the International Criminal Court' (2011) Leiden Journal of International Law 411.

⁴¹ For example, but not limited to: The Statute of The International Court of Justice (1945); The Geneva Conventions (1949); The United Nations Convention on Jurisdictional Immunities of States and their Property (2004); The Universal Declaration of Human Rights (1948); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); The Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (1984); The International Convention for the Protection of all Persons from Enforced Disappearance (2006); The Convention on the Prevention and Punishment of the Crime of Genocide (1948); The Geneva Convention (1949); The Hague Conventions (1899 and 1907); The Charter of the Arab League (2004); and The Suppression of Terrorism Convention of Arab Countries (1998).

Law and The Criminal Procedures Law. Fourth, case laws and reports that are relevant to the study are examined.

The secondary sources that are used in this study are monographs, journal articles, book chapters, and websites.

1.5.2 Research Methods

This study deals with three legal systems, namely international criminal law, especially the provisions of the Rome Statute; Islamic law; and Saudi domestic laws, especially the Basic Law of Governance and Criminal Procedural Law. Thus, it uses a comparative approach to see, to what extent, the provisions of Islamic law and the provisions of the Rome Statute, and Saudi domestic laws are compatible or incompatible.

1.5.2.1 A Comparative Approach

Divergent views exist among writers in that some claim there is no compatibility between international law and Islamic international law. It has been argued that 'Islamic international law may be of great historical interest and Islamic sources of inspiration for Islamic militants, but it has no relevance whatsoever for contemporary international law'.⁴² Furthermore, others argue that '[Islamic international law] cannot be said to be genuinely compatible with modern international jurisprudence with respect to treaty principles, customary law, general principles of law'.⁴³ On the other hand, some writers agree that there is compatibility between international law and Islamic international law in general. They have also gone further and argue that Islamic international law is part of the modern legal doctrine and philosophy that form international law. In other words, a harmonisation between international criminal law and Islamic international law may exist.⁴⁴ Zawati notes that 'the texts of international covenants may be compared to the texts of the Holy Quran and the true Prophetic hadiths. In many respects, the

⁴² Berger (n 4) 107.

⁴³ Christopher A Ford, 'Siyar-ization and Its Discontents: International Law and Islam's Constitutional Crisis' (1995) 30 Texas International Law Journal 500.

⁴⁴ Sobhi Mahmassani, *The Principles of International Law in Light of Islamic Doctrine* (Brill, Martinus Nijhoff Publishers 1966) 117; J Rehman, *Islamic States Practices, International Law and The Threat From Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Hart Publishing, Oregon 2005).

international agreements are equivalent to the treaties made by the Prophet Mohammad.⁴⁵

With respect to the comparative law method, there is no consensus between scholars about the theory of comparative law; moreover, the discussion between them 'has not yet exercised substantial influence on practical legal comparison'.⁴⁶ However, the comparative law approach is defined as an 'intellectual activity with law as its object and comparison as its process'.⁴⁷ The comparative law approach aims to understand and obtain more knowledge about foreign laws that may be valuable if the latter is relevant to the importing country.⁴⁸ It 'can be a means to diverse ends at the domestic level'.⁴⁹ This is because a state that operates a particular system of law can compare its existing domestic laws with foreign laws in order to find the most appropriate or common approach.⁵⁰ This means that a researcher must take into consideration the legal rules of the foreign laws in context in order to contribute to the development of existing and new laws. Such an approach is shown by providing a model of how imported laws work to address domestic problems. However, at international level, 'legislators may use comparative law when they deal with questions of whether and how unification of the law can be achieved'.⁵¹ Nonetheless, 'a comparative approach could lead to the recommendation not to unify the law'.⁵² Even so, the underlying goal could improve international understanding, which may help the international community to preserve international peace and security.⁵³

There are three dimensions to comparative law as follows: a) width—concerns about commonalities and differences; b) height—concerns about different areas of law, such as company law for example; and c) depth—concerns that

⁴⁵ H M Zawati, *Is Jihad A Just War? War, Peace and Human Rights under Islamic and Public International Law* (Studies in Religion and Society 2001) 5.

⁴⁶ Ralf Michaels, 'Comparative Law' (2011) Duke Law Scholarship Repository 1 <http://scholarship.law.duke.edu/faculty_scholarship/2388/> accessed 6 April 2019. According to Gutteridge, comparative law is impossible to apply because it does not compass the entire subject matter. See Harold Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge University Press 1949).

⁴⁷ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998) 2.

⁴⁸ Mathisa Siems, *Comparative Law* (Cambridge University Press 2014) 24.

⁴⁹ Ibid.

⁵⁰ C F Pistor, 'National Model, lowest common demonstrator or synthetic concept' (2002), cited in Siems (n 48) 5.

⁵¹ Siems (n 48) 4.

⁵² Ibid 20.

⁵³ Rahmatulla Khan and Sushil Kumar, *An introduction to the study of comparative law* (New Delhi, Bombay, N M Tripathi 1971).

'address different approaches to legal knowledge'.⁵⁴ Siems points out that explaining the variations between compared legal systems can be conducted using a comparative legal approach.⁵⁵

The objectives of comparative law, according to Glenn, are: the acquisition of information about the law from elsewhere; the evaluation of common changes among legal families; and the understatement of a compared legal system in an attempt 'to improve it or for interpreting the constitution'.⁵⁶ The comparative law approach aims to understand what can be compared and if/how the compared legal systems have commonalities or differences.⁵⁷ The target contribution can be 'used as a means effecting sameness and [to explore] differences'.⁵⁸ Indeed, the underlying objective of the study is to uncover the compatibility and incompatibility between the aforementioned legal systems.

Thus, scholars have adopted two levels of comparative law: functionalism and transplant. Functionalism is an appropriate method to undertake and help the researcher to conduct the current study because it helps to look at the functions of the compared legal systems. Since the main questions of the study are to find compatibilities/incompatibilities between international criminal law, Islamic law, and Saudi domestic law through examination of the functions of each legal system, it is necessary to adopt functionalism. The nature of such an approach is briefly explained below.

1.5.2.2 Functionalism

Functionalism introduces the theory of the 'legal family' and was devised by scholars in order to find a response to the rise of comparative law.⁵⁹ Since then, it has become a core element of comparative law.⁶⁰ Zweigert and Kötz put forward the idea of functional comparison, claiming that law reflects the demands of society.⁶¹ According to Zweigert and Kötz, some legal systems are comparable if they hold the same objectives.⁶² Hohfold explains that when

⁵⁴ Siems (n 48).

⁵⁵ Ibid.

⁵⁶ H Patrick Glenn, 'The Aims of Comparative Law' in J M Smits (ed) *Elgar Encyclopaedia of Comparative Law*, (Cheltenham, Edward Elgar 2006) 57.

⁵⁷ Jaakko Husa, 'Farewell to Functionalism or Methodological Tolerance?' (2003) 67 (3) *The Rabel Journal of Comparative and International Private Law* 419.

⁵⁸ Ian Ward, 'The Limits of Comparativism: Lessons from UK-EC Integration' (1995) 2 *Maastricht Journal of European & Comparative Law* 23.

⁵⁹ Zweigert and Kötz, (n 47) 63. See also René David & John E C Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3rd edn, Stevens and Sons 1985) 21.

⁶⁰ Mathisa Siems, *Comparative Law* (Cambridge University Press 2014) 25.

⁶¹ Zweigert and Kötz (n 47) 34.

⁶² Ibid.

using functionalism with regard to comparative law, a researcher should distinguish the differences and commonalities between the compared legal systems.⁶³ This is achieved through deep examination to discover the extent of convergence or difference between the two systems.⁶⁴ According to Siems, the main purpose of the functionalist approach is 'to provide the necessary link between the different rules that legal systems tends to employ'.⁶⁵ The common denominators between the compared legal systems can then be explored.⁶⁶

The limitations of functionalism have been noted by scholars as follows. a) The 'incomparable cannot be usefully compared and in law the only things which are comparable are those which fulfil the same function'.⁶⁷ b) The compared legal systems should be at the same stage in terms of legal, political, and economic aspects.⁶⁸ It has been argued that the consideration of political aspects may make the comparison fruitless.⁶⁹ This is because the functionalist approach may be conducted by comparativists without considering the political aspects, since it 'may make some separations fruitless'.⁷⁰

The functionalist method raises debate when it becomes the central focal point for comparative law. This is because 'a) [it deals with] centres versus peripheries of research project interest; b) it can be the mainstream versus avant-garde; c) it [can be a] convergence versus pluralism.'⁷¹ Thus, functionalism is often described as 'a modern paradigm'.⁷² Functionalism has become more popular in the last two decades.⁷³ It is the 'basic methodological principle of comparative law'.⁷⁴ However, it should be applied objectively because each society has its own issues that may be solved using its own

⁶³ A Frandberg, 'Systematics of Legal Concepts' (1987) *Scandinavian Studies in Law* 83-115. Cited in Mark Van Hoecke 'Methodology of Comparative Legal Research' (2015) *Boom juridisch* 1.

⁶⁴ *Ibid.*

⁶⁵ Siems (n 48) 24.

⁶⁶ *Ibid.*

⁶⁷ Zweigert and Kötz (n 47) 34.

⁶⁸ Peter De Cruz, *Comparative Law in a Changing World*, (3rd edn, Routledge, Cavendish London 1999) 226.

⁶⁹ Siems (n 48) 27.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411.

⁷³ Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 (4) *The American Journal of Comparative Law* 671.

⁷⁴ Zweigert and Kötz (n 47) 34.

legal systems, which are derived from different mechanisms and which would lead to similar results.⁷⁵ The functionalist approach mostly aims to implement the demands of society.⁷⁶ Thus, in this study, targeting legal systems by using the comparative approach aims to protect humanity from heinous crimes.

Functionalism is more than just a methodological discipline.⁷⁷ It has been criticised because it does not have a standard mode of evaluation and does not focus on cultural aspects.⁷⁸ It also does not take into account the idea that not all societies face similar problems.⁷⁹ The functionalist method has been described as a 'bête noire' by its proponents and a 'mantra' by those who oppose the idea.⁸⁰ Supporters of the system view it as a reliable method for comparative law, but those who oppose the system say that it is bad for mainstream comparative law.⁸¹

Esser describes functionalism as a '*terium comparations*', which means that, 'function can serve to find similar solutions by different means'.⁸² He explains that there are universal principles of law that 'can be formulated as a system with its own terminology'.⁸³ Gordley presents a similar view to that of Esser, stating that there are universal problems that can be solved by different means, depending on the response of societies.⁸⁴ An example is noted by Liszt, who points out that 'when a state enacts punishments within its criminal law, it aims to maintain the legal order and its legal developments, then criminal punishments'. Liszt further says that states have 'to be judged against their ability to maintain the legal order'.⁸⁵ Thus, functionalism in comparative

⁷⁵ Ibid.

⁷⁶ Michele Graziadei, 'The Functionalist Heritage' (2003) in Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 100.

⁷⁷ Ralf Michaels, *The Functional Method of Comparative Law* (The Oxford Handbook of Comparative Law 2006) 340.

⁷⁸ Vivian Grosswald Curran, 'Fear of Formalism: Indications from the Fascist Period' in France and Germany of Judicial Methodology's Impact on Substantive Law' (2000) 35 Cornell International LJ 101.

⁷⁹ Adams M and Griffiths J, 'Against 'Comparative Method': Explaining Similarities and Differences' in M. Adams & J. Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge: Cambridge University Press 1964) 279.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Josef Esser, 'Grundsatz und Norm in der Richterlichen Rechtsfortbildung' (1956) in Mathias Reimann, Reinhard, *The Oxford Handbook of Comparative Law* (2006) 346.

⁸³ Ibid.

⁸⁴ James Gordley, 'The Universalist Heritage' (2003) in Legrand, Pierre, *Comparative Legal Studies: Traditions and Transitions* (Cambridge, UK; New York, Cambridge University Press 2003).

⁸⁵ Franz von Liszt, 'Der Zweckgedanke im Strafrecht' (1882) cited in Ralf Michaels, *The Functional Method of Comparative Law* (The Oxford Handbook of Comparative Law 2006).

law serves to clarify similar values shared between societies. These similar values create laws that have similar goals and results but are different in doctrine.⁸⁶

Hence, international criminal law and Islamic law may be comparable if both systems have the same functions for protecting humanity from heinous crimes. Thus, functionalism is an appropriate method to examine principles and jurisdiction to see the functions of both legal systems because the protection of society from serious and heinous international crimes is one of the most important demands of society.

1.5.2.3 Transplant

Since this study adopts the functionalist approach to deal with the compared legal systems of international criminal law and Islamic law, it is important to present a brief outline of the principles of legal transplant. This is another method that raises debate in legal circles.

Watson and Freund first triggered the debate about legal transplant in respect of its successes and failures.⁸⁷ Their study discusses legal philosophical mechanisms to facilitate comparative law.⁸⁸ According to Watson, transplant is 'the moving of a rule or a system of laws from one country to another or from one people to another'.⁸⁹ The process of legal transplant has spread widely, especially in the last few decades, because of 'free trade in legal ideas'.⁹⁰ This process can be viewed as part of the implementation of Roman Law processes in some European countries, and the impact of common law in other European countries.⁹¹ Legal transplant's influence has been especially notable in democratic countries, especially in European societies where it has contributed towards the approach used by the European Union.⁹² The popularity of the legal transplant approach has also coincided with the end of socialism in many European countries.⁹³

⁸⁶ Pierre Lepaulle, 'The Function of Comparative Law: With a Critique of Sociological Jurisprudence' (1922) *Harvard Law Review* 838.

⁸⁷ Alan Watson, 'Legal Transplants and European Private Law' (2000) 4 (4) *Electronic Journal of Comparative Law* <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 13 April 2019.

⁸⁸ *Ibid.*

⁸⁹ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh 1974) 21.

⁹⁰ Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *The Modern Law Review* 1.

⁹¹ Alan Watson, *Legal Origins and Legal Change* (Hambledon Press 1991) 73.

⁹² Jorg Fedtke, 'Legal Transplants' (2012) in Jan Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2nd edn, Cheltenham 2012) 550.

⁹³ *Ibid.*

There is much academic debate surrounding the idea of legal transplant. This debate falls into two main divergent views. The first is presented by Watson when he explains that '[t]he development of civil law is the result of purely legal history, and can be explained without reference to social, political or economic factors'.⁹⁴ Nichols elaborates on Watson's idea, explaining that the most effective way to regulate or reform laws in a society is to use transplant because 'laws exist in their contexts, and culture may not complicate their efficiency'.⁹⁵ Thus, according to Watson, culture has an influence on modifying laws but not on enacting them because Members of Parliament or a King are responsible for the enactment of laws in society.⁹⁶

A divergent view is presented by Legrand who argues that 'legal transplants are impossible [because] how could law travel if it was not segregated from society?'.⁹⁷ He also claims that 'the use of foreign law as a model for domestic law becomes abuse only if it is informed by a legalistic spirit which considers this connect of the law'.⁹⁸ This is because, 'law, like language or music, is a historically determined product of civilization and, as such, has its roots deep in the spirit of the people'.⁹⁹ He argues that '[transplant] makes reception and assimilation of foreign ideas problematic, unless they have been considered'.¹⁰⁰ Furthermore, Freund adds to Legrand's argument to suggest that 'some areas of law are more closely linked to society than others, and that the success of transplants of more organic areas of law depends primarily on the political system'.¹⁰¹ This view is supported in the argument that legal transplant could be impossible since culture plays a significant part in society and law is embodied in culture.¹⁰² In this sense, Williams argues that law should reflect culture and satisfy the demands of society and should be

⁹⁴ William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 (4) *The American Journal of Comparative Law* 489.

⁹⁵ Philip M Nichols, 'The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code' (1997) 18 *University of Pennsylvania Journal of International Economic Law* 1235.

⁹⁶ Alan Watson, 'Legal Evolution and Legislation' (1987) *Brigham Young University Law Review* 353.

⁹⁷ Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journals of European and Comparative Law* 111.

⁹⁸ Nichols (n 95).

⁹⁹ Christopher Osakwe, 'Introduction: The Problems of the Comparability of Notions in Constitutional Law' (1984) 59 *Tulane Law Review* 875.

¹⁰⁰ Legrand (n 97).

¹⁰¹ *Ibid.*

¹⁰² Richard Thompson Ford, 'Facts and Values in Pragmatism and Personhood: A Review of Margaret Jane Radin's *Reinterpreting Property*' (1996) 48 *Stanford Law Review* 217.

considered in terms of 'mirror theory'.¹⁰³ Twinning also argues that 'there might not be enormous laws and apparent similarities between laws worldwide'.¹⁰⁴ Hence, for transplant to be viable, the surrounding circumstances of the host country should be identical to those of the importing one.¹⁰⁵ Teubner suggests that 'there are some areas of law that may be transferable to another country.'¹⁰⁶

However, it is clear that for the objectives of the current study, the transplant method is not appropriate because the study deals with two international systems and does not seek to transplant one of the compared legal systems to the other. Instead, the main focus is to explore the compatibilities and incompatibilities between international criminal law and Islamic law.

The doctrinal method is considered in this study with respect to analysing Saudi domestic laws, especially the provisions that may need reform. The doctrinal method is the (inductive) legal method used for case analysis and can be defined as 'rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and extracting general principles from an inchoate mass of case law'.¹⁰⁷ The doctrinal method can assess the extent to which Saudi laws conflict with the provisions of the ICC, and to what extent they require reform to be able to conform to the Rome Statute.

1.6 The Structure of the Study

This study comprises four parts. The first includes two chapters: chapter one is an introduction to the study and chapter two outlines brief historical background information relevant to the study. The second part consists of two chapters. Chapter three examines the sources of the Rome Statute and Islamic law, and explores commonalities and differences between the sources of both legal systems. Chapter four presents a macroscopic view of the compatibilities and incompatibilities between the principles of Islamic criminal law and the principles of the Rome Statute. The third part discusses international crimes using a comparative approach and includes three

¹⁰³ William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 (4) *The American Journal of Comparative Law* 489.

¹⁰⁴ Twinning W, 'Generalizing About Law: The Case of Legal Transplants' (2000) *The Tilburg-Warwick Lectures General Jurisprudence* 1.

¹⁰⁵ Ann Seidman and Robert B Seidman, 'Drafting Legislation for Development: Lessons from a Chinese Project' (1996) *The American Journal of Comparative Law* 1.

¹⁰⁶ Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 (1) *The Modern Law Review* 11.

¹⁰⁷ T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) *Deakin Law Review* 83.

chapters: chapter five focuses on war crimes, chapter six discusses crimes against humanity, and chapter seven concentrates on genocide. The last part of the study, which is the fourth part, comprises two chapters: chapter eight focuses on a quest for compatibilities and incompatibilities namely the procedural issues between Saudi domestic law and the Rome Statute, and chapter nine concludes the study and makes recommendations.

Chapter Two

A Brief Historical Overview of the Development of International Criminal Law

2.1 Introduction

International criminal law is a body of law consisting of international provisions that deal with and categorise international crimes and its punishment of those who have committed such crimes.¹ It is premised on the principle of individual criminal responsibility and authorises the international community to prosecute those who have been accused of committing international crimes.² The objectives of international criminal law are to protect humanity from serious international crimes and to maintain international peace and security.³ These fundamental aims are associated with pursuing and prosecuting perpetrators who have committed international crimes as well as protecting victims and witnesses.⁴

2.2 An Overview of the Development of International Criminal Law

Delving into the history of international criminal law reveals that mankind commits atrocities such as holocausts, bloodshed, and violence. Atrocities were noted during the trial of Peter Von Hangbach in 1474 during the occupation of Breisach in Germany, when Von Hangbach was handed the death penalty by judges of the Holy Roman Empire.⁵ Serious violations of international criminal law were committed during World War I and World War II. International criminal law was developed because there was no international deterrent and no specific enforceable laws that punished criminals, and no international criminal court with universal jurisdiction. As a result, international criminal law developed in several phases that can be summarised into four distinct stages as follows.

¹ Antonio Cassese, *International Criminal Law* (3rd edn, The Oxford University Press 2011) 3.

² Ibid.

³ The Rome Statute Articles 5 to 8 and the Preamble para (5-7). Rome Statute of the International Criminal Court, entered into force on 1 July 2002; see Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press Inc. New York 2002) 4.

⁴ The Rome Statute Article 68.

⁵ M Cherif Bassiouni, *Nouvelles Etudes Penales: Draft Statute International Tribunal* (2nd edn, Vol. 10-11, Association internationale de droit pénal 1993).

2.2.1 The First Stage: The Most Significant International Conventions Designed to Protect Humanity

2.2.1.1 The Hague Conventions of 1899 and 1907

The idea of prosecuting war criminals appeared in the nineteenth century as a result of the efforts of Gustave Moynier.⁶ Moynier was one of the founders and the President of the International Committee of the Red Cross.⁷ His efforts resulted in a proposal for the prosecution and punishment of suspected individuals who breached humanitarian morals of 1864.⁸ After this, there were attempts to develop international law through the introduction of the Hague Convention of 1899 and the Hague Convention of 1907 in order to settle international conflicts via mediation or good offices.⁹ These conventions comprise the codification of provisions under the Law of War.¹⁰ The conventions aimed to impose obligations on states during armed conflict. They emphasised the protection of civilians, the importance of the lives of individuals, the protection of properties, and the protection of culture and religions. Belligerents were obliged to follow the provisions under the laws of war.¹¹ The provisions of The Hague Conventions were used in connection with crimes committed in the Balkan war.¹² However, the provisions do not mention the criminal liability of individuals and do not include sanctions.¹³

2.2.1.2 The Versailles Convention (The Treaty of Peace) 1919

Another important international convention that contributed to the development of international criminal law is the Versailles (Peace Treaty) of 1919, which was devised after World War I.¹⁴ The victorious states of World

⁶ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 1, 2.

⁷ Keith Hall, 'The First Proposal for a Permanent International Criminal Court' in the official website of the International Committee of the Red Cross <<https://www.icrc.org/eng/resources/documents/article/other/57jp4m.htm>> accessed 24 August 2017.

⁸ The first movement of establishing the Geneva Convention. For more information, see The Official website of the International Committee of the Red Cross < <https://www.icrc.org/en>>.

⁹ The Hague (1899) Convention II With Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, entered into force on 4 September 1900; Convention IV Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague 18 October 1907, entered into force on 26 January 1910 <<https://ihl-databases.icrc.org/ihl/Intro/195/>> accessed 9 April 2017.

¹⁰ Schabas (n 6).

¹¹ Ibid.

¹² Ibid. This war took place in the Balkan Peninsula in 1912 and 1913.

¹³ Ibid.

¹⁴ The Versailles Convention, known as The Treaty of Peace (28 June 1919), entered into force on 10 January 1920.

War I decided to prosecute Kaiser Wilhelm II and German individuals who were responsible for committing war crimes (as the authors of the war).¹⁵ However, the German Empire voted not to apply the provisions of the Treaty.¹⁶ Consequently, this resulted in the need to prepare a list of nine hundred accused by the victor states and try them under national courts of the German Empire. During the process, the number of those accused dropped to forty-five, and some were charged in prison while others eventually were charged in disciplinary actions involving twelve trials.¹⁷

2.2.1.3 The Convention on the Prevention and Punishment of the Crime of Genocide 1948

This Convention was enacted in order to develop international criminal law and human rights. Known as the Convention on the Prevention and Punishment of the Crime of Genocide 1948, Article 1 of the Convention prohibits acts of genocide towards persons.¹⁸ The provisions of this Convention aim to protect humanity from genocide in times of war and peace.

2.2.1.4 The Geneva Conventions of 1949

The Geneva Conventions and their protocols were crucial for developing the idea of individual liability in a legal context. Article 66 deals with armed conflict.¹⁹ Article 3 of the Geneva Conventions provides significant protection to peoples who do not take any active part in hostilities, whether internal or international. The Fourth Geneva Convention provides the most significant protections for human beings during armed conflict. These protections provide that the parties of conflict must protect individuals who are not involved in conflict.

¹⁵ The victorious states were The British Empire, The Russian Empire, and The French Republic.

¹⁶ Schabas (n 6).

¹⁷ Ibid.

¹⁸ UN Treaty Series, Convention on the Prevention and Punishment of the Crime of Genocide 78 (1948) 951, entered into force on 12 January 1951. (Chapter seven of this study includes further discussion about genocide).

¹⁹ The Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949), entered into force on 21 October 1950. See The International Committee of the Red Cross website.

2.2.1.5 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984²⁰

This Convention entered into force in 26 June 1987 under Article 27.²¹ The Convention prohibits torture, any degrading treatment, and any inhuman or cruel acts.²² Article 1 provides the definition of torture and the clear description of acts that lead to torture. This definition may assist a State party that does not have a definition of torture in its domestic legislation and that chooses to adopt the definition proposed under this international Convention. Article 5 gives rights to a domestic judicial authority of a State party to practise its jurisdiction over cases as follows: (i) when crimes under this Convention are committed in the territories of a State party, or on ships and planes, registered in that State; and (ii) when a suspected person or a victim is a citizen of the State party.

2.2.2 The Second Stage: Establishing International Military Tribunals (Nuremberg and Tokyo)

The Allied Powers (the United States, Great Britain, and the Soviet Union) met in London on 8 August 1945 to discuss establishing an International Military Tribunal of Nuremberg (IMT 1945).²³ This Tribunal was set up on 15 March 1946 and related to the Nuremberg situation. It sought to prosecute offenders who had committed war crimes in Nuremberg.²⁴ Following this, the Allied Powers established another International Military Tribunal for the Far East, Tokyo (IMTFE 1946), relating to the Japanese war.²⁵

²⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), entered into force on 26 June 1987.

²¹ Article 27 provided that this convention entered into force after 20 states ratified the Convention and on the thirtieth day after the date of deposit with the Secretary General.

²² Ibid. Article 1 provides the meaning of torture as follows: 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

²³ The Allied States signed an agreement on 8 August 1945 for punishing personnel who were responsible for war crimes; see International Committee of the Red Cross website <<https://www.icrc.org/en>>.

²⁴ The Charter of the International Military Tribunal: Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London Agreement, <<https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg>> accessed 8 April 2019.

²⁵ This Tribunal was established on 19 January 1946.

The continuous development of international criminal law was seen during 1949—1950 when the International Law Commission of the United Nations received the draft code for a permanent international criminal court from the General Assembly. The International Law Commission was requested to codify the draft code for crimes against the 'Peace and Security of Mankind'.²⁶ The General Assembly established a preliminary committee to revise the draft code with the participation of seventeen member states of the United Nations. The Preliminary Committee returned the draft code to the General Assembly with a consideration that the establishment of a permanent international criminal court is 'feasible and desirable'.²⁷

2.2.3 The Third Stage: Establishing ad hoc International Tribunals (Yugoslavia and Rwanda)

The third stage established the ad hoc International Criminal Tribunal for Yugoslavia (ICTY 1993) under United Nations Security Council Resolution 827.²⁸ This tribunal aimed to prosecute individuals who were responsible for crimes against humanity in Yugoslavia. Another ad hoc International Criminal Tribunal was established for Rwanda (ICTR 1994) by United Nations Security Council Resolution 955.²⁹ This tribunal aimed to prosecute individuals who were responsible for crimes against humanity in Rwanda. However, despite the critique that previous international criminal tribunals have received—including that they were established by Allied Powers, that they punished crimes retroactively, and that they were prompt and temporary tribunals—these new developments were seen as making significant steps forward to deter criminals. Moreover, these tribunals affected the development of international criminal law in terms of defining international crimes and selecting their elements.³⁰

²⁶ Bassiouni (n 5) 2, 5.

²⁷ Ibid.

²⁸ The UN SC Resolution Doc 827 (1993) <<http://unictr.unmict.org/en/ictr-milestones>> accessed 9 March 2017. There are some hybrid tribunals such as The Special Court for Sierra Leone and The Special Tribunal for Lebanon. In 2002, the United Nations requested that the Government of Sierra Leone establish a special court to prosecute serious crimes against civilians in its territories. On 30 May 2007, the Security Council set up resolution 1757 to establish a tribunal based on the request of the Lebanon Government regarding the terror attack resulting in the death of former Lebanese Prime Minister Rafik Hariri.

²⁹ The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by The UN SC Resolution Doc 955 (1994).

³⁰ M Cherif Bassiouni, *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind* (19 Rue Gustave Couber, 31400 Toulouse 1993) 6.

2.2.4 The Fourth Stage: Establishing the International Criminal Court (ICC)

The fourth stage was the establishment of the International Criminal Court in 1998.³¹ The Court Statute was adopted, and came into force, in 2002.³² The idea of establishing a permanent international criminal court was considered by the General Assembly of the United Nations, which moved the idea again to the International Law Commission in 1989.³³ During its 44th session in 1992, The International Law Commission established a draft code that aimed to prevent and criminalise international crimes against humanity and promote international peace and security.³⁴ The General Assembly released its Resolution 49/53 in 1994 to establish an ad hoc committee. This committee was open to all member states of the United Nations in order to review a draft that was prepared by the International Law Commission. Based on the report of the ad hoc committee, the General Assembly released its Resolution 50/46 in 1995.³⁵ This resolution aimed to establish a preparatory committee to discuss the draft further and to review the substantive observations arising from the International Law Commission and from the member states of the United Nations.³⁶

The commitment of the international community was also considered by the Preparatory Committee for establishing the International Criminal Court. Thus, it held meetings from February to August 1997 and from December 1997 to April 1998 to complete the final draft of the Statute in a deep consolidated text.³⁷ The Preparatory Committee suggested convening a diplomatic conference of plenipotentiaries to finalise and adopt an international treaty of an international criminal court.³⁸ Meanwhile, the United Nations decided to

³¹ 'Report of the Preparatory Committee on the Establishment of an International Criminal Court (15 June-17 July 1998), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (14 April 1998), UN Doc A/CONF.183/2/Add 1; 'Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998), UN Doc A/CONF.183/10 entered into force on 1 July 2000.'

³² Ibid.

³³ UNGA Resolution 44/39 GAOP, 44th Session, Sup. NO. 49 UNDOC A/44/49 (1989) 310 <<http://legal.un.org/unjuridicalyearbook/pdfs/english/volumes/1989.pdf>> accessed 24 April 2019.

³⁴ The Report of the International Law Commission, GAOR 45th Session Sup. No. 10. UNDOC A/45/10, 36, 55.

³⁵ T MacArthur Foundation, *The International Criminal Court: Observations and Issues before the 1997-1998 Preparatory Committee and Administrative and Financial Implications* (International Human Rights Law Institute, DePaul University Chicago 1997)1, 4.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

convene an international diplomatic conference from 15 June until 17 July 1998 in Rome, Italy to finalise the Rome Statute after years of negotiations. At the end of the conference, 120 states voted in favour of the Treaty, seven states voted against, and twenty-one abstained.³⁹ Based on Article 125 of the Statute and the fact that sixty-seven states ratified the Treaty, the Court was adopted and entered into force on 1 July 2002.⁴⁰ After the establishment of the Court, some arguments surrounded some provisions of the ICC Statute. Thus, it is important to set the scene by briefly highlighting the most general contentious academic arguments regarding the International Criminal Court.

2.3 The Contentious Academic Arguments Surrounding the Court

The international community has made significant progress in undertaking its responsibility in the area of international criminal law.⁴¹ This can be seen by continuous efforts to prevent international crimes and protecting human rights.⁴² This progress first emerged when the United Nations held a diplomatic conference in July 1998 in Rome, Italy to adopt the provisions of the Rome Statute for establishing a permanent international criminal court.⁴³ The Rome Statute is considered the most significant codification of international criminal law of this era.⁴⁴ The Court obtained its international legal legitimacy through the Rome Statute, which was adopted through the desire of the international community.⁴⁵ The Court was established to fulfil objectives to protect humanity from atrocious international crimes and to raise individual international criminal responsibility.⁴⁶ The Court has jurisdiction over war crimes, crimes against humanity, and genocide.⁴⁷ The jurisdiction of the Court aims to end impunity and prosecute perpetrators who have committed international crimes and who have violated human rights, whether

³⁹ See the official website of the ICC <<https://www.icc-cpi.int/>> accessed 19 November 2016.

⁴⁰ Ibid.

⁴¹ Mauro Politi and Giuseppe Nesi, *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Ashgate Publishing Limited 2002) 65.

⁴² The Rome Statute Preamble.

⁴³ The official website of the International Criminal Court <<https://www.icc-cpi.int/>> accessed 19 November 2016.

⁴⁴ 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (n 1); see also 'Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court'.

⁴⁵ The Rome Statute Article 4, provides that the Court 'shall have legal personality and power to achieve its objectives by exercising its jurisdiction.' The International Criminal Court, entered into force on 1 July 2002, pursuant to Article 125, which provides that 'accession, ratification, approval, and signature shall be open from 17 July 1998 until 31 December 2000. All states shall deposit instruments with the Secretary General of the United Nations.'

⁴⁶ The Rome Statute Article 25.

⁴⁷ Ibid Articles 5, 6, 7, 8, and 8 *bis*.

in wartime (when crimes have been committed during armed conflict) or in peacetime.⁴⁸ This approach is seen to maintain international peace and security.

Since the Statute was opened on 17 July 1998 for signature, accession, and ratification, the Court has had 122 state parties.⁴⁹ Most of these are European states (forty three) and African states (thirty-four).⁵⁰ Only three Arab states (Jordan, Tunisia, and Palestine⁵¹) became parties to the Court.⁵² The ratification of the Rome Statute seems, according to some writers, to have been based on the membership of developed and developing countries.⁵³ These writers argue that most developed states have ratified the Statute because they respect the role of law in their territories and want to protect their nationals and civilians from war crimes and crimes against humanity through co-operation with the Court.⁵⁴ Developing states fear ratification of the Treaty because some have or have had internal conflicts in their territories.⁵⁵ However, the United States, Russia, and China are all classed as developed states and still operate outside the Court, even though all are permanent members of the Security Council of the United Nations.⁵⁶

The main debates regarding the contentious points can be divided into two categories: the first covers theories associated with the Statute of the Court

⁴⁸ Ibid Articles 27 and 28.

⁴⁹ The official website of the International Criminal Court <<https://www.icc-cpi.int/>> accessed 19 May 2017. Acceptance and approval means that a State expresses its consent by adopting the provisions of the Treaty pursuant to Articles 2(1) and 14(1) of The Vienna Convention on the Law of Treaties, and accession means that a state accepts the Treaty to become a Party at the beginning of negotiation of the Treaty. Acceptance, approval, and accession have the same legal effects over a State Party pursuant to Articles 2(1) and 15 of the Vienna Convention. The 'ratification defines as the international act whereby a State indicates its consent to be bound to a Treaty if the parties intended to show their consent by such an act' pursuant to Articles 2, 10, and 14(1) of The Vienna Convention.

⁵⁰ Both Eastern European and Western European.

⁵¹ There are some arguments about whether Palestine is a state or not, but it was agreed by the UN that Palestine has the rights of a state; see the UN website <<https://www.un.org/en/>> accessed 24 August 2017. Eight Arab States have signed the Treaty (Bahrain, Egypt, Morocco, Kuwait, Oman, United Arab Emirates, Yemen, and Sudan). The six Islamic States that have now ratified the Treaty are: Jordan, Tunisia, Afghanistan, Djibouti, Comoros, and Palestine. The Kingdom of Saudi Arabia (KSA) did not ratify nor sign and, hence, remains outside the Court.

⁵² The official website of the International Criminal Court <<https://www.icc-cpi.int/#>> accessed 17 July 2017.

⁵³ Terrence L Chapman and Stephen Chaudoin, 'Ratification Patterns and the International Criminal Court' (2013) 57 *International Studies Quarterly* 400.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ The official website of the International Criminal Court. The other permanent countries of the Security Council, the United Kingdom and France, are members of the ICC.

(the Rome Statute) and the second is associated with the role of the Court in practice.

2.3.1 The Rome Statute

This category covers four main themes: a) arguments about the Court's legitimacy; b) arguments about the relationship between the Security Council and the Court; c) arguments about the role of the Prosecutor of the Court relating to the initiation of investigations by himself or herself; and d) arguments about the sovereignty of states and the jurisdiction of the Court.

The first theme is the Court's legitimacy. Tolbert (the Deputy Prosecutor of the International Criminal Tribunal for the Former Yugoslavia) notes a problem in the jurisdiction of the ICC.⁵⁷ He explains that its jurisdiction does not cover states that are not parties to the ICC.⁵⁸ The issue here is that this makes up more than half of the world's population (the United States, China, India, Indonesia, and Russia), which means that the jurisdiction of the ICC is not universal.⁵⁹ However, the Court was established by the willingness of some states⁶⁰ as pursuant to Article 4 of the Rome Statute.⁶¹ It is authorised to prosecute individuals of state parties or those on whose territory international crimes have been committed and to punish them within its jurisdiction in order to stop impunity and to maintain international peace and security.⁶² Establishing the International Criminal Court was undertaken to maintain international peace and security and is considered an international entity.⁶³ This reinforces the 'role of law'⁶⁴ at a national level and at an international one, side by side.⁶⁵

⁵⁷ Cited in David Hoilc, *Justice Denied: The Reality of the International Criminal Court* (1st edn, The African Research Centre 2014) 22; Brunnée Jutta and Stephen John discuss the concept of legitimacy and legality in *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010). This study adopts the legitimacy concept according to Antonio Cassese as outlined in his article 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) 25 (2) *Leiden Journal of International Law* 491.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ One hundred and twenty-two states have ratified the Statute of the Court; see the official website of The ICC <<https://www.icc-cpi.int/asp>> accessed 17 September 2019.

⁶¹ The Rome Statute.

⁶² The Rome Statute Article 12.

⁶³ Stahn Carsten, *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 31.

⁶⁴ Tomas Bingham, *The Role of Law* (Allen Lane first published 2010) 481.

⁶⁵ Flavia Lattanzi and William Schabas, *Essays on The Rome Statute of International Criminal Court* (II Sieent 1999) 41.

The second theme of academic debate surrounds the relationship between the Security Council and the Court. Kochler notes that the role of the Security Council in referring situations in Article 13(b) or deferring cases in Article 16 of the Rome Statute can be perceived as 'political interference to the Court's jurisdiction because this role is subject to the desires of the permanent members of the Security Council'.⁶⁶ An example of this is the Darfur case. In addition, the Syrian case has not yet been referred to the ICC.⁶⁷ Furthermore, during the European Parliament for Global Action Meeting, it was noted that the role of the Security Council can be challenging for the Court when permanent members of the Council want to subject another state to the Court's jurisdiction when they are not party to the Court.⁶⁸ Moreover, Schwebel argues that it is not right for the Security Council to evaluate the crime of aggression.⁶⁹ Akande argues that when the Security Council refers a case to the Court, it asks the Court to take an action within the Statute.⁷⁰ Article 13(b) of the Rome Statute stipulates that the Council has the right to refer a situation to the Court when the situation threatens the peace and security of the international community.⁷¹ It has been argued that this referral does not mean imposing a case to the Court but means moving a case to the Court.⁷² Article 16 of the Rome Statute provides that the Security Council has the right to defer a case for twelve months. It is noticeable that this deferral may potentially result in a loss of evidence and put witnesses at risk. The role of the Security Council in maintaining international peace and security is based on Charter V of the United Nations Articles 24 and 25, as approved by the Member States of the United Nations.⁷³ These states have authorised the Council to take responsibility on behalf of the international community. Moreover, Article 39 Chapter VII of the UN Charter provides that the Security

⁶⁶ Cited in Hoilc (n 57) 85. Article 13(b) provides that 'A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'. Article 16 stipulates that 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'.

⁶⁷ The Darfur case was referred to the Court via UNSCR 1593 (2005) 31 March 2005.

⁶⁸ Hoilc (n 57).

⁶⁹ Cited in Hoilc (n 57) 86.

⁷⁰ Dapo Akande, 'The legal nature of Security Council referrals to The ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* 333.

⁷¹ The Rome Statute Article 13(b).

⁷² Ibid Article 16. See Amal Alamuddin, 'The Role of the Security Council in Starting and Stopping Cases at the International Criminal Court: Problem of Principle' in Andraz Aidar (eds), *Contemporary Challenges for the International Criminal Court* (BIICL 2014) 106

⁷³ The United Nations, Charter V, Articles 42 and 25.

Council is responsible for maintaining international peace and security.⁷⁴ This was evident when the Council established previous international tribunals, such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. In this sense, the Security Council's work can be seen as an international mechanism operating with the Court to preserve international peace and security based on its duties.⁷⁵ During the drafting of the Rome Statute, Saudi Arabia was not in favour of this role and joined a group of Arab states that issued a statement in which the reasons for this were explained as follows.

The Security Council might be granted powers that could affect the role of the Court concerning any war criminal, regardless of country, religion, or nationality. The text adopted might increase the powers of the Council over and above those set out in Chapter VII of the Charter of the United Nations.⁷⁶

The third theme of debate surrounds the role of the Court's Prosecutor to initiate an investigation. Article 15 of the Rome Statute provides that the Prosecutor of the Court has the right to initiate an investigation *proprio motu*, namely by himself or herself.⁷⁷ Tiemessen argues that the Prosecutor of the Court works within 'a political environment' when he or she receives a referral from a state party to the Court or from the Security Council.⁷⁸ This may lead to unfair trials because these referrals reflect the interests of political leaders of the state parties to the Court/and or the political considerations of the permanent members of the Security Council;⁷⁹ for instance, the self-referrals of the Central African Republic and Uganda.⁸⁰ Schabas explains that the

⁷⁴ Ibid Article 39 stipulates that 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'.

⁷⁵ Carsten (n 63) 62.

⁷⁶ The Group of Arab States declared their statement in the 9th Plenary Meeting on 17 July 1998 A/CONF.183/SR.9; Report of the Credentials Committee, A/CONF. 183/7 and Corr. I and 2, paragraph 13, 126
<http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> accessed 24 August 2017.

⁷⁷ The Rome Statute Article 15.

⁷⁸ Alana Tiemessen, 'The International Criminal Court and the Politics of Prosecution' (2014) 18 (4-5) *The International Journal of Human Rights* 444.

⁷⁹ Ibid.

⁸⁰ The situation in the Central African Republic was referred to the ICC by the Government itself in December 2004 (ICC-01/05). See *The Prosecutor v Jean-Pierre Bemba Gombo*, Bemba Case (ICC-01/05-01/08) <<https://www.icc-cpi.int/car/bemba>>. The Uganda situation was referred to the ICC by the Government itself January 2004 (ICC-02/04). In Uganda, there was an armed conflict predominantly between the Lord's Resistance Army and the national authorities, mainly in Northern Uganda. The Government of Uganda referred the situation to

prosecutorial system of the Court within the 'political environment' can be similar to the general framework in a domestic system of a state.⁸¹ Furthermore, the role of the Court's Prosecutor is limited by the Pre-Trial Chamber pursuant to Article 53 of the Rome Statute.⁸² This article obliges the Prosecutor to consider the interests of justice and the reasonable basis for making an investigation. The crimes committed must fall within the Court's jurisdiction. In this sense, the Prosecutor is not, 'a person who has a universal power'.⁸³ Again, Saudi Arabia objected to giving the Prosecutor this power during the drafting of the ICC's provisions. Saudi Arabia noted that 'the Prosecutor should have the agreement of the state party which he or she wishes to visit'.⁸⁴

The fourth theme of debate surrounding the court is the significance of achieving a balance between the jurisdiction of the Court and the sovereignty of the states via the complementary principle.⁸⁵ According to Article 10 of the Rome Statute 'nothing in this part [namely jurisdiction] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'. It has been internationally agreed that a State has the right to exercise its jurisdiction over individuals and crimes on its territories based on the sovereignty principle.⁸⁶ However, the ICC can exercise its jurisdiction over international crimes to fulfil its objectives to preserve the interests of the international community. Article 1 of the Rome Statute stipulates that the Court's jurisdiction is complementary.⁸⁷ Article 17 provides that the Court shall apply its jurisdiction over a State that is genuinely unwilling or unable to conduct any investigations or prosecutions of international crimes. However, someone may ask who measures whether or not a state is 'unwilling or unable'? Is this the state itself? Or does this decision

the ICC with regard to war crimes and crimes against humanity committed by the Lord's Resistance Army. See the official website of The ICC <<https://www.icc-cpi.int/uganda>> accessed 24 August 2017.

⁸¹ William Schabas, *The International Criminal Court, A Commentary on The Rome Statute* (Oxford Press 2010) 1117.

⁸² The Rome Statute Article 53.

⁸³ Carsten (n 63) 61.

⁸⁴ Report of the Credentials Committee, A/CONF. 183/7 and Corr. I and 2, paragraphs 4 and 6, 349 <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf/> accessed 24 April 2019.

⁸⁵ The Preamble of The Rome Statute and Article 1 and Article 10; see also Daniel Nsereko 'The ICC and Complementary in Practice' (2013) 26 (2) *Leiden Journal of International Law* 427.

⁸⁶ UN General Assembly Report of the Third Committee, A/50/635/Add 2, 27 February 1996, with respect to the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes.

⁸⁷ The Rome Statute Preamble and Article 1.

originate from other international organs such as the Security Council? Saudi Arabia asserted its sovereignty by completely refusing the Court's jurisdiction by stating that 'internal conflicts should be excluded, provided that a state is correctly meeting its obligations. The intervention of the Court would prejudice state sovereignty'.⁸⁸

2.3.2 The Role of the Court in Practice

This category deals with two contentious points regarding the role of the Court in practice. The first is how the Court selects cases; the second is the lack of enforceable mechanisms to apply its decisions.

With respect to selectivity, it has been argued that most of the cases brought before the Court concern African states.⁸⁹ Libyan and Sudanese cases have been referred by the Security Council, while other African cases have been referred by the States themselves, for example the Central African Republic.⁹⁰ This has meant that the Court has tended to focus on certain African States. This led The African Union to adopt a strategy of withdrawal from the Court on 30 and 31 January 2017 in Addis Ababa, Ethiopia.⁹¹

In contrast, it has been argued that the Court has failed to investigate and prosecute crimes committed in Iraq, Afghanistan, Syria, and Palestine (Gaza).⁹² The second issue relates to the lack of enforceable mechanisms to apply Court decisions. Judge Sang Hyun Son has noted that the Court does not have adequate mechanisms to enforce its orders.⁹³ He has also argued that the ICC does not have the right police⁹⁴ or is able to use 'coercive powers'⁹⁵ to deal with its orders and arrest suspected individuals or gather

⁸⁸ A statement made by Mr Abdullah M Mohammed Ibrahim Al Sheikh on behalf of the Saudi Government on the drafting of the Statute, paragraphs 5, 6, 7, 8, 9, A/CONF.183/C.1/SR.28 at the 28th meeting on Wednesday 8 July 1998, 293; Consideration of the question concerning the finalisation and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly Resolutions 51/207 of 17 December 1996 and 52/16 of 15 December 1997, A/CONF.183/2/Add. 1 and Corr. L, and A/CONF.183/C.1/L.53.

⁸⁹ Gerhard Werle, Lovell Fernandez and Moritz Vormbaum, *Africa and the International Criminal Court* (International Criminal Justice Series 214) 181.

⁹⁰ Six African cases have been brought before The ICC; see the International Criminal Court website <<https://www.icc-cpi.int/#>> accessed 15 July 2017.

⁹¹ The African Union adopt a strategy of withdrawal from the Court on 30 and 31 January 2017 in Addis Ababa, Ethiopia. For the African Union Strategy of Withdrawal, see <https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf> accessed 15 July 2017.

⁹² Carsten (n 63) 57.

⁹³ Ibid 61.

⁹⁴ Hyeran Jo and Simmons Beth A, 'Can the International Criminal Court Deter Atrocity' (2016) *International Organization* 446.

⁹⁵ Carsten (n 63) 57.

evidence. In this sense, the Court relies on co-operation with other states, whether these are member State parties or third parties, in order to gather evidence or to hear from witnesses.⁹⁶

During and after the Rome Conference and since then, the Arab States have clarified their views with regard to the Court's provisions via the representative of Sudan on behalf of the League of the Arab States.⁹⁷ Their views include the following four points. a) They argue that the role of the Security Council in the Court in referring cases to the Court or pausing an investigation should be reduced. b) They argue that the role of the Prosecutor of the Court shall be 'under reasonable and logical control and not be *ex officio* only'. c) They emphasise the importance of including the definition of the crime of aggression in the provisions of the Rome Statute because it is considered to be 'the mother of all crimes'. d) They discuss embedding the crime of displacement of civilians within the Court's jurisdiction by referring to the Geneva Convention 1949.⁹⁸ However, the definition of the crime of aggression entered into force within ICC jurisdiction on 17 July 2018 according to the adopted Resolution of the State Parties of the Court No. RC/Res. 6 on 11 June 2010. The displacement of civilians is included in Rome Statute Article 7(2)(d) within crimes against humanity, and Article 8(e)(viii) within war crimes.

There were and remain some contentious points concerning why some Arab or Islamic States did not ratify the Statute. These arguments can be summarised in brief as follows: the Security Council's role in the Court and the Prosecutor's power to initiate investigations *proprio motu* (to initiate an investigation or prosecution by himself/herself). These elements are discussed briefly below.

⁹⁶ See Part 9 of the Rome Statute.

⁹⁷ The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome (15 June-17 July 1998), Official Records Volume II <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> accessed 26 May 2017.

⁹⁸ The Arab Group's statement by the representative of Sudan on behalf of the Arab States. The UN Diplomatic Conference concluded in Rome with a decision to issue an International Criminal Court Press Release L/2889 <<https://www.un.org/press/en/1998/19980720.l2889.html>> accessed 13 April 2017; see UN A/CONF.18/13 (Vol.11) Summary Record of the Plenary Meetings and of the Meetings of the Committee of the Whole. <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> accessed 13 April 2017.

2.4 Issues Raised by Some Arab/Islamic States about the Ratification of the Rome Statute

2.4.1 The Security Council's Role in the ICC

According to the Rome Statute's provisions, the relationship between the Security Council and the Court has three aspects as follows. a) Article 13(b) of the Rome Statute stipulates that the Security Council can refer a case to the Prosecutor of the Court when crimes under the Court's jurisdiction have been committed, even when the case happened in a state that has not ratified the Rome Statute.⁹⁹ This referral occurs by moving a referral case rather than imposing a prosecution. b) Article 16 of the Rome Statute stipulates that the Security Council can defer or pause investigations or a prosecution for twelve months when its resolution lies within the interests of international peace and security.¹⁰⁰ c) Article 87 of the Rome Statute stipulates that the Court can notify the Security Council when a state does not co-operate with the requests of the Court.¹⁰¹

Article 13(b) of the ICC Statute stipulates that there is a significant relationship between the Court and the Security Council for maintaining international peace and security.¹⁰² It has been argued that the Security Council has a significant relationship with the Court in order to maintain international peace and security.¹⁰³ It could be that rights have been given to the Security Council pursuant to Charter VII of the United Nations in order to maintain international peace and security.¹⁰⁴ Thus, the Security Council should have a relationship with the ICC in order to fulfil its purpose. It may be that the United Nations does not want to lose its relationship with the Court.¹⁰⁵ Moreover, a relationship exists between the Security Council and previous international criminal tribunals, such as those of Yugoslavia and Rwanda. Thus, the Court and the Security Council share the same purpose, which is to maintain international peace and security. However, the Court is not part of the organs of the United Nations.¹⁰⁶

⁹⁹ The Rome Statute Article 13(b). The Darfur case, for example. Sudan is not a member state of the ICC.

¹⁰⁰ Ibid Article 16.

¹⁰¹ Ibid Article 87.

¹⁰² Ibid Article 13(2) which provides that the Security Council has the right to refer a situation to the Court's Prosecutor when the situation appears to be within the Court's jurisdiction.

¹⁰³ Leila Nadya Sadat (eds), *The International Criminal Court and The Transformation of International Law: Justice for The New Millennium* (Transitional Publishers Inc. 2002) 79.

¹⁰⁴ The Rome Statute Article 13(2).

¹⁰⁵ Sadat (n 103).

¹⁰⁶ Ibid.

During the drafting of the Rome Statute, Arab States argued the following.

The Security Council might be granted powers that could affect the role of the Court concerning any war criminal, regardless of country, religion, or nationality. The text adopted might increase the powers of the Council over and above those set out in Chapter VII of the Charter of the United Nations.¹⁰⁷

The Arab States, during the Rome Conference, attempted to reduce the powers of the Security Council by identifying acts where the Security Council should apply its power.¹⁰⁸ However, this could lead to the use of vetoes among permanent members of the Security Council to prevent the investigation or prosecution of citizens of their states.¹⁰⁹ The power of the Security Council to trigger cases to the Court can be criticised from several angles. First, the Court can only deal with international crimes based on its provisions without interference from the Security Council to behave independently.¹¹⁰ Second, the power of the Security Council could be considered political; hence, the politicisation of decisions may occur, which may result in an unfair referral because those decisions may be taken under political considerations.¹¹¹ This has occurred in cases such as Darfur and Libya, where the Security Council referred the Darfur case to the Court under Resolution 1593/2005.¹¹² In this instance, more than 300,000 people were displaced and more than 800 people were killed at the beginning of the armed conflict in Darfur.¹¹³ Another case that was referred by the Security Council to the Court was Libya under Resolution 1970/2011.¹¹⁴ In this instance, hundreds of people were killed at

¹⁰⁷ The Group of Arab States declared their Statement at the 9th Plenary Meeting on 17 July 1998 A/CONF.183/SR.9, 'Report of the Credentials Committee (A/CONF. 183/7 and Corr. I and 2)' (13) 126.

¹⁰⁸ Steven C Roach, 'Arabic States and the Role of Islam in the International Criminal Court' (2005) 53 *Political Studies* 143.

¹⁰⁹ Ibid. See The Guardian Newspaper 15 March 2019, The US denies providing visas for investigators of the ICC <<https://www.theguardian.com/us-news/2019/mar/15/mike-pompeo-us-war-crimes-investigation-international-criminal-court>> accessed 14 July 2019.

¹¹⁰ Andraz Zidar and Olympia Bekou, *Contemporary Challenges for the International Criminal Court* (British Institute of International and Comparative Law 2014) 103.

¹¹¹ Roy S Lee (eds), *The International Criminal Court: The Making of The Rome Statute* (Kluwer Law International 1999) 149.

¹¹² UNSC Res 1593/2005 (March 2005) UN Doc/Res 1593 <<https://www.icc-cpi.int/NR/rdonlyres/85FEED1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 25 April 2019.

¹¹³ *The Prosecutor v Omar Hassan Ahmad Al Bashir* Case No. ICC-02/05-01/09: First Warrant of Arrest (4 March 2009) <<https://www.icc-cpi.int/darfur/albashir/Documents/albashirEng.pdf>> accessed 25 April 2019.

¹¹⁴ UNSC Res 1970/2011 (February 2011) UN Doc/Res 1970 <<https://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf>> accessed 25 April 2019.

the beginning of the event by Qaddafi's forces.¹¹⁵ However, the Security Council did not refer the case in Syria when more than 250,000 people were killed, more than seven million were displaced, and more than four million were made into refugees.¹¹⁶

Based on Articles 24 and 25 of Chapter V of the Charter of the United Nations, all member States of the United Nations have authorised the Security Council to work on their behalf to safeguard international peace and security.¹¹⁷ This is regarded as the main purpose of the ICC and includes preventing international crimes in order to maintain international peace and security and to present criminals before the Court. Furthermore, Article 39 of Chapter VII of the UN Charter gives the Security Council the right to decide whether or not a situation that is taking place is against international peace and security in accordance with Articles 41 and 42 of the Charter.¹¹⁸ It also gives the Security Council the right to take necessary measures to preserve international peace and security. Article 39 has been accepted by all member States of the United Nations. This Article is compatible with the Security Council's work in its referral and deferral procedures. Article 39 provides that 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'.

The main goal of the Security Council has been to preserve international peace and security. This goal was realised when it established the International Criminal Tribunal for former Yugoslavia and Rwanda. The establishment of these international tribunals was on the basis of Chapter VII in order to maintain international peace and security in the world¹¹⁹ Furthermore, the Security Council's process of referral and deferral may help

¹¹⁵ *The Prosecutor v Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi*, Case No ICC-01/11-01/11 <<https://www.icc-cpi.int/libya/gaddafi0>> accessed 25 April 2019; see also The United Nations, Security Council Resolution 1970.

¹¹⁶ Human Rights Watch <<https://www.hrw.org/world-report/2016/country-chapters/syria/>> accessed on 7 March 2017.

¹¹⁷ The Charter of the United Nations (1945) Article 24, Chapter 5 provides that 'to keep the United Nations work effective and rapid, all member states authorise the Security Council to work on their behalf to maintain international peace and security'; Article 25 also provides that 'all member states shall accept the Security Council's decisions in accordance with the Charter of the United Nations'.

¹¹⁸ *Ibid* Article 39.

¹¹⁹ The United Nations A/CONF.183/SR.9 Summary Records of the Plenary Meetings (A/CONF. 183/7 and Corr. 1 and 2) (24) Statement by Mr Giovanni Conso (Italy) 63.

the Court to gain technical and financial support.¹²⁰ Technical support is needed to save time because international investigations may be complex and it may be necessary to provide connections between prosecutors of the Court and experts such as inspectors or doctors as well as victims. Financial support is important to provide the Court with resources and equipment such as rooms in a court in a country where a crime needs to be investigated.¹²¹

2.4.2 The Prosecutor's Power to Initiate Investigations (*Proprio Motu*)

The Prosecutor of the Court has the right to initiate investigations by himself or herself based on Article 15(1).¹²² It has been argued that the main aim of the Prosecutor's right to start an investigation *proprio motu* is to reflect the independence of the Court as follows.

a) Those who drafted the Rome Statute noted that giving this right may help some states who would usually hesitate to refer a situation to the Court, or who do not want to deal with it in their own territory.¹²³ The Prosecutor can also receive information from victims or witnesses or non-governmental organisations.¹²⁴ This opens up a direct path connecting the Court to victims who do not need to rely on individual governments.¹²⁵ Moreover, the Prosecutor may receive confidential information from victims who do not want their governments to have knowledge of that information.¹²⁶

b) According to Article 15(3), the Prosecutor can submit a request to the Pre-Trial Chamber with supporting information or evidence, and when he or she obtains approval, an investigation can commence. Hence, the pre-trial examination may increase the independence of the Prosecutor, and the pre-trial may scrutinize the information that has been submitted by the Prosecutor.¹²⁷

c) Article 53 provides that the investigation may not be admissible if it has no reasonable basis, or the crimes committed do not fall within the Court's jurisdiction, and that the Prosecutor should consider the interests of justice.

¹²⁰ Rosa Aloisi, 'A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court' (2013) 13 *International Criminal Law Review* 147.

¹²¹ *Ibid.*

¹²² The Rome Statute Article 15 provides that 'the Prosecutor can commence an investigation by himself or herself when he can ensure that crimes fall within the Court's jurisdiction'.

¹²³ Antonio Cassese, *The Rome Statute of the International Criminal Court* (Oxford University Press 2002) 662.

¹²⁴ *Ibid.* 663.

¹²⁵ *Ibid.*

¹²⁶ Cassese (n 123) 177.

¹²⁷ Zidar and Bekou (n 110) 39.

This may mean a consideration of the importance of the validity of the information submitted in order to commence an investigation by the judicial department of the Court.

On the other hand, it has been argued that there cannot be complete independence of the Prosecutor's work.¹²⁸ This is because he or she may receive the following.

First, a referral from a state party to the Court according to Article 14(1). This Article provides that 'a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes'. This may lead to a referral depending on political considerations. However, the oversight by the Pre-Trial Chamber on the basis of Article 53 is to ensure that there are no political considerations.

Second, a referral from the Security Council according to Article 16, which provides that the Security Council has a right to pause or defer an investigation or prosecution for twelve months by a resolution released under Charter VII of The United Nations.¹²⁹ This Article may affect the independence of the Prosecutor's work as a referral may reflect political desires. In addition, the Security Council's role here may lead to a loss of evidence of the case in question. However, it is more important to consider the principle of the sovereignty of a State, particularly when a State is willing to investigate a case and the Prosecutor wants to commence an investigation.¹³⁰ In this regard, the Saudi delegations stated that 'the Prosecutor should have the agreement of the state party which he or she wishes to visit'.¹³¹

One may note that the requirements for the nomination of the Prosecutor as well as the measures for changing the Prosecutor may strengthen the prosecutor's status in terms of expertise and integrity. This can be seen as follows.

¹²⁸ Tiemessen (n 78)

¹²⁹ The Rome Statute Article 16.

¹³⁰ Quadri Kafayat, 'The Proprio Motu Power of The ICC Prosecutor: The Reasons Some States Have Refused to Ratify the Rome Statute' (2014) 2 (1) International Journal of Humanities and Management Sciences 12.

¹³¹ Report of the Credentials Committee, A/CONF. 183/7 and Corr. I and 2, paragraph 4 and 6, 349 <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf/> accessed 24 April 2019.

- a) The secret approach used for nominating the Prosecutor by the Assembly of States is based on Articles 42/4.¹³²
- b) The Prosecutor should have higher-level qualifications with practical experience in the field of criminal prosecution.¹³³
- c) The State parties (by Assembly) can change the Prosecutor if there is misconduct in an investigation or if they are unable to achieve the required level of investigation based on Article 42(6).¹³⁴
- d) The Security Council's role may not be understood as one that compels the Prosecutor; rather, it may be understood as a notification.

It is relevant now to highlight the importance of the International Criminal Court for the international community in respect of two key elements. First, it is of theoretical importance; second, it is significant practical importance as explained below.

2.5 The Importance of the ICC

2.5.1 Theoretical Importance

2.5.1.1 The Importance of the Court at International Level

The ICC was established by international statute. It promises independence, permanence, international legitimacy, international gravitas, and communication via international channels such as the Security Council.¹³⁵ It was a voluntary act undertaken by member states to create international jurisdiction and relies on provisions that were adopted by state parties. Thus, it is considered the most important international judicial institution of its era. Its importance is also due to two main aspects. First, it raised international legal liability for individuals regardless of who they are and what their capacity is.¹³⁶ Second, its main goal is to protect human rights and to protect future generations from atrocious crimes. Subsequently, in this regard, investigations and prosecutions are as complex as the nature of the crimes

¹³² Ibid Article 42 (3).

¹³³ C K Hall, 'The Powers and Role of the Prosecutor of the International Criminal Court in the Global Fight against Impunity' (2004) *Leiden Journal of International Law* 125-126 <<http://0-search.proquest.com.wam.leeds.ac.uk/docview/219601159?accountid=14664>> accessed 15 May 2017.

¹³⁴ Ibid.

¹³⁵ The Rome Statute Article 4.

¹³⁶ Ibid Articles 27 and 28.

the ICC deals with. These crimes are usually committed by experienced and competent individuals. Furthermore, the Court does not exercise its jurisdiction retroactively.¹³⁷ Previous international criminal tribunals and their instruments have also reflected the need for such a court. Thus, the establishment of the Court was considered a real development towards introducing human rights but decreasing ultimate sovereignty, immunities, and amnesties.¹³⁸

2.5.1.2 The Importance of the Court at a National Level

The Court's provisions act as a precautionary measure to prevent individuals, state leaders, and officials committing international crimes. This produces a positive political, legal, social, and economic impact. Political impact is attained by discouraging leaders from committing international crimes on their territories. This helps to maintain stability because leaders of states have to comply with the rules of international criminal law. Legal impact is obtained through improving domestic legislation, applying international rules, and seeking compatibility between domestic legislation and international rules. Other positive results may be an increase in the level of investigations and prosecutions when applying the principles of complementary law.¹³⁹ Social impact can be seen in terms of the development of stability with respect to health and wealth. Economic impact is associated with social impact because a state may enjoy greater stability, increase its economic prosperity, and become attractive to external investors.

2.5.2 Practical Importance

Establishing a permanent international criminal court on the basis of the approval of state parties can help create powerful international legitimacy and equal justice, and enforce international criminal law.¹⁴⁰ In terms of legitimacy, the Court's provisions emphasise the legal status of the Court and Court powers pursuant to Article 4.¹⁴¹ Moreover, power is practised by the Court by

¹³⁷ The Rome Statute Article 24.

¹³⁸ Dominic McGoldrick, Peter Rowe and Eric Donnelly *The Permanent International Criminal Court* (Hart Publishing Oxford and Portland Oregon 2004) 43.

¹³⁹ The Rome Statute Articles 1, 86, and 87.

¹⁴⁰ McGoldrick (eds) (n 138) 45.

¹⁴¹ The Rome Statute Article 4 provides that 'the Court has an international personality and capacity to fulfil its objectives and functions'.

selecting judges and prosecutors in a confidential way pursuant to Articles 36 and 42.¹⁴²

In terms of the equality of justice, criticisms of previous international tribunals have had an impact on the development of the ICC's provisions in relation to the idea of equal justice. The goal of equal justice appears in the general principles of the Court, and in terms of the definition of international crimes and their elements.¹⁴³ The application of the Court and the capacity of its officials are covered in Article 27.¹⁴⁴ Provisions relating to the rights of the accused are covered in Article 67,¹⁴⁵ and protecting victims and witnesses is covered in Article 68.¹⁴⁶ Limitations and ending impunity are covered in Article 29.¹⁴⁷ These provisions help to provide justice and fair international trials.

Since the First World War, the international community has enacted international treaties that aim to save humanity from atrocities and maintain international peace and security. These treaties have been designed to combat human trafficking, torture, and prevent chemical weapons attacks; but none, until now, have provided for the legal responsibility of individuals. The Rome Statute is classed as broader in scope than any international treaties that have preceded it because of its attempt to implement provisions internationally. The Rome Statute was designed to undertake the following.

a) Apply international co-operation between member states with the Court (Article 86).¹⁴⁸

b) Empower the Court to enforce international criminal jurisdiction over crimes (Article 5).¹⁴⁹ This is done based on its principle of 'complementary' law. This principle asserts that the Court will exercise its power over a state that is unable to prosecute suspected individuals or when domestic judicial authorities have been destroyed (such as in Rwanda and during the Pol Pot regime, which destroyed Cambodia's domestic courts).¹⁵⁰

¹⁴² See The Rome Statute Articles 36 and 42.

¹⁴³ Ibid Articles 5, 6, 7, 8, 9, and 22.

¹⁴⁴ Ibid Article 27.

¹⁴⁵ Ibid Article 67.

¹⁴⁶ Ibid Article 68.

¹⁴⁷ Ibid Article 29.

¹⁴⁸ Ibid Articles 86 and 87.

¹⁴⁹ Ibid Article 5.

¹⁵⁰ See Ken Kiernan, *The Cambodian Genocide* (Samuel Totten, no date of publication) 87. <<http://niod.nl/sites/niod.nl/files/Cambodian%20genocide.pdf>> accessed 25 April 2019.

c) To refer cases from the Security Council when it considers that the situation is under the Court's jurisdiction and threatens international peace and security (Articles 13 and 16).

d) Sustain the right of the Prosecutor of the Court to commence an investigation.

e) Uphold the obligation of any state that is not a state party of the treaty to refrain from any act that may fail the purposes and objectives of the Rome Statute (see the Preamble of the Rome Statute).¹⁵¹

In this climate, it is more important than ever to demonstrate the position of Saudi Arabia to the ICC.

2.6 The Saudi Position with Regard to the ICC

The Kingdom of Saudi Arabia exhibited its desire to participate in the establishment of the ICC, but its position at the end of the Rome Conference with respect to the Court was not clear. However, it could be argued that the vote of Saudi Arabia was in favour of the Statute, based on the statement presented by the Saudi Government representative. This appeared after the Rome Conference, when other statements of the representatives of Arab States (Qatar, Iraq, Yemen, and Libya) were presented against establishing the Court.¹⁵² It was reported that the representative of the Kingdom of Saudi Arabia, Abdullah Al-Suliman, stated that the decision to establish a working group on the crime of aggression was a step in the right direction; he could not over-emphasize the importance of the definition of such a crime, and the absence of a proper definition could lead to different interpretations, with grave results. He said that the heinous crime of moving populations was still being committed by occupying powers, and an appropriate definition should be properly articulated.

Saudi Arabia accorded great importance to the establishment of an International Criminal Court, provided it would undertake its tasks properly. Saudi Arabia reiterated the importance of elaborating an acceptable definition of the crime of aggression and of the crime of the movement of populations. It

¹⁵¹ The Rome Statute Preamble.

¹⁵² UN Meetings' Coverage and Press Releases GA/L/3115
<<https://www.un.org/press/en/1999/19991021.gal3115.doc.html>> accessed 9 February 2017.

hoped that the Preparatory Committee would successfully complete its work on these subjects.¹⁵³

However, the Rome Statute was further developed during conferences held in 2010, 2011, 2014, and 2017, especially in terms of defining crimes of aggression and selecting its elements.¹⁵⁴ In addition, the Court's member states increased to 122.

Saudi Arabia is a member of the United Nations, which may mean that international obligations under the Charter of the UN shall be taken into account whether in internal or international aspects. This is because Article 81 of the Basic Law of Governance in Saudi Arabia indicates that all provisions of the Basic Law should not hinder the international obligations of international treaties' provisions that Saudi Arabia has ratified. In addition, the provisions of the Basic Law of Governance shall not affect international commitment and implementation under international treaties ratified by the Saudi government. Thus, adherence to the provisions of the Charter of the United Nations should be considered because Saudi Arabia should not evade international obligations by invoking its national laws. This is because one point relates to the extension of the Court's jurisdiction over a non-state party, when the state is unwilling or unable to prosecute responsible individuals who have committed international crimes, and when the Security Council refers a case to the Court.¹⁵⁵ Article 27 of the Vienna Convention of Treaties 1969 provides that a state shall not invoke its domestic legislation to justify its failure in any international treaty.¹⁵⁶ Nevertheless, Article 12 of the Court's provisions provide that the Court tacitly has the right to exercise its jurisdiction over a state that is not a party through a referral by the Security Council under Section VII of the Charter of the United Nations. This aims to ensure that international provisions prevail over domestic legislation.¹⁵⁷ Moreover, not signing or ratifying the ICC Statute does not mean limited enforceability of

¹⁵³ Statement of the Presenter for Saudi Arabia at the United Nations (Abdullah Al-Suliman) The United Nations, UN Meetings' Coverage and Press Releases, GA/L/3115 <<https://www.un.org/press/en/1999/19991021.gal3115.doc.html>> accessed 9 February 2017.

¹⁵⁴ See Resolution of the State Parties of the Court No. RC/Res. 6 on 11 June 2010; Resolution on the Activation of the Jurisdiction of the Court over the Crime of Aggression (New York ASP Resolution) Doc. ICC-ASP/16/Res. 5, 14 December 2017, Review Conference in Kampala <<https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf>> accessed 11 February 2019. The amendments are based on Article 97(c).

¹⁵⁵ The Preamble and Article 17 of The Rome Statute.

¹⁵⁶ The Vienna Convention of Treaties (1969), Article 27.

¹⁵⁷ William Schabas, 'The International Criminal Court and Non-Party States' (2010) 28 Windsor Yearbook of Access to Justice, Faculty of Law 1.

legal effects, nor assuming an act that may obstruct the purpose and function of the Court.¹⁵⁸

Saudi Arabia is a member of the Organisation of Islamic Co-operation (OIC).¹⁵⁹ This organisation is inter-governmental, and one of its purposes is to build a link between Muslim States and other non-Muslim states to achieve fair justice between peoples around the world. Moreover, Saudi Arabia is a member of the League of Arab States, which adopted The Arab Charter on Human Rights through its Council on 22 May 2004. The Charter consists of similar general criminal principles to the Rome Statute.¹⁶⁰

Saudi Arabia is at the centre of the Islamic States because it is home to two important Holy Mosques and has a fundamental relationship with most of states around the world. Hence, Saudi's position in not ratifying the Rome Statute may be considered controversial. Ratification of the Rome Statute may promote Saudi's ability to maintain international peace and security as well as to show it is well meaning with respect to the protection of human rights. Inclusion of the Court's provisions within some of Saudi's domestic legislation may provide a powerful legislative tool because it can combine principles of international criminal law and principles of Islamic criminal/international law as we will see in this study.

2.7 Summary

This chapter has outlined the most important discussions relating to the International Criminal Court, in particular the right of the Security Council to refer a case to the ICC or suspend an investigation for twelve months. It has also discussed arguments relating to the Prosecutor's right to initiate an investigation. All these points were considered when the Court was established but were not supported by Saudi Arabia. This chapter has

¹⁵⁸ The Rome Statute Article 13.

¹⁵⁹ The Organisation of Islamic Co-operation <<http://www.oic-oci.org/home/?lan=en>> accessed 26 August 2017. This organisation was founded in 1969, consisting of 57 member states. Article 2(1) of the Charter of this Organisation provides that 'All Member States commit themselves to the purposes and principles of the United Nations'.

¹⁶⁰ The League of Arab States <<http://www.lasportal.org/ar/Pages/default.aspx>> accessed on 4 March 2017. The Arab Charter on Human Rights (2004), enacted on 22 May 2004, entered into force on 15 March 2008. Article 15 of The Arab Charter on Human Rights provides that 'There shall be no crime or punishment except as provided by a previously promulgated law. The accused shall benefit from subsequent legislation if it is in his favour.' Article 12 provides that 'All persons are equal before the courts. The State Parties ensure the independence of the courts and the protection of judges against interference, pressure or threat. All persons within the territory of the State Parties are ensured a right to legal remedy.' Article 19 provides that 'No one shall be tried twice for the same offence. Anyone against whom such proceedings are brought shall have the right to challenge their legality and to demand his release.' Article 16 provides the principle of the presumption of innocence of the accused.

highlighted the evolution of international criminal law through the enactment of numerous international conventions and the establishment of international tribunals that have been set up to punish the perpetrators of the most heinous crimes against humanity. This chapter has also briefly explained the importance of the Court's theoretical and practical existence in contemporary times. It has also made clear Saudi Arabia's position in this regard.

Part Two

**An Insight into the Sources/Principles of International Criminal Law
and Islamic Criminal Law**

Chapter Three

Sources of the Rome Statute and Islamic Law: Commonalities and Differences

3.1 Introduction

The main sources of Islamic law are deemed to be divine, while the sources of the Rome Statute comprise a set of international laws.¹ Even so, historically, international criminal law has been informed by a wide range of sources. These include the teachings of the Bible and the principles of classical Greek and Roman law, and, most notably, intellectuals connected to Christianity, among which are St Ambrose, St Augustine, St Thomas, Francisco de Vitoria, Francisco Sudrez, and Hugo Grotius, who all contributed, in one way or another, to imparting the rules of *jus ad bellum* (the laws of war), a principle which continues to influence international criminal law.² Article 38 of the Statute of the International Court of Justice (ICJ) is the modern source of international law. It aims to enable the, 'consensual regulation of relations between co-equal sovereign states'.³ International criminal law contains principles and jurisdiction that govern international crimes and its punishments in order to seek international peace and security.⁴

This chapter will partly comprise an examination of the roots and sources of Islamic law and of international criminal law (Rome Statute). It will examine the sources of Islamic law from a religious and legal perspective, and the sources of international criminal law from a historical legal perspective. It will cover the main sources and the other tiers of sources of both legal systems, and will refer to relevant academic material connected to the development of Islamic law and international criminal law. It will look at the development of treaties such as the Rome Statute and its relationship to the laws of different states and international customary law.⁵ It will discuss these sources as well as provide elucidation of the sources of Islamic law. This will be done in order to prequel an exploration of commonalities and differences between international criminal law and Islamic law. This chapter also seeks to

¹ Article 21 of the Rome Statute, see chapter one note 10.

² Samantha Besson, Jean D'Aspremont and Sevrine Knuchel, *The Sources of International Law*, (1st edn, The Oxford Handbook, Oxford University Press 2017) 45, 68; see also Robert Goldman and Hays Parks, *International Humanitarian Law* (Spring 2011) 47.

³ M Cherif Bassiouni, *International Criminal Law, Volume 1: Sources, Subjects and Contents* (Brill 2008).

⁴ Elies Van Sliedregt, *Individual Criminal Responsibility in International Law* (1st edn, Oxford University Press 2012) 13.

⁵ John Chipman Gray, *The Nature and Sources of the Law* (Quid Pro, LLC 2012) 77.

undertake a comparative approach to discover commonalities and differences between the other tiers of sources of international criminal law and Islamic law. In this endeavour, the researcher will examine the other tiers of sources of both legal systems, as well as the views of scholars.

International criminal law is a branch of international law, and the sources of the former relate to the sources of the latter.⁶ Thirlway argues that the sources of international criminal law are sometimes 'less visible'.⁷ However, international criminal law cannot be isolated from international law. The Rome Statute reflects the authority of international criminal law and is central to the current study, and in this respect, it is important to trace its development. Indeed, the sources of the Rome Statute are stipulated in its Article 21, under the heading 'Applicable Laws'. Article 21 states the following.

- (1) The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from the national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute, and with international law and internationally recognised norms and standards.
- (2) The Court may apply principles and rules of law as interpreted in its previous decisions.
- (3) The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, and religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

This Article contains a hierarchy of sources of law. Paragraph 1(a) states that the Rome Statute, its Regulations of Elements of Crimes (Article 9), and its Rules of Procedure and Evidence (Article 51) comprise the main sources that judges shall resort to. Paragraphs (1) (b) and (c) refer to another tier of sources of the Court, which it has the right to rely on. This tier of sources comprises the sources of international law, including: international treaties,

⁶ Antonio Cassese, *International Criminal Law* (3rd edn, Oxford University Press 2003) 9.

⁷ Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 8.

general principles, international customary law, judgments and decisions issued by previous international courts, as well as the opinions of specialists in the legal field. These sources are referred to in Article 38 of the Statute of the ICJ.⁸

According to Article 21(1) (c), the ICC can resort to general principles of law derived from national laws of legal systems of the world 'as appropriate'. This can be done if the national laws of states have jurisdiction over the crime, and those principles of law shall not be inconsistent with Court Statute provisions and with international law norms.

Islamic international law is a branch of Islamic law.⁹ The main sources of Islamic law are the Quran and Sunnah. Another tier of sources of Islamic law includes *ijmá'* (consensus), *qiyás* (analogy), *istihsán* (juristic preference), *urf* (custom), *maslahah mursalah* (public interest), and Siyra.¹⁰ Islamic law has been developed, particularly Islamic international law, by jurists who have made significant contributions, including Abo Hanifa (767), Abo Yusuf (731), Al-Shaybani (747), and al-Sarakhsi (1090). All have recognised the need to regulate the affairs of Muslim states with other non-Muslim states and the importance of international treaties.¹¹

In recent years, much debate has ensued about the question of compatibility between Islamic international law and international criminal law. For instance, it has been argued that '[Islamic international law] cannot be said to be genuinely compatible with modern international jurisprudence with respect to treaty principles, customary law, general principles of law, precedent, or even

⁸ The Statute of the ICJ (1945) Article 38 provides that '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognised by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.'

⁹ Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (John Hopkins Press, Baltimore 1966) 6.

¹⁰ Noel J Coulson, *A History of Islamic Law* (New Delhi, Universal Law Publishing 2013); Wael Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009); M Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Times of War and Peace* (Cambridge University Press 2014); Christopher G Weeramanty, *Islamic Jurisprudence an International Perspective* (Macmillan Press 1980); Shaheen Sardar Ali, 'Resurrecting Siyar through Fatwas? (Re) Constructing Islamic International Law in a Post-(Iraq) Invasion World' 2009 *Journal of Conflict & Security Law* 115; Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Brill 2011).

¹¹ Mohammad T Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff, The Hague 1968) 35.

the teachings of eminent publicists'.¹² Muslim academics have also presented different arguments, some of which comprise views in favour of seeking harmonisation between the two legal systems. For example, Mahmassani argues that 'sufficient explanation of the basic principles of the international law of Islam is necessary in order to bring out its similarities with modern principles, and to demonstrate that universal principles, being based on the unity of mankind, are part and parcel of the tradition of Islam'.¹³

3.2 The Sources of the Rome Statute

3.2.1 The Main Sources

Article 21(1) of the Rome Statute names itself as the main source, together with The Elements of Crimes and its Rules of Procedure and Evidence of the Crimes. However, the Rome Statute is not the only source of international criminal law.¹⁴ Other sources of international criminal law comprise those mentioned in Article 38 of the Statute of the ICJ, as well as other international rules and conventions, such as The Convention on the Prevention and Punishment of the Crime of Genocide in 1948.¹⁵ However, the Rome Statute is now viewed as the most important treaty of international criminal law because its provisions broadly define international crimes; its principles are derived from the domestic laws of states; and the writers of the Rome Statute acknowledge and endorse the provisions of the case law of the ICTY and ICTR tribunals.¹⁶ In this respect, the sources of the Rome Statute can be divided into main sources and another tier of sources.

Article 21(1) (a) states that the Court shall apply, in the first place, 'its Provisions, Elements of Crimes and Rules of Procedure and Evidence of the Crimes', which are considered in equal value.¹⁷ It also provides for the legality

¹² Christopher A Ford, 'Siyar-ization and Its Discontents: International Law and Islam's Constitutional Crisis' (1995) 30 Texas International Law Journal 500.

¹³ Sobhi Mahmassani, *The Principles of International Law in The Light of Islamic Doctrine* (Brill, Martinus Nijhoff Publishers 1966) 205.

¹⁴ Cassese (n 6).

¹⁵ The Convention on the Prevention and Punishment of the Crime of Genocide which was approved and proposed for signature and ratification or accession by General Assembly Resolution 260 A (III) of 9 December 1948, and entered into force on 12 January 1951, in accordance with article XIII
<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx>> accessed 24 April 2019.

¹⁶ Cassese (n 6).

¹⁷ The Rome Statute Article 21(1)(a) stipulates that 'the Court shall apply: In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence'; see also William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2011) 207.

of the decisions of the Court and fulfils obligations relating to the principles of human rights.¹⁸ These rules are based on decisions made by the Pre-Trial Chamber II of the ICC¹⁹ which state that the Court shall apply its Statute and The Elements of Crimes and Rules of Procedure and Evidence of the Crimes 'in the first place'; but only 'in the second place', and where appropriate, 'applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'. Accordingly, the rules and practices of different jurisdictions, whether national or international, are not, as such, 'applicable law' before the Court.

The mechanisms of the interpretation of the sources of the Rome Statute are mentioned in Article 21(3) of the Statute itself. Article 21(3) invites the Court to interpret and apply the principles of the Statute and its Elements of Crimes and Rules of Procedure and Evidence of the Crimes, taking into account the principles of international human rights. Interpretation should fall within the scope of the Universal Declaration of Human Rights 1948, as well as the rights of the accused and the right of victims that correspond with Article 58 of The Rome Statute itself.²⁰ This Article states that the Court shall interpret and apply international law according to 'internationally recognised human rights conventions' and according to Articles 31 and 32 of the Vienna Convention.²¹ Thus, the Court is required to reject any 'adverse distinction' that conflicts with recognised human rights conventions.²² If there is a contradiction between the provisions of the recognised human rights conventions and the provisions of the Rome Statute, the provisions of the latter shall prevail; thus, the hierarchy of the sources of the Rome Statute is presented.²³ In cases where there is a lacuna in the provisions of the Rome Statute, the Court shall refer to the sources as mentioned in Articles 21(1) and (2).²⁴

3.2.2. Another Tier of Sources of the Rome Statute

Article 21(1) paragraph (b) of the Rome Statute outlines another tier of sources that are relevant to the Treaty as follows: applicable international

¹⁸ Eleanor Roosevelt, 'General Principles of International Criminal Law' in Leila Sadat *The International Criminal Court and the Transformation of International Law* (Translation Publisher Inc., Ardsley, New York 2002) 173.

¹⁹ *Prosecutor v Uganda*, (ICC-02/04-01/05-2005), Pre-Trial Chamber II of the International Criminal Court (28 October 2005) (19).

²⁰ Pierre Saland 'International Law Principles' in Roy S Lee *The International Criminal Court: The Making of The Rome Statute* (Kluwer Law International 2002) 213-216.

²¹ Schabas (n 17) 207.

²² Cassese (n 6) 9.

²³ Schabas (n 17).

²⁴ *Ibid.*

treaties, the general principles of law, the rules of customary international law, and the precedents of courts and scholars writing in the legal field. This paragraph refers to internationally applied treaties that have already been established by states, and where signature and ratification has been based on the important provisions and rules of other international treaties that preserve international peace and security.²⁵

Applicable international treaties that can be used in the Court include The Hague Conventions of 1899 and 1907 and their protocols, and humanitarian law.²⁶ In this respect, the Treaty uses the words 'where appropriate'. The paragraph also refers to the general principles of international law that relate to international human rights. General principles of international law are distributed among many different international conventions; for example, the responsibilities of commanders are outlined in the Geneva Conventions.²⁷ These general principles of international law can be used when the rules of the Treaty do not contain or do not explicitly cover the case in question; thus, the general principles of international law can be drawn into consideration.²⁸ General principles can be inferred when an international convention and/or customary law does not stipulate rules in connection with the case in question.²⁹ This principle is outlined in Article 21(1)(c) of the ICC Treaty. The results of this kind of sharing help to build common ground with other laws, including Islamic law.³⁰

²⁵ Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (2nd edn, Brill 2011) 149.

²⁶ Cassese (n 6) 11.

²⁷ The Vienna Conventions (1969), entered into force in 1980. Article 29 provides that 'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.'

²⁸ Cassese (n 6) 15.

²⁹ *Ibid.*

³⁰ The Rome Statute Article 21(1)(c) states: 'Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.' The words 'failing that' could mean that the drafters of the Rome Statute had no doubt that paragraphs (a) and (b) were enough to establish the hierarchy of the Court because no third place is listed. Moreover, the words 'as appropriate' may provide another indication that general principles of law can be used as another source for the Court to rely on. Thus, the judges of the Court have a choice to rely on them, but in paragraphs (a) and (b) the judge is bound by these paragraphs as the main sources. Another meaning of paragraph (c) is that which limits the judges of the Court to refer to national laws that exercise criminal jurisdiction over crimes, if these national laws contradict the provisions of the Court. It should be mentioned that national laws that judges can refer to must be those of the member states of The ICC.

3.2.2.1 International Treaties

Applicable international treaties are included under the umbrella of the Rome Statute, according to its Article 21(1)(b), which refers to, 'in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'. Hence, relevant international treaties are relevant to the provisions of the Rome Statute. There are two types of international treaty; namely, the multilateral treaty and the bilateral treaty.³¹ Multilateral treaties are signed by a number of states or between a number of states and international organisations.³² They are designed to 'have effect generally, not restrictively, and they shall not to be contrasted with those treaties which merely regulate limited issues between a few states'.³³

Treaties such as the Rome Statute and The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment exist to prevent the occurrence of international crimes against groups of people. The provisions of multilateral treaties are binding on the signatory parties.³⁴ Bilateral treaties are signed between two or more states, and relate to a specific subject area; for example, a treaty between two states in relation to extradition. This kind of treaty has a binding effect on the parties, but not on other states that have not ratified the treaty.

The meaning of the word 'treaty', according to international law, is defined in Article 2(1)(a) of the Vienna Convention of the Law of Treaties 1969 as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.³⁵ Janis describes this as the 'plainest source of international law'.³⁶ International treaties are often made by, and concluded between, sovereign states and international organisations as written forms of agreement.

The provisions of The Vienna Convention of 1969 require legal obligation as well as legal capacity between parties to an international treaty, according to Article 2(1). Danilenko explains that parties to international treaties can be

³¹ *Treaty Handbook*, prepared by the Treaty Section of the Office of Legal Affairs, United Nations Publications (2012).

³² *Ibid.*

³³ Malcolm N Shaw, *International Law* (6th edn, CUP, Cambridge 2008) 95.

³⁴ Lassa Oppenheim, *International Law: A Treatise*, (3rd edn, The Law Book Exchange Limited New Jersey 2005) 24.

³⁵ The Vienna Convention on the Law of Treaties (1969), entered into force in 1980.

³⁶ Mark Janis, *An Introduction to International Law* (16 Connecticut Law Review 1984) 900.

sovereign states and international organisations, and treaties can be between states, international organisations, and/or international organisations that exist within states.³⁷ The expressions used in The Vienna Convention in Article 2(1)(b) include 'ratification', 'acceptance', 'approval', and 'accession'. This means 'a State establishes on the international plane its consent to be bound by a treaty'.³⁸ These expressions reflect the legal obligations of the parties concerned.

The legal effect of the provisions of treaties commences only after there is approval by states to ratify the international convention in question.³⁹ This meaning can be understood from Article 2 of The Vienna Convention 1969, which explains that when a state presents its approval or starts ratifying the agreement concerned, it is obliged to be bound within the provisions of the agreement. In this respect, a treaty is a manifestation of customary international law, and all party states are bound by the treaty provisions they sign up to, and the treaty becomes a part of customary international law.⁴⁰

However, even if some international treaties are not ratified by some countries, these countries can still be bound not to breach the provisions of these treaties. This principle can be inferred from Article 2(6) of the UN Charter, which indicates that countries that are not members of its Charter should act in accordance with the principles of the United Nations, including the maintenance of international peace and security.

Previous international tribunals are a source of the ICC. This can also be understood in accordance with Article 4 of the International Criminal Tribunal for Rwanda (ICTR), which states that it is possible to 'grant jurisdiction over a violation of Article 3 common to all four Geneva Conventions in respect of non-international armed conflict'.⁴¹ The provisions of international treaties may 'also be taken into account, wherever this is legally admissible, as evidence of the crystallisation of customary international law rules'.⁴² In this respect, the international treaties most relevant to the Rome Statute are the Hague

³⁷ Gennadii Danilenko, *Law-Making in the International Community* (Marinus Nijhoff Publisher, Netherlands 1993) 46.

³⁸ Ibid.

³⁹ See the Judgment of The ICJ about *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Judgment of July 1994); see Reports of the ICJ, 112, Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Judgment of 1st July 1994).

⁴⁰ Shaw (n 33) 95.

⁴¹ International Criminal Tribunal for Rwanda Statute (1994) Article 4 Concerning Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.

⁴² Cassese (n 6) 13.

Convention of 1907, the Geneva Conventions and their Additional Protocols, and the Convention on the Prevention and Suppression of the Crime of Genocide 1948.⁴³ It could also be argued that the previously mentioned international treaties are sources of the Rome Statute, since the latter derives its jurisdiction from the aforementioned treaties.

3.2.2.2 General Principles of Law⁴⁴

General principles of law can be classed as a source of international law, as stipulated in Article 38(1)(c) of the Statute of the ICJ, which talks about 'the general principles of law recognised by civilized nations'.⁴⁵ The Rome Statute, Article 21(1)(c), also states that general principles of law are derived from national systems and comprise one of the sources of the Rome Statute. The Article describes general principles of law as follows.

General principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisprudence over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.⁴⁶

It can be observed that, according to Article 21(1)(c), these principles can only be applied if they comply with four conditions: (i) the national laws must have jurisdiction over a crime; (ii) the derived principles shall not contradict the provisions of the Rome Statute; (iii) the derived principles shall not contradict international law and international norms that have been recognised by the international community; and (iv) these general principles are used 'as appropriate'.

The phrase 'recognised by civilized nations' is mentioned in Article 38(1)(c) of the ICJ Statute. According to Bassiouni, this refers to all members of the United Nations.⁴⁷ The term 'general principles' may be interpreted in different ways, but Bassiouni explains it as follows.

⁴³ See Chapter Two of this thesis.

⁴⁴ Fitzmaurice talks about distinction 'by a principle, or a general principle, as opposed to a rule, even a general rule of law is meant chiefly as something which is not itself a rule, but which underlies a rule, and explains or provides the reason for it'. Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law* (Recueil des cours 2006), cited in Thirlway (n 7) 94.

⁴⁵ The Statute of the ICJ (1945), Article 38(1)(c).

⁴⁶ The Rome Statute Article 21(1)(c).

⁴⁷ M Cherif Bassiouni, 'A Functional Approach to General Principles of International Law' (1989-1990) 11 (3) Michigan Journal International Law 768.

General principles are, first, expressions of national legal systems, and, second, expressions of other unperfected sources of international law enumerated in the statutes of the Permanent Court of International Justice and ICJ; namely, conventions, customs, writings of scholars, and decisions of the Permanent Court of International Justice and ICJ. It is obvious that if these legal sources are perfected, they are *ipso facto* creative of international legal obligations. They are not perfected, however, such as when a custom is not evidenced by sufficient or consistent practise, or when States express *opinio juris* without any supportive practice.⁴⁸

General principles of law are formed from different legal institutions that work with the other tiers of sources such as the writings of scholars and/or the decisions of courts. Dixon suggests that general principles of law may not be enough to establish international law but are the pure sum of rights that constitute part of international law.⁴⁹ However, debate surrounds what laws should be classed as the 'general principles of law'. Are general principles of law those laws derived from various domestic laws? Or are they those laws that have been accepted by states in international law?⁵⁰ Clark suggests that the general principles of law refer to those laws that have been accepted by states as being applicable to international law because they relate to the idea of *pacta sunt servanda* in international law.⁵¹ Furthermore, Brownlie suggests that the general principles of law are 'general principles of municipal jurisprudence'.⁵² However, Malanczuk argues that 'there is no reason why it should not mean both [domestic principles and international principles]; the greater the number of meanings which the phrase possesses, the greater the chance of finding something to fill gaps in treaty law and customary law'.⁵³

Thus, it is possible to conclude that two classes of law comprise 'the general principles of law'. First, laws created in the international field that form the general approved principles written in international treaties. For example, the Vienna Convention has a strong place in international law, and *pacta sunt*

⁴⁸ *ibid.*

⁴⁹ Martin Dixon, *Textbook on International Law*, (6th edn, Oxford University Press 2007) 41.

⁵⁰ Thirlway (n 7) 95.

⁵¹ Anthony Clark Arend, *Legal Rules and International Society* (Oxford University Press 1999) 52.

⁵² Ian Brownlie, *Principles of Public International Law* (6th edn, Clarendon Press 1990) 8. The principle of *pacta sunt servanda* is an international legal rule rooted in customary international law. It means that the parties to the treaty are contracted and the provisions of the treaty are binding on the parties unless otherwise provided for in the treaty.

⁵³ P Malanczuk, *Modern Introduction to International Law* (7th revised edn, Routledge London and New York 1997).

servanda is a significant principle in the international field.⁵⁴ Second, general principles of law as derived from different legal systems of the world such as the principles stipulated in the Rome Statute, including the principle of *ne bis in idem* referred to in Article 20, the principle of *nullum crimen sine lege* referred to in Article 22, the principle of *nulla poena sine lege* referred to in Article 23, and the principle of non-retroactivity *ratione personae* referred to in Article 24. To conclude, 'general principles of law' are rules contained in the applicable statute, treaty, or customary international rules.⁵⁵

3.2.2.3 Customary International Law

Within the international stratum, the customs derived from different civilizations have played a significant role in generating legally accepted rights and obligations.⁵⁶ However, debate exists among writers as to whether customary international law is a source of international law in general. It has been argued that customary international law cannot be described as a source of international law because it is 'too clumsy and slow-moving'.⁵⁷ However, customary international law is a source of international law because it is affirmed in the Preamble of the Vienna Convention on Diplomatic Relations 1961: '... the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention.' Thus '[it] is one of the primary components of law in the international legal process'.⁵⁸ Customary international law encompasses many universal principles that are practised by many states: thus, it informs the codification of international law.⁵⁹ In this respect, there are two significant elements in relation to customary international law: a) the practices of a state and b) *opinio juris*.⁶⁰ A relationship between these elements was identified in the Judgment of the ICJ in the case of the *North Sea Continental Shelf*. In this case, the ICJ stated the following.

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a

⁵⁴ Thirlway (n 7) 96. He refers to the writers of the Statute of the ICJ and states that 'general principles' include the concept of human rights.

⁵⁵ Cassese (n 6) 15.

⁵⁶ Thirlway (n 7) 53.

⁵⁷ Shaw (n 33) 73.

⁵⁸ Jordan J Paust, 'Customary International Law: Its Nature, Sources and Status as Law of the United States' (1990) Volume 12 | Issue 1 Michigan Journal of International Law 59.

⁵⁹ Anthony A D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 12.

⁶⁰ Thirlway (n 7) 57.

belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion *opinio juris necessitates*.⁶¹

Thus, the actual practices of states and their beliefs and opinions constitute the materials of customary international law.⁶²

3.2.2.3.1 The Practices of States

The practices of states form part of the relationship between states in relation to international law. The practices of a state stem 'from the nature of the process whereby custom grows up from action by one subject of law and the reaction of other subjects of law concerned: acceptance, rejection, or toleration'.⁶³ In the words of D'Amato, the 'physical conduct of states' should be classed as state practices, but it may not be necessary to consider issued statements of intent relating to the practices of states.⁶⁴ In this sense, Brownlie notes that opinions expressed by the delegates of states in the enactment of international conventions, as well as declarations by Heads of State, may be considered state practice in relation to customary international law.⁶⁵ Furthermore, to be classed as a state practice, principles need to be consistently repeated by the states.⁶⁶ However, the practices need not be universal, according to the ICJ Judgment in the *North Sea Continental Shelf* case, which stated that 'the passage of only a short period of time is not necessary'.⁶⁷ Thus, the practices of states are relevant when establishing customary international law.

According to Thirlway, customary rules of international law can be deduced by looking at the permanent practices of states, even if these practices have been repeated less than a dozen times.⁶⁸ He adds that the practices of states should be continuous to constitute customary international law, even if there are no numerous incidents of the practices, and the practices do not need to

⁶¹ *North Sea Continental Shelf* (Judgment 1969) ICJ Report (44) (77).

⁶² Reports of Judgments, ICJ (Judgment 1985) Advisory Opinions and Orders: *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* 29 <<https://www.icj-cij.org/files/case-related/68/068-19850603-JUD-01-00-EN.pdf>> accessed 15 April 2019.

⁶³ Thirlway (n 7) 63.

⁶⁴ D' Amato (n 59) 63.

⁶⁵ Brownlie (n 52) 6.

⁶⁶ Thirlway (n 7) 64.

⁶⁷ *North Sea Continental Shelf: International Court of Justice* (Judgment 1969) ICJ Report (44) (74).

⁶⁸ Thirlway (n 7) 76.

be undertaken over a specific period of time.⁶⁹ According to Weisburd, some international customs practised by states may not need to be practised by all, but only recognised and accepted as the international norm in customary international law.⁷⁰ In addition, Tunkin notes that international customs need only be practised by states just one time in some cases, and may be rare, but undertaking the practice may constitute customary international law.⁷¹ He adds that the element of repetition need not occur continuously by a single state for the practice to be accepted as customary international law.⁷² Furthermore, Guzman suggests that even if the practices of one state are not classed as customary international norms, this does not diminish the importance of the rights of other states to adopt and exercise these rules.⁷³ Thus, the actions of one state may not be sufficient for these actions to be classed as customary international law.⁷⁴ In this respect, it would appear that customary international law comes into being via positive interaction between states and, in these cases, the rejection or acceptance of certain actions could be unacceptable at an international level.

3.2.2.3.2 *Opinio Juris*⁷⁵

Francois Geny coined the term *opinio juris* in connection with customary international law. He suggests that customary international law comprises actions practised by states that fall within the remit of acceptable beliefs.⁷⁶ Thus, the shared general international practices of states can be regarded as customary international law.⁷⁷ In the *North Sea Continental Shelf Case*, the ICJ talks about subjective elements that should be considered when establishing customary international law and observes that '[there should] be

⁶⁹ Ibid.

⁷⁰ A Mark Weisburd, 'Customary International Law: The Problem of Treaties' (1988) 21 *Vanderbilt Journal of Transnational Law* vol 21 No.1 .1, 6.

⁷¹ G I Tunkin, 'Remarks on the Judicial Nature of Customary Norms of International Law' (1961) 49 (3) *California Law Review* 419.

⁷² Ibid.

⁷³ Andrew Guzman, *How International Law Works: A Rational Choice Theory* (University Scholarship Online, Oxford 2008) 185.

⁷⁴ Thirlway (n 7) 63.

⁷⁵ Ibid 57.

⁷⁶ D'Amato (n 59) 75.

⁷⁷ *North Sea Continental Shelf Case* (Advisory Opinions 1986). See the ICJ (Judgment 1986) Reports of Judgments on Military and Paramilitary Activities in and against Nicaragua (97) <<https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>> accessed on 15 April 2019.

evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it'.⁷⁸

Opinio juris is an essential factor for establishing customary international law. According to Brownlie, *opinio juris* applies to behaviours that have been accepted and which result in methodical conduct at an international level.⁷⁹ There should be equal belief between states and an implicit acceptance of the rule in question by states. However, as previously noted, the practices of one state may not create international obligations within the rules of customary international law.⁸⁰ Thirlway points out that, 'the *opinio juris* would be lacking and one state could not suddenly insist that the custom be followed, if another state chose to take a different course in a particular case'.⁸¹ Thus, state practices and *juris opinio* both play a vital role in establishing customary international law.

International criminal law is a branch of international public law and its sources are derived from the latter.⁸² Customary international law provides necessary clarification of the context of written international provisions in order 'to fill the gap in these provisions'.⁸³ Resorting to customary international law proves that written international rules may not always be adequate.⁸⁴ Customary International law is derived from the decisions of courts with different backgrounds. Civil law courts rely more on written law than on the decisions made by previous courts, while common law courts usually rely on the decisions made by previous courts.⁸⁵ In Islamic law, judges rely on the main sources of Islamic law, namely the Quran and Sunnah, before resorting to the decisions made by previous courts. The latter are only sought when existing sources do not provide an appropriate answer.⁸⁶ The decisions of national courts may be taken into account when establishing customary international law. In addition, customary international law can be derived from existing

⁷⁸ *North Sea Continental Shelf*: International Court of Justice (Judgment 1969) Report 44 ICJ (77).

⁷⁹ Brownlie (n 52) 8.

⁸⁰ Guzman (n 73) 195.

⁸¹ Thirlway (n 7) 57.

⁸² Cassese (n 6) 9.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Esin Orucu, 'What is a Mixed Legal System? Exclusion or Expansion?' (2008) 12 Electronic Journal of Comparative Law 1 <<http://www.ejcl.org/121/art121-15.pdf>> accessed 16 April 2019.

international instruments and the decisions made in previous international tribunals.⁸⁷

3.2.2.4 Judicial Decisions and Scholars' Opinions

Judicial decisions made in previous international tribunals have been applied in international criminal courts. This means that previous judicial decisions have been leveraged in the process of establishing international rules. The Statute of the ICJ states that 'judicial decisions ... and the teachings of the most highly qualified publicists of the various nations, [qualify] as subsidiary means for the determination of rules of law'.⁸⁸ This is because the rule of *star decisis* is excluded by Article 59 of the Statute.⁸⁹ Article 38(1)(d) refers to Article 59 of the Statute, which provides that 'the decision of the Court has no binding force except between the parties and in respect of that particular case'. In this respect, Bing explains that previous judicial decisions, namely precedents, should be 'persuasive' rather than a 'binding authority' for the Court.⁹⁰ Shahabuddeen argues that Article 59 means that the precedents of courts should not be binding on judges of the ICJ, but they may be construed and cited.⁹¹ Article 21(2) of the Rome Statute formally refers to previous decisions made in international courts and provides that '[the ICC] may apply principles and rules of law as interpreted in its previous decisions'. Thus, the doctrine of *star decisis* can be rejected.⁹² Additionally, Lauterpacht argues that 'respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice'.⁹³

As discussed above, advisory opinions that are issued by ICJ judges are classed as a 'subsidiary means' for determining international rules.⁹⁴ Thus, in the application of precedents, the ICJ seeks to 'apply the law and not to make the law'.⁹⁵ However, Thirlway explains that 'no decision can simply be applied

⁸⁷ Malekian (n 25) 149.

⁸⁸ The Statute of the ICJ Article 38(1)(d).

⁸⁹ *Star decisis* is the legal principle of determining points in litigation according to precedent; see the Oxford Dictionary of Law.

⁹⁰ Jia Bing 'Judicial Decisions as a Source of International Law and the Defence of Duress in Murder or Other Cases Arising from Armed Conflict', in Wang Tieya and Sienho Yee (eds), *International Law in the Post-Cold War World: Essays In Memory of Li Haopei* (Routledge, New York 2001) 83.

⁹¹ Mohamed Shahabuddeen, *Precedent in the World Court* (University of Cambridge, Research Centre for International Law 1996) 99.

⁹² Cassese (n 6) 18.

⁹³ Hersch Lauterpacht, *The Development of International Law by International Court* (CUP, Cambridge 1996) 14.

⁹⁴ Cassese (n 6) 18.

⁹⁵ Rebecca Wallace, *International Law* (4th edn, Sweet and Maxwell, London 2002) 23.

automatically to another case ... even if one or both of the parties are the same'.⁹⁶ Thus, ICJ judges look to interpretations for appropriate guidelines in certain cases.

Article 38(1)(d) of the Statute of the ICJ states that 'the teachings of the most highly qualified publicists of the various nations [provide] subsidiary means for the determination of rules of law'. In this respect, Shabtal explains that written documents produced by scholars have influenced decisions made in previous international tribunals.⁹⁷ However, even if there are divergent views among writers, this does not lighten the value of these views.⁹⁸ Even so, Malekian argues that 'the views of publicists have not the effect of law-making power and cannot be regarded as a definite legal interpretation in the system of international criminal law'.⁹⁹ This may be because of the different cultures, and political, social, and economic backgrounds, of the writers.¹⁰⁰ However, it is undeniable that the writings of legal scholars have influenced views on certain issues/cases. Their writings may also continue to have a long-term impact, especially on subsequent writers.

3.3 The Sources of Islamic Law

Looking at the sources of Islamic law necessitates providing background information about the concept of *Sharí'ah* and Islamic law. Historically, Islam emerged in the Peninsula of Arabia, where it passed through different stages as follows: the period before the emergence of Islam, the period of the Prophet Mohammed (peace be upon him), and the period of transformation and development of the sources of Islamic law.¹⁰¹ These main stages comprise three significant phases: the creation of Islam; the period of the formation of Islam during the life of the Prophet Mohammed; and the enlightenment stage, when Islam expanded and became understandable and open to other civilisations and other cultures.¹⁰² These phases have also contributed to significant stages of the development of Islam from a legal perspective.

⁹⁶ Thirlway (n 7) 120.

⁹⁷ Shabtal Rosenne, *The Law and Practice of The International Court of Justice* (2nd revised edn, Martinus Nijhoff Publishers 1985) 614.

⁹⁸ Malekian (n 25) 153.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Lippman, McConville and Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction* (New York 1998) 3.

¹⁰² Weeramanty (n 10); see also Muhammad Khalid Masud, Brinkley Messick and David S Powers, *Islamic Legal Interpretation* (Harvard University Press 1996).

3.3.1 A Brief Historical Background to Islam

In the Arabian Peninsula before Islam, there was no specific religion.¹⁰³ Tribes followed different customs that governed their lives, the relationships between peoples, and violations of laws and crimes.¹⁰⁴ Each tribe possessed its own traditional customs and was usually ruled by a wise man or a superior man (a *Sheikh*), who had executive authority to solve disputes between individuals and who ruled on decisions made according to tribal customs.¹⁰⁵ Although there was no criminal law, the wise man would implement punishments such as deportations, and award compensation to a victim, and if the victim was not satisfied with the sanctions given to the offender, then the victim would take revenge on the offender himself, or this act would be undertaken by a relative or cousin.¹⁰⁶

The second stage is the formation of Islam, which is the period of the Prophet Mohammed, between 610 to 623 CE. The Prophet received a revelation from Allah, and began teaching and interpreting the verses of the Quran to the people.¹⁰⁷ The Prophet practised deeds and passed on sayings to his companions.¹⁰⁸ The Prophet moved from Mecca, where he had been a key member of the Quraysh tribe (the biggest Arabic tribe in the Arabian Peninsula at that time) to Medina, where he established his authority and the *Sahefat Al-Medina*, which was the first constitution in Islam.¹⁰⁹ The *Sahefat Al-Medina* regulated the rights and duties of people in Medina. In this constitution, the Prophet considered the diversity of religions in Medina, because some people were Christians and others Jewish.¹¹⁰ He also tried to implement peace and security in Medina. Moreover, in 628 CE, the Prophet enacted an agreement between the tribes of Mecca and the Muslim community in Medina. This agreement was the Treaty of *Hudaybiyyah*, which is classed as the first treaty in Islam between the Muslim community and the non-Muslim community.¹¹¹

¹⁰³ Weeramanty (n 10) 3.

¹⁰⁴ Coulson N J, *A History of Islamic Law* (Edinburgh University 1964) 9.

¹⁰⁵ Ibid.

¹⁰⁶ M Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace*, (Cambridge University Press 2014) 15.

¹⁰⁷ Coulson (n 104) 13.

¹⁰⁸ Bassiouni (n 106) 19.

¹⁰⁹ Yetkin Yildirim, 'Peace and Conflict Resolution in the Medina Charter' *Social Justice* (2006) vol 18 Issue 1 A Journal of Social Justice Taylor 109.

¹¹⁰ Bassiouni (n 106) 29.

¹¹¹ Perry S Smith, 'Of War and Peace: The Hudaibiya Model of Islamic Diplomacy' (2006) Florida Journal of International Law 135; Maḥmūd Rashīd, 'Istirāṭijyyāt Tafādī al-Nizā' Siyāsathā wa-Taktikātuhā Ṣulḥ al-Ḥudaybiyyah Inmūdhajan' (2015) 3 (42) Dār al-Manha Journal Collection: Humanities and Social Sciences 973 (Arabic Source).

The agreement alluded to the importance of cohabitation and the importance of avoiding war. Furthermore, it aimed to protect communities from murder, protect properties, and allow Muslims to undertake *hajj* (the pilgrimage). According to Bassiouni, at this time the Prophet Mohammed believed that religious obligations could not change political decisions.¹¹²

The third stage is the enlightenment stage of Islam, which lasted from the eighth to the twelfth century CE.¹¹³ This period was called the 'Golden Age' because it was characterised by the phenomenal development of knowledge in Islam, and because the Muslim community embraced new learning and science from different cultures and civilizations, including from Roman, Indian, Greek, and Persian cultures.¹¹⁴ At this time, Muslim scholars acquired knowledge about science, philosophy, medicine, education, and legal systems, such as the Roman legal system.¹¹⁵

Muslim scholars, whether they were Arab or non-Arab, implemented acquired knowledge that was consistent with the teachings of the Quran and Sunnah, and which was taken from the work of several civilizations.¹¹⁶ At the same time, scholars taught the Islamic religion to peoples, and translated the main sources into Hebrew, Italian, Indian, and Persian. Some work was undertaken by non-Arab Muslims who had converted to Islam. An example of this exchange is exemplified in the work of Ali Ibin Sina (Avicenna) who wrote about 200 works relating to medicine.¹¹⁷ Other examples included the work of Mohammed Al-Farabi who was influenced by Aristotle, and who wrote about politics and philosophy, and Mohammed Al-Shiybani, who devised the Islamic concept of *siyar* for nations in war and peace, during 749-805 CE.¹¹⁸

According to Bassiouni, numerous factors contributed to this new exchange of knowledge between Muslim scholars and non-Muslim scholars, including the following.

a) The expansion of Islam to other regions by Arab and non-Arab Muslims, who traded commodities in places such as India, Africa, and from west to east.

¹¹² Bassiouni (n 106) 32.

¹¹³ Wael Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) 14, 27.

¹¹⁴ Lippman, McConville and Yerushalmi (n 101) 11.

¹¹⁵ Bassiouni (n 106) 35.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Majid Khadduri, *The Islamic Law of Nations, Shaybani Siyar* (Johns Hopkins Press Baltimore, Maryland 1966) 7.

They spread tolerance of Islam and dealt with people from different cultures and civilizations.

b) Muslim scholars acquired new knowledge about science and legal systems from other civilizations.

c) The emergence of new discoveries led to new questions and issues that had to be interpreted in the context of the Quran and Sunnah.

d) Some verses of the Quran, the Hadiths, and the Sunnah, were subjected to interpretation within the context of the needs of Muslim communities.¹¹⁹

Thus, on the one hand, Muslim scholars acquired and exchanged knowledge of the sciences with other cultures and established their own schools of thought as follows: *Ḥanafī*, *Málikī*, *Sháfi'ī*, and *Hanibali*. All were dedicated to the worship of Islam and Islamic law. The perspectives held by these schools are classed as supplementary sources in Islamic law and encapsulate the principles of *ijmá'* (consensus), *qiyás* (analogy), *istiḥsán* (juristic preference), *maslahah mursalah* (public interest), and *siyar*.¹²⁰ In addition, scholars helped to stabilise methods of legal reasoning known as *úṣúl al-fiqh*.¹²¹

Invasions in the twelfth century, led by Mongols and Seljuks, destroyed many documents written by Muslims.¹²² This led to fears from traditional jurists that the philosophies of Socrates and Plato, as derived from Greek and Roman culture, would be lost, resulting in a closing of the door of *ijtihád* (legal reasoning).¹²³ At the time, political leaders from the Muslim regions became

¹¹⁹ According to Bassiouni, this period was also characterised by the split in the Muslim community between Sunni and Shia. Today, Sunni Muslims total about 1.6 billion people, while Shia Muslims comprise about 10% of this total, with most Shia Muslims living in Iran; see Bassiouni (n 106) 14.

¹²⁰ Hallaq (n 113) 13.

¹²¹ Bassiouni (n 106) 10.

¹²² Ibid.

¹²³ There is a debate with regard to closing the door of *ijtihád*. For example, Schacht and Anderson describe that Muslim jurists of Islamic schools, by the beginning of the fourth century-although some believe in the tenth century and others believe in the thirteenth century-felt that they had covered most of the important issues and reached an agreement in most opinions; thus, they said that most future activities should 'be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all'. This closure occurred to immune the *Sharí'ah* against interference from Muslim political leaders. Moreover, Rahman adds that the curtailment of *ijtihád* was used to stop the 'conflicts of opinions and doctrines'. On the other hand, Hallaq argues that the door of *ijtihád* was not closed. He explains that *ijtihád* is the only used mechanism by which jurists can reach the judicial judgments to be derived from the Quran and the Sunnah. Thus, it is a permeant and actual tool in order to use their legal reasoning regarding the time in which we live. Arshia Javed and Muhammad Javed agree with Hallaq's argument by saying that 'Muslims must return to critical thinking and the key to this remains in the practice of *ijtihád*. This is the only way through which Muslims can make themselves compatible with the existing world and can cope with the challenges presented by the contemporary world.' J

more influential than the jurists.¹²⁴ Thereafter, in the seventeenth century, Muslim communities, especially Sunni scholars, dedicated themselves to retrieving the knowledge of the 'Golden Age' and again opened up the acquisition of new knowledge from different cultures.¹²⁵

3.3.2 The Concept of *Sharí'ah* and Islamic Law

Sharí'ah is the religion of Islam.¹²⁶ It includes the precepts of Islam and applies fairness as well as sanctions.¹²⁷ It literally means 'the right path'.¹²⁸ It is thought of as a 'divine law' that remains valid over time, and includes rights, responsibilities, and values.¹²⁹ It is also used to regulate relationships relating to public and private conduct between a person and Allah; relationships between people (women, men, and children); and relationships between states, whether these are Muslim or non-Muslim.¹³⁰ *Sharí'ah* has been defined as an 'umbrella of rules, regulations, values and normative framework covering all aspects and spheres of life for Muslims'.¹³¹

For Muslims, *Sharí'ah* rules in all aspects of life, whether moral, legal, economic, social, or political.¹³² Indeed, *Sharí'ah* contains prescriptions and proscriptions and explains what is legitimate and what is illegitimate.¹³³ Islamic law is a term that refers to wider sources as well as *Sharí'ah*, but

Schacht, *An Introduction to Islamic Law* (Oxford, 1964) 70-71; J N D Anderson, *Law Reform in the Muslim World* (London 1976) 7; F Rahman, *Islam* (Chicago, 1966) 77-78; Wael B Hallaq, 'Was the Gate of *ijtihād* Closed? (Mar 1984) *International Journal of Middle East Studies*, Vol 16 No 1. 3; Arshia Javed and Muhammad Javed, 'The Need of *ijtihād* for Sustainable Development in Islam' (2011) *IIUC STUDIES* ISSN 1813-7733 Vol- 8, 215.

¹²⁴ Ibid.

¹²⁵ Bassiouni (n 106) 35.

¹²⁶ The Quran Verse 3:19 stipulates that 'Truly, the religion with Allah is Islam'. This verse has been interpreted by many jurists, Alzajaj being one of them. He explains that *Sharí'ah* means the individual worship of Allah and his commands; the Quran Verse 4:105 stipulates that 'We have sent down to you (the Prophet Mohammed) and the Book (The Quran) in truth that you might judge between men by that which Allah has shown you ... so be not a pleader for the treacherous.' See also Abdullahi Ahmed An-Na'im, 'Islamic Law, International Relations and Human Rights' (1987) 20 (2) *Cornell International Law Journal* 317.

¹²⁷ Mohammad Kamali, *Principles of Islamic Jurisprudence* (3rd edn, The Islamic Texts Society 2003) 306; see also Ghulam Sarwar, *Islam: Beliefs and Teachings* (London: The Muslim Educational Trust 2006) 153.

¹²⁸ A R Doi, *Shariah: The Islamic Law* (2nd edn, Ta-Ha Publishers Ltd 2008).

¹²⁹ Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Sharia*, (Cambridge: Harvard University Press 2008) 13; see also Seyyed Hossein Nasr, *Ideals and Realities of Islam* (Cambridge: The Islamic Texts Society 2001).

¹³⁰ H Enayat, *Modern Islamic Political Thought* (1st edn, Univ of Texas Pr 1982).

¹³¹ Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016) 22.

¹³² Bassiouni (n 106) 18. The Quran includes 30 verses on criminal law, 20 verses on procedural law, 70 verses on the obligation of contract, and 70 verses on family law.

¹³³ Bassiouni (n 106) 49.

Sharí'ah itself derives from two main sources, the Quran and Sunnah.¹³⁴ Baderin explains that 'Islamic law covers the entire system of law and jurisprudence associated with the religion of Islam.'¹³⁵ Islamic law is also derived from *ijmá'*, *qiyás*, *istihsán*, *urf*, *maslahah mursalah*, and *siyar*. These terms will be explained briefly below.¹³⁶

3.3.3 The Main Sources of Islamic Law

3.3.3.1 The Quran

The Quran is, 'the revelation and words of Allah'.¹³⁷ The Quran was revealed from Allah to the Prophet Mohammed through Gabriel over a twenty-two year period from 610 to 632 CE.¹³⁸ It was written in the Arabic language in Mecca and Medinah in Arabia. It is a collection of 6,239 verses, divided into 114 chapters.¹³⁹ Allah says, 'Verily, We have sent it down as an Arabic Quran in order that you may understand'.¹⁴⁰

The verses of the Quran were uttered by the Prophet Mohammed to his companions. The companions then communicated the verses to others.¹⁴¹ The Prophet's companions kept the verses in their memories, while others inscribed them on leaves, pieces of wood, and pieces of palm.¹⁴² After the Prophet's death, his companions started to collect the verses into one document. They completed the first document during the administration of the first Khalifa (Caliph) Abo Baker. The Quran was then transmitted frequently over generations. It regulates the life of mankind and contains principles and rules relating to two major subjects: the worship of Allah; and transactions and relationships between people: personal, political, economic, legal, and

¹³⁴ Muhammad Elsayed, 'Contracting into Religious Law: Anti-Sharia Enactments and the Establishment and Free Exercise Clauses' (2012) 20 (3) George Mason Law Review 937.

¹³⁵ Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford Monographs in International Law 2005) 32. Islamic criminal law has been described as 'the result of a speculative attempt by pious scholars working during the first three centuries of Islam, to define the will of Allah. In self-imposed isolation from practical needs and circumstances they produced a comprehensive system of rules, largely in opposition to existing legal practice which expressed the religious ideal.' See J Coulson, 'The State and the Individual in Islamic Law' (1957) 6 International and Comparative Law Quarterly 49, 57.

¹³⁶ Bassiouni, (n 106) 40.

¹³⁷ Ibid 61.

¹³⁸ In The Quran Verse 45:2, Allah says 'The revelation of the Book is from God'.

¹³⁹ Bassiouni (n 106) 59.

¹⁴⁰ The Quran Verse 12:2.

¹⁴¹ For more information, see Majid Khadduri, *The Islamic Law of Nations* (Johns Hopkins Press 1965); see also Hallaq (n 113) 61.

¹⁴² Bassiouni (n 106) 61.

social.¹⁴³ Thus, the Quran is the original and bedrock source of *Sharī'ah* for all Muslims worldwide. Saudi Arabia, for instance, is an Arab and a Muslim state, which has adopted the Quran and Sunnah as the basis for constitutional law.¹⁴⁴

3.3.3.2 The Sunnah

The Sunnah is the second source of *Sharī'ah*.¹⁴⁵ It records the 'deeds and words' of the Prophet Mohammed and the Hadiths.¹⁴⁶ The Sunnah explains and interprets the main source of Islam, the Quran, and deals with a wide range of subjects and issues that the Quran is silent on, or where no detail is given. For instance, prayer is obligatory according to the Quran, but no instructions are given about how to pray and how many times a day one must pray. The Sunnah elaborates on methods of prayer and the number of times a Muslim must pray, which is five times a day.¹⁴⁷ It also describes words, practices, and approvals on matters as they were recorded by the Prophet's companions, who then passed this information to others over time to teach people about Islam's precepts and injunctions, as well as to expand the Islamic religion.¹⁴⁸ From the era of the Prophet until the current day, the two main sources of Islam remain the Quran and Sunnah. These texts govern the life of all Muslims and Muslim states in all aspects. Sarwar notes that 'Islamic law is complete and perfect and covers all aspects of human life ... *Sharī'ah* is permanent for all people all the time. It does not change with time and conditions.'¹⁴⁹

¹⁴³ Elena Namli, 'Universal Rights versus Sharia? Reflection on the Moral and Legal Dimensions of Human Rights Law and Sharia' (2013) Martinus Nijhoff Publishers Vol. 8 no 2 139-161, 139, 155.

¹⁴⁴ The Basic Law of Saudi Arabia (1992) Article 1 stipulates that 'The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH). Its language shall be Arabic, and its capital shall be the city of Riyadh.' Royal Order No. (A/91) 27 Sha'ban 1412H (1 March 1992) published in 3397 (2) Umm Al-Qura Gazette Ramadan 1412H 5 March 1992.

¹⁴⁵ The Prophet Mohammed Ibin Abdullah was born in Mecca in 570. He was the last messenger of God to mankind; see M Cherif Bassiouni (n 106) 64-65. There have been many discussions about how the Sunnah relates to the Hadith, and what is not referred to in the Sunnah, such as the personal practices of the Prophet. There is no need to discuss this here, because this falls outside of the main objectives of the research. There are other books that contain the Al Hadiths of Asaheha, such as al Bukary. The Sunnah is supported by the Quran as the second source of Sharia and is alluded to in the Quranic Verse 59, Chapter 3: 'O you believe! Obey Allah and obey the Messenger Mohammed.'

¹⁴⁶ Baderin (n 135) 34.

¹⁴⁷ Bassiouni (n 106) 62-64.

¹⁴⁸ Kamali (n 127) 58.

¹⁴⁹ Ghulam Sarwar, *Islam: Beliefs and Teachings* (London: The Muslim Educational Trust 2006) 153.

3.3.4 Another Tier of Sources of Islamic Law

After the death of the Prophet Mohammed, the main sources of *Sharí'ah*, namely the Quran and Sunnah, were complete.¹⁵⁰ Then, religious men (jurists) began to apply *ijtihád* (legal reasoning) and *fiqh* (jurisprudence). *Ijtihád* is described by Kamali as the main tool of independent interpretation of the main sources of *Sharí'ah*.¹⁵¹ *fiqh* means 'the theory or philosophy of Islamic law based on the teachings of the Koran and the traditions of the Prophet.'¹⁵² This happened from the eighth century with the expansion of Islam to many different parts of the world and because there were newly discovered incidents, matters, and cases that were not covered explicitly in the former sources. Consequently, such sources needed to be interpreted.¹⁵³ The result of this was the establishment of another tier sources of Islamic law,

¹⁵⁰ See the Quranic verse 5:3, Allah says 'This day I have perfected for you your religion and completed My favor upon you and have approved for you Islam as religion'. See also John Burton, *The Collection of the Quran* (Cambridge University Press, Cambridge 1977) 139.

¹⁵¹ Kamali (n127) 118. These interpretations relate to the changing needs of the Muslim community for achieving justice. This approach obtains its validity from the Quran and Sunnah. It aims to 'correct understanding of the words and sentences of legal texts as well as to discover answers to new matters and ascertain the attention of the law giver with what has been left unexpressed as a matter of necessary inference from the surrounding circumstances' in Kamali (n 127) 468. Moreover, *ijtihád* is defined by Hallaq as 'the processes of reasoning that the jurist employs in order to arrive at the best guess of what he thinks might be the law pertaining to a particular case' in Hallaq (n 10) 27; see also Frank Vogel, *Islamic Law and Legal Systems; Studies of Saudi Arabia*, (Brill 2000) 33. It could be argued that *ijtihád* is changeable and evolves over time based on the requirements of the Muslim community and is considered as ongoing and practised by linguistic jurists because the language of the Quran is sometimes not clear to everyone.

¹⁵² The Oxford Dictionary <<https://en.oxforddictionaries.com/definition/fiqh/>> accessed 24 April 2018.

¹⁵³ Baderin (n 135) 38.

namely: *ijmá'*, *qiyás*, *istihsán*, *urf*, *maslahah mursalah*, and *siyar* by the jurists of the Islamic schools of *Ḥanafí*,¹⁵⁴ *Málikí*,¹⁵⁵ *Sháfi'í*,¹⁵⁶ and *Ḥanbalí*.¹⁵⁷

Jurists of the Islamic schools use this tier of sources and their legal reasoning by approval of the Prophet, who appointed one of his companions, Muad ibn Jabal, as the Judge of Yemen. Muad was asked by the Prophet what sources should be used for judging cases, and Muad replied the Quran and Sunnah. The Prophet then asked him what he would do if he did not find an answer in

¹⁵⁴ This school was run by the Imam *Abo Hanifa Numan bin Thabit Mouli*, who was the founder. He was a non-Arab jurist. He was born in Iraq in 699 CE and died in 767 CE. This school was the first and oldest school of the jurisprudence of Islamic law. *Abo Hanifa* based his approach on the main sources of *Sharí'ah*, and interpreted these sources in depth, considering rational and legal reasons and traditional customs. He employed a combination of analysis of the main sources of *Sharí'ah* and the jurisprudence of Islamic law *fiqh*, using the method of *Ilim Iusu al-fiqh*, the doctrinal method. His doctrine was transmitted by his students (from the sub-schools of Abo Hanifa). One sub-school was the school of *Mohammed al-Shaybani* (749-805 CE) in Iraq. Mohammed al-Shaybani established a codified text of the Islamic international laws of war and peace. The Dutch jurist Hugo Grotius (1583-1645) was the father of international law, but Mohammed Al-Shaybani was the grandfather of international law eight centuries before Grotius. Mohammed was described by Joseph Freiherr Von Hammer and by the Judge of The International Court of Justice Christopher Weeramantry, as 'the author of the most detailed early treaties on international law'. See also Baderin M, 'Muhammed Al-Shaybani (749-805)' in Baedo Fassbender et al., *The Oxford Handbook of the History of International Law* (Oxford 2012) 1081; see also Malisa Ruthven, *Islam, A Very Short Introduction* (Oxford University Press 2000) 92.

¹⁵⁵ This school was founded in Medina in the Arabian Peninsula in the 700s CE. It was run by the Imam *Abdallah Malik Ibin Anas* (711-790 CE). He was a specialist who gathered more than 2,000 Hadiths (the sayings of the Prophet) and established a comprehensive volume entitled *Almuwatta*. This work was classed as containing the precedents of the Prophet and his companions. His interpretation was based on the main sources of *Sharí'ah*, but if he could not find fairness of judgment in these main sources, he used the *urf* (customs) in order to reason his rulings around the practices of the Muslim community and their culture. The *Málikí* school was adopted in Morocco, Libya, and Tunisia. See Bassiouni (n 106) 45.

¹⁵⁶ Imam *Mohammed bin Adris Sháfi'í* (767-820) was the founder of the third school of Islamic jurisprudence in Egypt. His most significant contribution was the expansion of *úṣúl al-fiqh* (a method of Islamic jurisprudence). *Sháfi'í* was influenced by the first two schools because he was a student of both the *Ḥanafí* and *Málikí* schools. He memorised all verses of the Quran when he was seven years old. *Sháfi'í* established his own independent school, which was adopted in many parts of the Muslim world, for instance in Indonesia, Malaysia, Egypt, and Yemen. See Abdullah Alarefi, 'Overview of Islamic Law' (2009) *International Criminal Law Review* 707; Abdulhalim al-Jondi, *Ahmad bin Hanbal* (Dar al- ma'rifa, 1970 Cairo 1970) (Arabic source).

¹⁵⁷ In Iraq, the last school of Islamic jurisprudence was founded by Imam *Ahmad bin Hanbal* (780-855). He based his school on the main sources of *Sharí'ah* and was influenced by the first school (the *Ḥanafí* School). His contribution to Islamic jurisprudence was to gather more than 80,000 hadiths of the Prophet Mohammed in his distinguished work *al-Musnad*. In this work, he adopts the *ijmá'* (consensus) of the previous Imams of previous schools and uses *qiyás* (analogy). One of the most famous scholars of this school was Imam *Ibin Taymiyya*. Jon Hoover wrote a book about *Ibin Taymiyya's* interpretations and reasoning. This school was adopted in Iraq, Saudi Arabia, Qatar, and in the Arab Emirates. See Abdullah Alarefi, 'Overview of Islamic Law' (2009) 9 *International Criminal Law Review* 707.

these sources and Muad replied, 'I will use my own legal reasoning'. The Prophet was satisfied with his answers.¹⁵⁸

Five major factors contributed to the establishment of the Islamic schools (*madhhab*).¹⁵⁹ First, in formulating the language of the Quran and Sunnah, some grey areas were left that became subject to interpretation by the highest qualified scholars, whether judges or muftis (scholars).¹⁶⁰ Second, new legal issues arose, and new discoveries of knowledge made, in science and in many other aspects of life in the Muslim community.¹⁶¹ Third, Islamic law is obliged to consider these new incidents, cases, and situations that arise from time to time.¹⁶² Fourth, there was an expansion of Islam into many areas and into different cultures.¹⁶³ Fifth, the texts of the Quran and Sunnah are mostly subject to interpretation.¹⁶⁴ Thus, grey areas, the new discoveries of knowledge, social needs, and moral norms must be interpreted within the general context to be compatible with the main sources of *Sharī'ah*.¹⁶⁵

The main Islamic schools and their methodologies were established by religious authority and not by political rulers.¹⁶⁶ Thus, the jurists of Islamic schools aimed to maintain the noble sources of Islamic law as well as to assist posterity by building up information about Islamic law.¹⁶⁷ Moreover, rules were studied carefully by jurists relating to particular cases and taking into account

¹⁵⁸ Abu Dawood, *Sunan Abu Dawood*, is a collection of hadith compiled by *Imam Abu Dawud Sulayman ibn al-Ash'ath as-Sijistani* <<https://sunnah.com/abudawud>> accessed 4 April 2020.

¹⁵⁹ *Madhhab* means the 'opinion of the jurist.' See Hallaq (n 10) 19. There are also Shia schools in Islam. The Shia branch believes that Ali, the fourth successor, deserved the caliphate after the death of the Prophet Mohammed. The Shia branch of Muslims comprises about 10% percent of all Muslims. Most of them live in Iran and others in Bahrain, Pakistan, Sudan, Yemen, Syria, Turkey, and Lebanon. See Bassiouni (n 106) 43. It is important to note that Max Weber (1954) states that there seems to be a similarity between Roman jurists and Muslim jurists in their practice of 'legal consultation and teaching of students'. Many different schools of legal interpretation such as the Roman legal system had two schools: the Proculian and the Sabinan. Common law also uses a different approach to legal interpretation as practised by judges. See Jany Janos, 'The Four Sources of Law in Zoroastrian and Islam Jurisprudence' (2005) 12 (2) *Islamic Law and Society* <<http://www.jstor.org/stable/3399405>> accessed 6 November 2017; see also Weeramanty (n 10) 46; see also Aharon Layish, 'The Transformation of the Shari'a from Jurists' Law to Statutory Law' (2004) 44 (1) Brill. 85.

¹⁶⁰ Hallaq (n 113) 19.

¹⁶¹ Bassiouni (n 106) 52.

¹⁶² *Ibid.*

¹⁶³ The official website of *Sheikh al Alarefy Mohammed* <<http://arefe.ws/ar/>> accessed 16 November 2017.

¹⁶⁴ *Ibid.*

¹⁶⁵ Oussama Arabi, *Studies in Islamic Law and Jurisprudence* (Kluwer Law International 2001).

¹⁶⁶ Hallaq (n 113) 30.

¹⁶⁷ Abdul Rehman Doi, *Shari'ah: The Islamic Law* (London: Taha Publishers 1984) 48.

the 'boundaries of conceptual jurists'.¹⁶⁸ They might agree on one view on any case, but they might also disagree on other matters. Thus, when a view was issued by one of the schools, it would not be considered to be a collective view unless the others agreed to it.¹⁶⁹

As noted by Baderin, two important stages of legal reasoning emerged in the tenth century and in the thirteenth century. In the tenth century, the idea circulated that the established schools of Islamic law had fully exhausted most or all aspects of Islamic law. This led to the fear of closing the door to *ijtihad* (legal reasoning). By the thirteenth century, legal reasoning in the established schools had gradually diminished. This led to the opening of a door to Taqlid (legal confirmation). Thus, Islamic law has been restricted by the views of previous jurists. Jurists of Taqlid found themselves bound to follow previous recorded interpretations and, as such, they found 'a reduction in the dynamics' and injection into Islamic law.¹⁷⁰

By the seventh century, no one main methodology of legal reasoning was applied, but jurists at the time considered the importance of adopting an appropriate methodology. Thus, the methodology adopted was *úşúl al-fiqh*, which can be defined as 'the science of the rules through which to ascertain the prescriptions of *Sharí'ah*'.¹⁷¹ The chosen methodology considers *siyasat a-Sharí'ah* (the policies of *Sharí'ah*) and *maqasid a-Sharí'ah* (the purposes of the *Sharí'ah*). It is based on systematic deduction from the sacred revealed text.¹⁷²

Because *Sharí'ah* has some grey areas, it was ruled that *Sharí'ah* should be subject to interpretation by the highest qualified scholars, whether these be judges or muftis.¹⁷³ Their knowledge improved many aspects of life in Muslim communities.¹⁷⁴ Social needs and moral norms are also subject to interpretation within the general context of the main sources of *Sharí'ah*. Thus, Islamic law must consider new incidents, cases, and situations arising from

¹⁶⁸ Hallaq (n 113) 23.

¹⁶⁹ Ibid.

¹⁷⁰ Baderin (n 135) 37-38.

¹⁷¹ Bassiouni (n 106) 43. The Oxford Dictionary provides a definition of '*úşúl al-fiqh*' as the 'roots of law ... the body of principles and investigative methodologies through which practical legal rules are developed from the foundational sources.'

¹⁷² Mohammad Hashim Kamali, *Qawa'id al-Fiqh: The Legal Maxims of Islamic Law* (The Association of Muslim Lawyers UK no date) 7.

¹⁷³ Hallaq (n 113) 19.

¹⁷⁴ Bassiouni (n 106) 46.

time to time.¹⁷⁵ The result of this was the establishment of supplementary sources in Islamic law as follows.

3.3.4.1 *Ijmá'* (Consensus)

Ijmá' refers to the agreed decisions that have been issued by Muslim jurists.¹⁷⁶ These jurists may be Imams of the previous schools of Islamic law, their pupils, new independent scholars, or researchers working at the Organisation of Islamic Co-operation (OIC).¹⁷⁷ Consensus has been reached upon certain matters, issues, and cases, whether religious or legal, in order to apply legal reasoning for the Muslim community.¹⁷⁸ This is the cornerstone of *ijtihád* in Islamic law, since it is based on inference from the objectives of *Sharí'ah*. There is no specific matter or specific time limit for making consensus decisions.¹⁷⁹ Moreover, these agreements could be an approval of a decision based upon a given question. There is a legal basis for the approach of consensus in Islamic law as follows. First, Allah says 'and who (conduct) their affairs by mutual consultation ... we have bestowed on them'.¹⁸⁰ Second, after the Prophet Mohammed's demise, his companions did not know who the Caliph would be; subsequently, his companions took a decision consensually to give the succession to Abo Baker.¹⁸¹

The method used to reach consensus is *úşúl al-fiqh*. It depends on inference from the main sources of *Sharí'ah*. Using this method results in achieving important objectives of consensus, which then work as supplementary sources in Islamic law. The consultation principle and the unity principle consider the needs of Muslim society¹⁸² as well as the significant role of confirming legal rules that once had been debatable.¹⁸³

¹⁷⁵ Ibid.

¹⁷⁶ A Rahim, *Muhammadan Jurisprudence* (Mansoor Book House, Lahore 1995) 97.

¹⁷⁷ The Organisation of Islamic Co-operation is an inter-governmental organisation of the United Nations. It comprises fifty-seven Muslim countries around the world. It was established in 1969. More information is available on the official website <<https://www.oic-oci.org/home/?lan=en/>> accessed 24 April 2018.

¹⁷⁸ Hallaq (n 113) 20.

¹⁷⁹ N J Coulson, *A History of Islamic Law* (Edinburgh University Press, Edinburgh 1994) 230.

¹⁸⁰ The Quran 42:38.

¹⁸¹ Abdullah Alarefi, 'Overview of Islamic Law' (2009) 9 *International Criminal Law Review* 707.

¹⁸² Hallaq (n 113) 19.

¹⁸³ Rafat Y Alwazna, 'Islamic Law: Its Sources, Interpretation and the Translation of it into Laws Written in English' (2016) Springer Science and Business Media Dordrecht 251.

3.3.4.2 Qiyás (Analogy)

Qiyás is described as 'comparison, with a view to suggesting equality or similarity between two things'.¹⁸⁴ In Islamic law, judges and scholars use *qiyás* in an attempt to find legal reasoning in a particular case when there is nothing explicit to be found in the Quran or the Sunnah or *ijmá'*. Thus, it is used to scrutinise previous cases and new cases, and to explore similarities in order to establish rules for the new case. This seems similar to *jus dem generis* in common law, which is used as an extension for seeking legal reasoning.¹⁸⁵ *qiyás* literally means 'analogical deduction'.¹⁸⁶

The basis of using *qiyás* in Islamic law as a fourth source derives from a letter from Caliph Omar Ibn al-Khattab to a judge upon his succession, stating that he is 'seeking the ruling of the precedents and seeking the ruling that you consider to be closest to truth and most likely to earn the good-pleasure of Allah'.¹⁸⁷ There are four elements that are needed to use *qiyás* as a form of legal reasoning in Islamic law: first, it should be based on the existence of an original case, namely there must be a previous case that has been ruled on; second, the new case should have a cause or effect that is similar to the original case; third, a nexus should exist between the cause and the result of the original case that is similar to the new case; and fourth, the legal norm of the original case should be similar to the new case.¹⁸⁸ Thus, the importance of *qiyás* lies in the fact that it provides scope to address and rule on new cases that are not mentioned in the main sources.¹⁸⁹

One example of *qiyás* in Islamic law relates to drinking wine, which is explicitly prohibited in Islamic law. The prohibition here focuses on intoxication but not on the type of wine. Thus, jurists used *qiyás* to prohibit all wines because the reason for prohibition, namely intoxication, is prohibited in Islamic law. Hallaq states that the principle of *qiyás* relates to suitability for the needs of society and is relevant to the law because it offers a form of reasoning that is in the public interest.¹⁹⁰ Malekian also notes that hypotheses are not acceptable in *qiyás*, which must rely on facts. Thus, *qiyás* is based on an individual's

¹⁸⁴ Kamali (n 127) 264.

¹⁸⁵ Hallaq (n 113) 23.

¹⁸⁶ . Farooq A Hassan, 'The Sources of Islamic Law' (1982) 76 American Society of International Law Proceedings 65.

¹⁸⁷ Muḥammad ibn al-Qaiyyim *ʿi'lām al-Mūqī'in 'an Rab al-'ālamīn*, (Dār al-Kutub al-'ilmiyyah Beirut 1991) 85 (Arabic source).

¹⁸⁸ Hallaq (n 113); see also Alarefi (n 181).

¹⁸⁹ Alarefi (n 181).

¹⁹⁰ Hallaq (n 113).

interpretation of a jurist's decision, a jurist being someone who applies the general principles of Islamic law on a case-by-case basis using legal reasoning. Hence, *qiyás* aims to explore the law.¹⁹¹

3.3.4.3 *Istihsán* (Juristic Preference)

Istihsán (juristic preference) is described as 'an exemption that is justified by sacred text'.¹⁹² It relies on the necessity principle to reach an appropriate interpretation from jurists by using inference from the main text. The term is derivative of the verb *hasan*, which means good.¹⁹³ Literally *istihsán* is defined as 'to approve, or to deem something preferable'.¹⁹⁴ Kamali describes *istihsán* as a significant branch of *ijtihád* that jurists adopt in Islamic law in order to consider the changing needs of Muslim society. In this regard, *istihsán* reflects the flexibility and growth of Islamic law.¹⁹⁵ Kamali adds that *istihsán* aims to avoid any rigidity of the spirit of Islamic law. Another aim is '[to find] an alternative ruling which serves the ideals of justice'.¹⁹⁶ *Istihsán* can be 'a departure from *qiyás* in favour of a ruling which dispels hardship and brings about ease to the people'.¹⁹⁷ It can be stated that Muslim jurists seek to find a solution for a specific matter faced by Muslim society by using their view of Islamic jurisprudence. The legitimacy of *istihsán* in Islamic law derives from the action of the second Caliph Umar ibn al-Khattab, who decided not to implement the *hudúd* punishment for cutting off the hand of a thief in the time of famine.¹⁹⁸ It can be stated that the example of *istihsán* at the present time is the approval of using alcohol to treat wounds and in some medical operations.

The main difference between *qiyás* and preference may lie in the fact that while the reasoning behind *qiyás* falls chiefly within the large body of the law with no exception allowed, the reasoning underpinning preference, on

¹⁹¹ Malekian (n 25) 79.

¹⁹² Hallaq (n 113) 25-26.

¹⁹³ Ibid.

¹⁹⁴ M H Kamali, *Principles of Islamic Jurisprudence* ((3rd edn, The Islamic Texts Society 2003), 218. It is worth noting that there is no agreement between Muslim jurists on *istihsán* as a source of Islamic law. For example, the *Ḥanafí*, *Málikí*, and *Ḥanbalí* schools deemed *istihsán* as a subsidiary source of Islamic law, while the *Sháfi'í* school rejected *istihsán*. For a further discussion about *istihsán*, see Kamali 218-224.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

the other hand, is to find a particular exception through the jurist's selection of a revealed text that allows this very exception.¹⁹⁹

3.3.4.4 *Urf* (Customs)

Urf is an idea accepted by people in society as a moral or legal rule, whether this is a saying or an actual act.²⁰⁰ A custom is something that is agreed on by people living in a society. Such customs may vary from society to society. In Islamic law, there are four types of *urf*: a public custom that is generally accepted by most people in society; a private custom that is approved by a tribe or family; a positive custom agreed on by society; and an evil custom that constitutes abuse.²⁰¹

The legal basis of using 'customs' as a source in Islamic law is a saying of the Prophet Mohammed: 'whatever that is seen as well in a Muslim society, it will be well with Allah'.²⁰² Before Islamic law was created, some customs existed that became accepted in Islamic law; for instance, the custom of 'blood money'.²⁰³ However, some customs were not approved such as slavery (arguably). Evidence for this is when Allah says in the Quran, 'O mankind we have created you from male and female, and made you into nations and tribes, that you may know one another ... verily, Allah is all-knowing, well-acquainted (with all things)'.²⁰⁴ The most important conditions of using 'custom' as the fifth source of Islamic law are: a) it must not contradict with anything written in the main sources and b) it must be established before the case in question.²⁰⁵

3.3.4.5 *Maslahah Mursalah* (Public Interest)

This was identified as a means of interpretation of the *ijtihād* by jurists who sought to provide a proportionate interpretation in order to maintain public interest based on the needs of a community.²⁰⁶ It is described by Hallaq as 'a rational' principle that examines the public interest by protecting society from what is harmful and promoting to society what is appropriate. The method of

¹⁹⁹ Alwazna (n 183).

²⁰⁰ Yūsif al-Ḥuzaymī, *ʿaṣl al-ʿurf ʿinda Mālik wa-Qāʿidat al-Maʿrūf ʿurfa ka-Lmashrūṭ Shartā*, (2014) *Dār al-Manẓūma* 20 (Arabic source). There is some debate about this, including what should be conceded as a custom and what should not be.

²⁰¹ *ibid.*

²⁰² *ibid.*

²⁰³ Alwazna (n 183).

²⁰⁴ The Quran 49:13. For more information see chapter seven and the section on slavery in this study.

²⁰⁵ al-Ḥuzaymī (n 200).

²⁰⁶ Natana J Delong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad* (Oxford University Press 2004) 103.

using this means is to interpret the suitability of public interest, and 'to conform to the spirit of the law'.²⁰⁷ Moreover, it is associated with a necessary status that is not explicitly mentioned in the main sources of Islamic law.²⁰⁸ Furthermore, it can be used to reform legal texts and international treaties in order to maintain international peace and security between Muslim countries and other Muslim states.²⁰⁹ The application of this means aims to consider changes over time and requires two conditions: it must bring benefits and it must protect from harm.²¹⁰

3.3.5 *Siyar*

Siyar refers to Islamic international law. It covers the rules and justifications for resorting to war and regulates operations and conduct in war.²¹¹ It also governs international crimes such as war crimes, crimes against humanity, and genocide, which are prohibited and punishable. Historically, the expansion of Islamic territories across the world has been based on the importance of interrelationships with other states, namely between Muslim and non-Muslim states. Jurists who specialise in Islamic international law have made significant contributions in this field. They include Abo Hanifa (767), Abo Yusuf (731), Al-Shaybani (747), and al-Sarakhsi (1090). All of them have recognised the need to regulate the affairs of Muslim states with other non-Muslim states.²¹² Jurists began to record legal incidents, especially in international relations. This sparked an endeavour to try to regulate the domestic and international affairs of Muslim states. This process was called *siyar*.²¹³ *Siyar* is commonly known as 'Islamic international law' or 'The Islamic Law of Nations'.²¹⁴ It literally means 'path', 'way',²¹⁵ or 'conduct'.²¹⁶ It is also

²⁰⁷ Hallaq (n 113) 25.

²⁰⁸ Delong-Bas (n 206) 146.

²⁰⁹ Muhammed Tahir, *Treaties on Maqasid*, (The International Institute of Islamic Thought: 2006) 131.

²¹⁰ Abdallah Şālih, 'al-Maṣlaḥah al-Mursalāh wa-Taṭbīqātihā', (2000) 15 (1) *Majalt Dimashq* 354 (Arabic source).

²¹¹ Ahmed Al-Dawoody, *The Islamic Law of War Justification and Regulations* (Palgrave Macmillan 2011) 4.

²¹² Mohammad T Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff, The Hague 1968) 34.

²¹³ Labeeb Ahmad Bsoul, 'Historical Evaluation of Islamic Law of Nations/Siyar: Between Memory and Desire' (2008) 17 *Spring* 48.

²¹⁴ Shaheen Sardar Ali and Javaid Rehman, 'The Concept of Jihad in Islamic international law' (2005) *Journal of Conflict & Security Law* 321.

²¹⁵ *Siyar* is the plural of the word *sirah*, which is derived from Arabic literature. See Muhammed Hamidullah, *Muslim Conduct of State* (Leiden 1953).

²¹⁶ Muhammed Hamidullah, *Muslim Conduct of State* (Leiden 1953).

defined as the path of the Prophet Mohammed and his four Caliphs in times of peace and war.²¹⁷ This term also refers to legal incidents.²¹⁸

The concept of *siyar* was introduced by the leader of the *Ḥanafī* School, Abo Ḥanafī, and later rolled out by his student Abo Yusuf, who continued Abo Ḥanafī's work. Later on, Al-Shaybani and al-Sarakhsi developed the work of these two jurists further.²¹⁹ Khadduri defines *siyar* as meaning the significant part of *Sharī'ah* that governs the law of Muslim nations with others and binds all Muslim states and societies to protect the interests of Islam.²²⁰ Hamidullah defines this as 'part of the law and custom of the land and treaty obligations which a Muslim de facto or de jure state observes in its dealings with other de facto or de jure states'.²²¹ Furthermore, Badr observes the following.

[The] Islamic law of nations is part of the corpus of Islamic law just as the original *jus gentium* was a branch of municipal Roman law. Islamic law is a religious law only in the sense that its basic ethical grounds and some of its general principles are to be found in the Quran and the pronouncements of the Prophet Mohammad. Beyond that, the corpus of Islamic law as it developed over the ages is 'man-made' in the sense that it resulted from the efforts of the jurists of the various schools of law.²²²

The modern scholar, Ali, defines *siyar* as 'a legal system based on the *Sharī'ah* intended to apply universally to all people in every time and place'.²²³ In relation to *siyar*, Al Ghunaimi suggests a framework to cover the relationship of Muslim states with non-Muslim states and other Muslim states.²²⁴ Bsoul suggests the following.

The concept of *siyar* evolved from its lexicographical meaning in particular; from its connotation of behaviour or conduct [which was] used by

²¹⁷ Ibid.

²¹⁸ Mohamed Elewa Badar, '*Jus in Bello* under Islamic international law' (2013) 13 Nijhoff International Criminal Law Review, 593.

²¹⁹ Muḥammad al-Sarkhashī, *Kitāb al-Mabsuṭ* (Dār al-Ma'rifah 1342 H). See also Haniff Ahamat and Mohd Hisham Mohd Kamal, 'Modern Application of *Siyar* (Islamic Law of Nations): Some Preliminary Observations' (2011) 24 (4) Brill Arab Law Quarterly 423.

²²⁰ Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (John Hopkins Press, Baltimore 1966) 6.

²²¹ Hamidullah (n 216) 4.

²²² Gamal M Badr, 'A Survey of Islamic International Law' (1982) 76 Proceedings of the American Society of International Law 56.

²²³ Shaheen Sardar Ali, 'Resurrecting *Siyar* Through Fatwas: (Re) Constructing "Islamic international law" in a Post- (Iraq) Invasion World' (2009) Journal of Conflict & Security Law 115.

²²⁴ Al Ghunaimi (n 212).

chroniclers in their narrative accounts to mean life or biography, i.e. the conduct of an individual.²²⁵

Furthermore, Bsoul argues that *siyar* refers to the rules governing international relations and Muslim states.²²⁶ According to Khadduri, *siyar* 'was not based essentially on reciprocity or mutual consent, but was a self-imposed system of law, the sanctions of which were moral or religious and binding on its adherents, even though the rules might run counter to their interests'.²²⁷ Thus, it can be said that *siyar* means following the rules of the Prophet and his successors in international affairs, in times of war and peace.

Islamic international law is a part of Islamic law. Its main sources are the Quran and Sunnah. The other tier of sources includes the *ijmá'* (consensus), *qiyás* (analogy), *istihsán* (juristic preference), *urf* (customs), and *maslahah mursalah* (public interest). Islamic international law is known as *siyar*, which has additional sources according to Hamidullah. These additional sources are arbitration, treaties/conventions, official instructions, and internal legislation.²²⁸ Accordingly, all the other sources of Islamic law are clearly devised by human knowledge and endeavour. This inference, however, does not appear to be as obvious as it should have been, leading some scholars to argue that Islamic law is divine law and hence unchangeable.²²⁹

The subjects of Islamic international law are individuals—whether these are Muslims, *dhimmi*,²³⁰ or *mu'ahid*²³¹—and their entities, namely Muslim and non-Muslim states. The law provides legal rights and bears legal obligations.²³² It is also part of *Sharí'ah*, which regulates individual behaviour and conduct in times of peace and war.²³³ The general concept of *siyar* divides the world into a) *dár al-ḥarb* (the land of war); b) *dar-al-Islam* (the land of peace); and c) *dar-*

²²⁵ Bsoul (n 213) 6.

²²⁶ Ibid 7.

²²⁷ Khadduri (n 220) 6.

²²⁸ Hamidullah (n 216) 11.

²²⁹ Sardar Ali and Rehman (n 214) 7.

²³⁰ This means, 'a non-Muslim under protection of Muslim law. He is granted protection because he pays the *jizyah* (tax). A covenant of protection was made with conquered "Peoples of the Book", which included Jews, Christians, Sabaeans, and sometimes Zoroastrians and Hindus.'; See Oxford Dictionary <<http://www.oxfordislamicstudies.com/article/opr/t125/e536>> accessed 13 February 2019.

²³¹ This means a non-Muslim who lives in a Muslim state. He or she is granted protection under Islamic law. *Musta'min* means someone who was fighting against a Muslim state and has given up fighting. He too will be granted protection. See the Oxford Dictionary.

²³² Ahamat and Kamal (n 219) 427.

²³³ Bsoul (n 213).

al-ahd (the land of truce).²³⁴ However, the contemporary practices of Muslim states as members of the United Nations indicate that new contributions need to be added to the international norms of *siyar*, mainly because the practices of Muslim states are sources of *siyar*.²³⁵

3.4 Mechanisms of Interpretation: Commonalities and Differences

The main source of *Shari'ah* is considered to be divine law, but another tier of sources of Islamic law, namely consensus, *qiyás*, custom, public interest, and *siyar*, are subject to the interpretation of human beings. The latter approach is similar to the use of another tier of sources in international criminal law, which are subject to the thoughts of human beings.²³⁶

A form of consensus is adopted and practised in both legal systems. This has appeared during ICC meetings and discussions of The Assembly of State Parties, and described as 'the Court's management oversight and legislative body and is composed of representatives of the States which have ratified or acceded to the Rome Statute'.²³⁷ Moreover, in the international community, consensus often appears in discussions for establishing an international treaty; for instance, in discussions of the General Assembly of the United Nations or International Law Commission of the United Nations. This approach is similar to the concept of consensus in Islamic law as practised at the Organization of Islamic Co-operation (OIC).²³⁸ The former often requires attendance at meetings and the participation of delegations of states, and requires a number of states to adopt agreed views to establish an international treaty.²³⁹ However, the concept of consensus in Islamic law may not require attendance at meetings in general, but operates on the unity principle of Muslim states, because the OIC promotes the principle of solidarity among Islamic states and aims to unite the views of Muslim scholars with respect to

²³⁴ Sardar Ali and Rehman (n 214) 13-19.

²³⁵ Sardar Ali (n 223) 17.

²³⁶ Malekian (n 25) 64.

²³⁷ The International Criminal Court, the Assembly of States Parties <<https://www.icc-cpi.int/asp/>> accessed on 28 April 2018.

²³⁸ The Organisation of Islamic Co-operation (OIC) was formed in 1969 and aims to collect the voices of the Muslim community to achieve justice and security. The OIC was established within and under the umbrella of the UN Charter. This organisation has fifty-seven member Muslim states, and each state has member scholars from the different schools of Islamic law who work to adjudicate on new cases that are not explicitly mentioned in the main sources of Islamic law. For more information about the organisation's objectives and member states, see the official website <<https://www.oic-oci.org/home/?lan=en/>>.

²³⁹ Malekian (n 25) 78.

the needs of Muslim societies.²⁴⁰ This approach corresponds with Article 21(1)(c) of the ICC, which relates to the sources of the Treaty, and the results of reference to international principles, which can promote shared common values between common, civilian, and Islamic law.²⁴¹ However, the problematic question raised in this regard is, why not? In both legal systems, scholars should be representative members of delegations when establishing or amending an international treaty. They should not be simply an official delegation that may consider the interests of their states or take into account political considerations, whether they are acting for the ICC or the OIC.

The general principles of international criminal law are distributed across many international conventions, such as international treaties of human rights and the Geneva Conventions.²⁴² Thus, these general principles of law can be taken and used when the rules of the treaty do not contain or do not explicitly refer to the case in question. Consequently, the general principles of law can be taken into consideration.²⁴³ These general principles can be inferred when an international convention and customary law does not indicate an answer to the case in question.²⁴⁴

Furthermore, compatibility could be understood in terms of the general principles as stipulated in Article 38(1)(c) of the ICJ Statute. This Article provides that general principles that have been accepted and applied by civilised nations should be recognised as sources of international law. Since Islamic law is one of the major legal systems of the world, it could 'harmonise with and accommodate international rules'.²⁴⁵ Islamic law represents Muslim civilised nations worldwide, and compatibility should be viewed in terms of the legality principle that is applied and accepted among the major legal systems in the world. The general principles of Islamic law are discussed in the next chapter in terms of a compatibility approach between both legal systems.

Customs are classed as one of the oldest sources of international law according to Article 38(1)(b) of the International Court of Justice Statute.

²⁴⁰ Irmgard Marboe, 'Promoting the Rule of Law: UN, OIC and ILA Initiatives for Approaching Islamic Law' (2013) *Islam and International Law* 184.

²⁴¹ Cassese (n 6) 15.

²⁴² The Vienna Convention, Article 29 provides that, 'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.'

²⁴³ Cassese (n 6) 15.

²⁴⁴ *ibid.*

²⁴⁵ James Johnson and John Kelsay, *Just War and Jihad: Historical and Theoretical Perspectives of War and Peace in Western and Islamic Traditions*, (Praeger 1991) 200.

The Statute [of the ICJ] constitutes an integral part of the UN Charter and the ICJ is the principal judicial organ of the United Nations. Customary rules cannot, as a matter of principle, be a direct basis of incrimination by an international criminal judge ... [but] can nevertheless be a model or test when drafting future statutes of international criminal tribunals.²⁴⁶

Customary rules are defined by the ICJ as follows.

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.²⁴⁷

In Islamic law, jurists resort to custom if the Quran, the Sunnah, *ijmá'*, and *qiyás* do not cover the case in question. In contrast, the ICJ Statute's Article 38(1)(b) explains that 'customary international law derived from the practice of States' is considered as a source of international law. In this regard, Article 38 is a source of the Rome Statute according to Article 21(1)(b).²⁴⁸ Consequently, using custom as a source in both legal systems is indispensable. This is for two reasons. First, as Malekian states, 'the provisions of international criminal law may easily be accepted within the Islamic system due to the fact that it would not have been ratified by Islamic nations if its purpose had been against the principles of Islamic law'.²⁴⁹ This view is consistent with the view of Schabas who argues that there is an international obligation upon states to prevent international crimes in its territories or in another territory, according to the Geneva Conventions and the Genocide Convention.²⁵⁰ Second, new criminal terminologies have emerged in international law that are not explicitly defined in Islamic law; thus, it is important to use custom as a source to prevent international crimes and to adhere to international obligations.

Moreover, as it has been previously provided that customary international law is one of the sources of international law, Islamic law recognises that a custom, whether domestic or international, can be the source of law if it does not contradict its provisions, namely the Quran and the Sunnah. Such an

²⁴⁶ Vladimir-Djuro Degan, 'On the Sources of International Criminal Law' (June 2005) 4 (1) Chinese Journal of International Law 45.

²⁴⁷ *Nicaragua v. United States of America*, ICJ (Judgment of 27 June 1986) (186).

²⁴⁸ William Schabas, *An Introduction to the International Criminal Court*, (4th edn, Cambridge University Press 2011) 227.

²⁴⁹ Malekian (n 25)161.

²⁵⁰ Schabas (n 248) 227.

identified custom relates to the reciprocity rule in international law: when the custom has been practised and accepted, then it shall be fulfilled. This rule has been embedded in both legal systems, especially in diplomatic international law. The reciprocity rule is described in international law as a guide rule and has significant power.²⁵¹ A similar notion exists in Islamic law according to the Quranic verse, 'And if they incline to peace, then incline to it [also] and rely upon Allah'.²⁵² It would seem that if another party that fights you wants peace or settlement, Muslims should seek such peace or settlement. Another Quranic verse is as follows: 'and if you punish [an enemy, O believers], punish with an equivalent of that with which you were harmed. But if you are patient - it is better for those who are patient.'²⁵³

Compatibility could be understood in terms of the international treaties since Islamic law requires the commitment and implementation of contracts between parties whoever they are, whether states or individuals, Muslim or non-Muslim. The significant point here seems to be that the provisions and terms of the contracts must be followed and fulfilled by the parties.²⁵⁴ Thus, Muslims are obliged to obey and implement the provisions of the contracts. This approach is based on the Quranic verse, 'O you who have believed, fulfil [all] contracts'.²⁵⁵ In international law, there is a similar principle known as *pacta sunt servanda*. This principle provides that the parties of the contracts must be committed to the provisions and terms of the contracts.²⁵⁶

Thus, the provisions and terms of contracts in both legal systems must be respected and implemented as provided for in the contracts. The focal point here could be that in Islamic law there are no requirements that mention that the parties must be Muslim states. This opens the door to contracts if contracts serve the Muslim interest. There is a similar idea about the significance of the implementation of a contract that exists in the international maxim. Hence, according to the *Hanfi*, *Málikí*, and *Hanabli* schools, if there is a permanent peace treaty between a Muslim state and non-Muslim state, then the treaty

²⁵¹ See for example, Sean Watts, 'Reciprocity and the Law of War' (2009) 50 Harvard International Law Journal 365; Francesco Paris and Nita Ghei, 'The Role of Reciprocity in International Law' (2003) 36 (1) Cornell International Law Journal 93.

²⁵² The Quran 8:61.

²⁵³ The Quran 16:126.

²⁵⁴ The provisions and terms of the contract must not contradict the provisions of Islamic law.

²⁵⁵ The Quran 5:1.

²⁵⁶ See for example, Jason Webb Yackee. 'Pacta Sunt Servanda and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality' (2008) 32 (5) Fordham International Law Journal 171.

can be for an indefinite time.²⁵⁷ In this regard, one may observe that the Rome Statute can be a peace treaty that serves and protect humanity.

In light of the above, it is important now to clarify the nature of Islamic criminal law.

3.5 The Nature of Islamic Criminal Law²⁵⁸

Criminal laws—for instance, civil law, Roman law, common law, Hindu law, German law, and Islamic law—originate or rely on religion, customs, codified law in order to operate and may share some elements in common.²⁵⁹ These shared elements deal with procedural rules, proof of evidence, the rights of the accused, and imposing punishments upon guilty people.²⁶⁰ Islamic criminal law has roots that are grounded in the concept of human rights and social justice.²⁶¹ It is derived from the Quran and Sunnah, and from another tier of sources. Thus, it stands beside contemporary legal systems; for instance, common law and civil law.²⁶² Islamic criminal law has been defined as ‘the control of commission of the crimes so as to protect the rights and interests of the public and ensure peace in the society’.²⁶³ Schacht describes Islamic criminal law as ‘sacred law ... it contains Allah commands’ and is based on the rights and duties of the Islamic religion upon individuals.²⁶⁴

The concept of Islamic law, according to the International Union for Muslim scholars, is based on the *maqāṣid al-Sharī‘ah* (Objectives of the *Sharī‘ah*), which comprises direct and indirect components.²⁶⁵ The direct components

²⁵⁷ Abdul Hamid Sulayman, *Islamic Theory of International Relations* (International Institute of Islamic Thought, Virginia 1987) 18.

²⁵⁸ Islamic criminal law differs from the rules of *fatwa* (a religious or legal view held by scholars not by judges). The former is obligatory upon litigants, whereas the latter (*fatwa*) mostly relates to civil issues and is mostly requested by just one party. Thus, it is not obligatory upon a person to undertake a *fatwa*. See Muhammad Khalid Masud, *Islamic Legal Interpretation, Muftis and their Fatwas* (Harvard University Press 1996).

²⁵⁹ Bassiouni (n 106) 118.

²⁶⁰ Ibid.

²⁶¹ Rudolph Peters, *Crimes and Punishments in Islamic Law: Theory and Practice from the 16th to the 20th Centuries* (Cambridge University Press 2005) 144.

²⁶² Matthew Lippman, ‘Islamic Criminal Law and Procedure: Religious Fundamentalism v Modern Law’ (1989) 12 (29) *Boston College International & Comparative Law Review* 29.

²⁶³ Anwar Ullah Chowdhury, *The Criminal Law of Islam* (A.S Noordeen 2002) 1.

²⁶⁴ J Schacht, *An Introduction to Islamic Law* (The Clarendon Press, Oxford 1964); see also Hakeem, Farrukh B, Haberfeld, M.R., Verma, Arvind., *Policing Muslim Communities: Comparative International Context* (Springer Science Business Media, New York 2012) 9.

²⁶⁵ The International Union for Muslim Scholars is a non-governmental Islamic organisation. It provides a wide overview of Islamic criminal law definitions, but the author of this research has summarised these, as mentioned above <<http://iumsonline.org/en/>> accessed 17 November 2018.

are the preservation of the life of individuals by criminalising the murder of other people; the preservation of people's money and public money from theft; the preservation of religion from apostasy; the preservation of people's minds from alcohol; and preserving posterity by criminalising adultery and sodomy. The indirect components relate to punishments in *Sharí'ah*, which applies punishments equally and in proportion to the harm caused by a crime. As such, its punishments aim to show mercy to people. Since *Sharí'ah* is preventive and acts as a deterrent, its punishments are not the goal of *Sharí'ah* itself because Allah does not benefit from increasing or decreasing punishments given to criminals.²⁶⁶

Islamic criminal law derives its sources and its legitimacy from *Sharí'ah*, namely the Quran and Sunnah and other Islamic sources such as *ijmá'* (consensus) and *qiyás* (analogy). For instance, Allah says, 'Judge thou between them by what Allah hath revealed'.²⁶⁷ He also says, 'And when you judge between people that ye judge with justice'.²⁶⁸ Furthermore, Allah says, 'Allah commands justice, the doing of good, and liberty to kith and kin, and he forbids all shameful deeds, and injustice and rebellion ... He instructs you that ye may receive admonition on the day-of-judgement, those in sin'.²⁶⁹

In the Sunnah, the Prophet says, 'A true believer does not backbite, curse, practise lewdness, or utter obscene words ... He who believes in Allah and the Last Day shall honour his neighbour and he who believes in God and the Last Day shall speak well of others or keep quiet.'²⁷⁰ The Prophet himself practised judgment between people.²⁷¹ He also appointed some of his companions to be judges in Yemen and Iraq. In Yemen he sent Mu'd ibn Jabal, who reported the following.

(When) Allah's Messenger sent him to Yemen, he asked him how he would judge (decide cases). He said, 'I will judge in accordance with Allah's Book (the Qur'an).' The Prophet asked, 'What, if it is not found in the Book of Allah?' He said, 'Then according to the Sunnah of Allah's Messenger.' The Prophet asked, 'And if it is not in the Sunnah of Allah's Messenger?' He said, 'I will make *ijtihád* through my Judgement.' The Prophet said,

²⁶⁶ Ibid.

²⁶⁷ The Quran 5:49.

²⁶⁸ The Quran 4:58.

²⁶⁹ The Quran 16:90.

²⁷⁰ The Office of Islamic Legislation on Crime Prevention in Saudi Arabia, the Ministry of Interior in Saudi Arabia, Riyadh.

²⁷¹ Alarefi (n181).

'Praise belongs to Allah who has made the messenger of the Messenger of Allah consistent with what pleases him.'²⁷²

3.5.1 Islamic Criminal Law in Practice²⁷³

The modern concept of criminal procedures, including investigations, arrests, prosecutions, and detentions, were not, at the beginning of Islam, recognised in Islamic criminal law. *Shari'ah* leaves these procedures for individual states to establish and implement in accordance with the needs of society.²⁷⁴ Bassiouni states that the jurists of Islamic criminal law consider the important role of criminal procedures in the law for protecting human beings in all spheres.²⁷⁵ They have developed Islamic criminal law throughout the centuries, passing it on through the Umayyad (661-750) and Abbasid (750-1258) dynasties until the emergence of Al-Majalla, which was the first codification of criminal and civil law during the Ottoman Empire (1299-1923).²⁷⁶

Al-Majalla considered the views of jurists and the precedents of judges.²⁷⁷ Bassiouni also points out that although Islamic criminal law imposes itself upon Muslim societies in order to bind the religion of Islam, there are different

²⁷² As cited in Sayyid Rami al Rifai, *The Islamic Journal, From Islamic Civilisation To The Heart Of Islam, Ihsan, Human Perfection* (Sunnah Muakada 2015) 96.

²⁷³ Scholars differ when they try to divide current Muslim countries into types. Bassiouni categorises Muslim countries based on the relative relationship between their constitutional systems and *Shari'ah* as follows: In Tunisia and Turkey, *Shari'ah* is part of cultural society (these countries are known as secular states), while there are also Muslim countries that adopt *Shari'ah* as a source of legislation, such as Egypt. The last category adopts *Shari'ah* as its main source of law, with a direct application of its provisions, such as Saudi Arabia for instance. Baderin divides Muslim countries based on the current areas of spread of Islamic schools in the Islamic world as follows. Lebanon, Syria, Jordan, Turkey, Pakistan, Libya, India, and Iraq use *Hanafi*. Kuwait and most of the African countries, such as Morocco, for example, use *Maliki*. *Shafi'i* has been adopted in Malaysia, Indonesia, Egypt, and South Arabia. *Hanbali* is used in Saudi Arabia and Qatar. See M Bassiouni, *The Sharia and Post-Conflict Justice* (Cambridge University Press 2010); Mashood Baderin, *International Human Rights and Islamic Law* (Oxford Monographs in International Law 2003). It can be said that the application of Islamic law among the Islamic countries may be different because of the influence of the jurisprudence of Islamic schools because we can now see the adoption of the *Maliki* school in Morocco, *Shafi'i* in Egypt, *Hanafi* in Pakistan, and *Hanbali* in Saudi Arabia. There may have been an indirect impact of colonialism that has taken place in some Islamic countries, but the use of the importation of some of the legal concepts from colonial countries has occurred in terms of what is appropriate with the school adopted in each country or Islamic region.

²⁷⁴ Muhammed Abdul Haleem, Adel Sherif and Kate Daniels, *Criminal Justice in Islam* (IB Tauris 2003) 4.

²⁷⁵ Bassiouni (n 262) 122.

²⁷⁶ Uriel Heyd, *Studies in Old Ottoman Criminal Law* (Oxford University Press 1973) cited in Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge University Press 2005) 71; see also Harriet Rudolph, 'The Ottoman Empire and The Institutionalization of European Diplomacy' 1500-177.

²⁷⁷ Lippman (n 262) 34.

applications of this system across Muslim countries. These differences are based on various procedures of trial, procedures of proof, and stages of prosecution. This situation arose because all procedures have roots in their own cultures and societies; for instance, Indonesia in the East, Morocco in the West, Pakistan in the Indian subcontinent, and Saudi Arabia in the Middle East.²⁷⁸

Bassiouni evaluates the application of Islamic criminal law currently as a 'fragmented system' that is used across Muslim countries.²⁷⁹ This fragmentation is based on political influence and the diversity of cultures.²⁸⁰ Political influence can affect the work of judges if they are appointed by certain political authorities. In such a circumstance, judges may lose their objectivity and independence.²⁸¹ The diversity of cultures may place pressures upon judges, which may lead to obstacles when applying laws equally. The different approaches taken in Islamic criminal law can be understood by exploring three factors. First, some Muslim countries were colonised by Great Britain. These countries tend to use common law as well as *Sharí'ah*; for instance, Pakistan and Sudan. Second, other Muslim countries were colonised by France. These countries tend to use civil law as well as *Sharí'ah* law; for instance, Lebanon and Algeria. Third, other Muslim countries just use *Sharí'ah* law without using a mixed approach, such as the Maldives, Afghanistan, and Saudi Arabia.²⁸²

Lippman notes some features of Islamic criminal law that distinguish it from other legal and criminal systems.²⁸³ One feature is that Islamic criminal law and its legitimacy are derived from divine law. A second feature is that its provisions are fixed and immutable; thus, its principles are specific legal principles rather than 'elastic principles'. Another feature is that the punishments of Islamic criminal law are based on religious duty rather than fear of the power of secular law.²⁸⁴ Furthermore, Islamic criminal law aims to achieve justice by protecting the rights of the oppressed.²⁸⁵

However, another view of Islamic criminal law is that it takes a sociological approach to the analysis and punishment of crimes because its rules are a means to an end rather than a philosophical means for addressing

²⁷⁸ Bassiouni (n 106) 120.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² The US Central Intelligence Agency, as cited in Bassiouni (n 106) 123.

²⁸³ Lippman (n 262) 29.

²⁸⁴ Ibid.

²⁸⁵ Alarefi (n 181).

behaviours.²⁸⁶ However, Hakeem points out that this perspective examines Islamic punishments from a purely social angle.²⁸⁷ He argues that the main objective of Islamic criminal law is to regulate present life, and the afterlife, by clarifying the duties and rights of individuals as they are found in the main sources, in terms of their relationship with each other, as well as their relationship with Allah.²⁸⁸ Furthermore, Lippmann argues that Islamic criminal law considers ethical standards and legal rules at the same time. Ethical standards are seen in the context of conscience rather than the imposition of legal rules.²⁸⁹ Islamic criminal law preserves the right to life, reputation, religion, family, and properties.²⁹⁰ These rights are based on the classification of crimes in Islamic criminal law, namely *hudúd*, *qişásş*, and *ta'zír*, which are discussed below.²⁹¹

The application of Islamic criminal law creates a safe and stable society because it places emphasis on the moral aspects of life derived from the Islamic religion, as well as giving a warning that there are severe punishments for committing crimes. This approach provides a deterrent to crime.²⁹² It also goes further in terms of preventing crimes by prohibiting intoxicants connected to a criminal environment.²⁹³ It aims to protect the family by prohibiting sexual activity such as adultery and sodomy, and imposes punishments for these activities, thereby offering a framework of stability because the family is considered to be a cornerstone of life. Second, it maintains the stability of public order and life by protecting individuals from criminal acts or humiliation. Third, it protects properties, whether public or private, from theft or destruction. Fourth, it protects religion by prohibiting Muslims from apostasy and insulting other religions.²⁹⁴

The above objectives are achieved by using certain mechanisms. Hathout explains that a Muslim state is required to establish a competent authority that operates to protect the objectives of Islamic criminal law. The conscience of a Muslim person is an important mechanism used to prevent the committing of

²⁸⁶ D Garland and P Young, *The Power to Punish: Contemporary Penalty and Social Analysis* (Atlantic Highlands: Humanities Press 1983).

²⁸⁷ Hakeem (eds) (n 264).

²⁸⁸ Ibid.

²⁸⁹ Lippman (n 262) 37.

²⁹⁰ Ibid.

²⁹¹ Mohamed Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court' Vol 24 Issue 2 (2011) *Leiden Journal of International Law* 411.

²⁹² Hakeem (eds) (n 264).

²⁹³ Lippman (n 262) 41.

²⁹⁴ Ibid.

criminal acts because conscience binds us to Allah's commands.²⁹⁵ Moreover, for instance, community reform through the equal opportunities of economic means in society is maintained by applying *zakáh* (an obligatory tax that every Muslim must pay every year).²⁹⁶ This helps a state work to reduce crime by meeting the needs of individuals. The nature of the concept of punishment in Islamic criminal law is considered a deterrent because serious conditions are applied to criminals who have committed crimes.²⁹⁷

3.5.2 Categories of Crimes in Islamic Criminal Law

In Islamic criminal law, crimes are categorised according to the punishment administered. This approach reflects the law's objectives and its effectiveness to combat crimes.²⁹⁸ In Islamic criminal law, crimes are categorised into three types, *hudúd*, *qisás*, and *ta'zír*, and are defined as the 'prevention, hindrance, restraint, prohibition, and hence a restrictive ordinance or statute of Allah, respecting things lawful and unlawful'.²⁹⁹ They are also defined as a 'legal prohibition that [is] prescribed by God and carries definitive legal deterrents of *hudúd* and *qisás* punishments. In the case of an accusation, a state of purification is required by religious dictates, and, when proved and found correct, a state of execution is obligated by the legal commandments.'³⁰⁰ Awda defines these crimes as 'forbidden acts against Allah's commands, which prevents and punishes those acts in *hudúd* crimes, *qisás* crimes ... those forbidden acts either committing prohibited acts or disregarding mandatory acts.'³⁰¹

Hudúd crimes are classed as crimes against Allah, and *qisás* crimes are classed as crimes against the individual and properties.³⁰² Crimes against Allah relate to the rights of Allah, and it is the responsibility of a state to apply them. Crimes against individuals and properties relate to the rights of

²⁹⁵ M Hathout, 'Crime and Punishment: An Islamic Perspective' in Farrukh B Hakeem, M R Haberfeld, Arvind, *Policing Muslim Communities: Comparative International Context* (New York, Springer 2002).

²⁹⁶ See Oxford Islamic Studies online <<http://www.oxfordislamicstudies.com/>> accessed 4 April 20.

²⁹⁷ Hathout (n 295) 11.

²⁹⁸ Lippman (n 262) 38.

²⁹⁹ Mohammad Iqbal Siddiqi, *The Penal Law of Islam*, (Lahore, Kazi 1979) 6.

³⁰⁰ Alī ibn Muḥammad Māwardī, *al-Māwardī's al-Aḥkām as-sultāniyyah* (Indiana University 1978).

³⁰¹ Abdul qader Awda, *a-tashrī al-Jiyn'ai fi al-Islam muqarānh bi al-qanon al-wadāi* (al-Risālah Beirut 2000) (Arabic source).

³⁰² Lippman (n 262) 41.

individuals.³⁰³ Although punishments for *ḥudúd* crimes are specified in the Holy Book of Islam (the Quran), they will not be applied if there are grounds for doubt. The Hadith of the Prophet Mohammed explains this: 'Avoid applying legal punishment upon the Muslims if you are capable. If the criminal has a way out, then leave him to his way. Verily, it is better for the leader to make a mistake forgiving the criminal than it is for him to make a mistake punishing the innocent.'³⁰⁴ When the evidence and required conditions of *ḥudúd* crimes are proven before a judge, the judge has no discretionary powers to increase or decrease the punishment because it is a fixed punishment and a crime against Allah, the Prophet, as well as against public justice.³⁰⁵

3.5.2.1 *Hudúd* Crimes

Hudúd crimes are *sariqa* (theft), *ḥirábah* (armed robbery), *ziná'* (adultery), *qadhf* (defamation), *sharb al-khamr* (drinking/intoxication), *bugháh* (rebellion), and *ridda* (apostasy).³⁰⁶ The punishments for *ḥudúd* crimes are mentioned explicitly in the Quran and Sunnah. Judges have no discretionary power for applying punishments when the crimes are proven.³⁰⁷ This is because the evidential rules are strict and required in accordance with the Quran. If doubt arises in relation to evidence against the accused, then a judgment is ruled in favour of the accused.³⁰⁸

3.5.2.1.1 *Sariqah*

Theft is prohibited and criminalised in Islamic criminal law. It is defined as the 'taking of property belonging to another [secretly with intention]'.³⁰⁹ The relevant Quranic verse says, 'As to thief, male or female, cut off his or her hands. It is reward of their deeds, an exemplary punishment from Allah. Allah is mighty, wise'.³¹⁰

³⁰³ Ibid.

³⁰⁴ Abo Issa al-Tirmidhī, *Sunan al-Tirmidhī* (Dra al-qarb al-Islami 1996)1424 (Arabic source).

³⁰⁵ Etim E Okon, 'Hudud Punishments in Islamic Criminal Law' (2014) 10 (14) European Scientific Journal 227 <<https://eujournal.org/index.php/esj/article/viewFile/3405/3169/>> accessed 28 April 2019.

³⁰⁶ All crimes mentioned here are outlined in the Quran and Sunnah.

³⁰⁷ Bassiouni (n 106) 133.

³⁰⁸ Ibid.

³⁰⁹ Lippman (n 262) 45.

³¹⁰ The Quran 5:38.

3.5.2.1.2 *Hirábah*

Armed robbery, or 'highway robbery', refers to '... waiting by the wayside (or highway) to steal travellers' property by force, and by this means obstructing travel on the road'.³¹¹ The distinction between theft and armed robbery is that the latter crime is committed using force on a highway or in a public place, while the former takes place in secret and uses no force.³¹² An example of armed robbery is when the armed robber steals with the intention of killing passers-by. The Quran states the following.

The only recompense for those who make war upon Allah and His Messengers and strive after corruption in the land will be that they will be killed, or crucified, or have their hands and feet cut off on alternate side or will be expelled from the land. Such will be their recompense in this world, and in the Hereafter, theirs will be an awful punishment, except those who repent before you overpower them, for know that Allah is Forgiving, Merciful.³¹³

3.5.2.1.3 *Ziná'*

Ziná' is comprehensively defined by the *Hanafí* as 'sexual intercourse between a man and a woman without legal right or without the semblance of legal right'.³¹⁴ There are two types of punishments for adultery, both of which are based on the 'culprit's marital status'. The first type of punishment is stoning to death for committing adultery.³¹⁵ The punishment of stoning to death is prescribed by the Prophet for some guilty people.³¹⁶ The second type of punishment is a hundred lashes for committing fornication, which means, 'sexual relations between an unmarried man and an unmarried woman'.³¹⁷ The punishment of this crime is mentioned in the following Quranic verse: 'The committers of *ziná'*, male and female, flog each of them with a hundred stripes, and do not let pities for the two withhold you from obedience to Allah, if you

³¹¹ M C Bassiouni, *Crimes and the Criminal Process*, (12 Arab Law Quarterly 1997) 269.

³¹² Lippman (n 262) 57.

³¹³ The Quran 33:34.

³¹⁴ Lippman (n 262).

³¹⁵ Okon (n 305).

³¹⁶ *Ibid.* It must be noted that there is disagreement among the jurists of different Islamic schools regarding the penalty of stoning to death and confinement to death in homes for adulterers who were married before committing the crime and who became divorced because they committed adultery. For more information, see Bassiouni (n 306) 232.

³¹⁷ Okon (n 305).

believe in Allah and the Day of Judgement. And let a party of believers witness their punishment.'³¹⁸

3.5.2.1.4 Qadhf

Defamation refers to 'the defamation of an individual's chastity or improper accusation of adultery [or sodomy]'.³¹⁹ A false accusation in order to prove adultery or sodomy receives a punishment of eighty lashes.³²⁰ This action is criminalised in order to protect the honour and the freedom of people. The relevant Quranic verse says, 'And those who launch a charge against a chaste woman, and produce not four witnesses to support their allegations, flog them with eighty stripes, and reject their evidence ever after: for such men are wicked transgressors'.³²¹ Most jurists of the Islamic schools of *Ḥanafī*, *Ḥanbalī*, and *Shāfi'ī* believe that the words used to accuse the defendant must not be ambiguous, and clear words must be used, such as 'adulterer' or 'fornicator' to accuse the defendant. Thus, if the crime is ambiguous, then it is not a crime of *qadhf*.³²²

3.5.2.1.5 Sharb al-khamr

Drinking alcohol is forbidden in Islam. The relevant Quranic verse says, 'O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone altars [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful.'³²³ This verse does not explicitly include reference to the whip punishment for drinking alcohol, but in the Sunnah, the Prophet says, 'Every intoxicant is Khamr and every intoxicant is forbidden'.³²⁴ The *Ḥanafī*, *Mālikī*, and *Ḥanbalī* schools believe that the punishment for drinking alcohol should be eighty whips, but the *Shāfi'ī* believe the punishment should be forty whips.³²⁵ This is because a Hadith exists that states the Prophet ordered a person who had drunk alcohol to receive forty

³¹⁸ The Quran.

³¹⁹ Bassiouni (n 106)173.

³²⁰ Gamil Muhammed Hussein, 'Basic Guarantees in the Islamic Criminal Justice System' in Muhammad Haleem, *Criminal Justice in Islam* (I B Tauris 2003) 38.

³²¹ The Quran 24:4.

³²² Lippman (n 262).

³²³ The Quran 5:90

³²⁴ Muslim ibn al-Hajjaj an-Naysābūrī, *Sahih Muslim* (e-Book 36, Hadith 92 2003). The Hadith was reported by Ibn 'Umar and is found on the Sunnah website <<http://sunnahonline.com/library/figh-and-sunnah/747-the-prohibition-of-alcohol-in-islam/>> accessed 28 April 2019.

³²⁵ Lippman (n 262).

lashes.³²⁶ Moreover, taking drugs is also explicitly forbidden by *qiyás* (analogy) because drugs have the same effects as drinking alcohol in terms of the harm it causes to the human mind and public safety.³²⁷

3.5.2.1.6 *Bugháh*

The Quran deems that society must be protected from civil wars and so remain safe and peaceful. This is because civil wars in society can lead to the killing of innocent people and the destruction of public properties. Islamic criminal law prohibits rebellion against a leader.³²⁸ Rebellion is defined as an intentional and armed act that leads to the overthrow of the legitimate ruler.³²⁹ There is no agreement on the definition of rebellion among jurists of the Islamic schools, but they describe some conditions that meet the criteria for this crime: first, there must be a group of rebels; second, the rebels must be armed; third, the group must use force when revolting against a leader; and fourth, the group must have enough power to attempt to overthrow the leader.³³⁰ The leader will consider the demands of the group first, and if there is no reasonable basis for their demands, or they lack merit, then the group must desist from the rebellion.³³¹

Punishments for this crime vary according to the specific acts of the rebels. The leader must ask the group to stop the rebellion first, but if they do not stop, the leader has the right to invoke the Quran to fight them until they cease the rebellion.³³² Rebels who commit murder during the revolt are guilty of rebellion under the rule of *hudúd*. This crime carries the death penalty.³³³ Rebels who are arrested without committing murder receive *ta'zír* punishments (which are discussed later in this chapter).³³⁴ The relevant Quranic verse explains both the crime and its punishment: 'If two parties are fighting, then make peace between them, but if one of them transgresses beyond bounds against the

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Bassiouni (n 106)143.

³³⁰ Ibid.

³³¹ Lippman (n 262) 49.

³³² *Majālit al-bohoāth al-Ilmihā* is the official website used by religious scholars (Muftis) in Saudi Arabia, (Arabic Source) <<https://www.alifta.gov.sa/Ar/Pages/allMagazine.aspx>> accessed 1 May 2018.

³³³ Ibid.

³³⁴ Lippman (n 262) 35.

other, then fight ye all against the one that transgresses until it complies with the command of Allah'.³³⁵

3.5.2.1.7 Riddah

Apostasy can be defined as the voluntary renunciation of Islam.³³⁶ Islamic criminal law criminalises and punishes those who convert from Islam to another faith. This is because the person who converts to another faith violates his obligation with Allah.³³⁷ According to jurists of Islamic law, the punishment of this offence is assessed using three steps. First, the person giving up Islam must receive advice from jurists to return to Islam. Second, the person must be given enough time to make this decision. Most jurists give three days, but others give until the person is repentant and returns to Islam, while others rule that punishment is subject to the discretionary power of the ruler. Last, the person must face trial, and if found guilty, is punished with the death penalty.³³⁸ This punishment is not applied when the apostate does not know or understand the penalty of an act of apostasy.³³⁹

The prohibition of apostasy is cited in the relevant Quranic verse as follows: 'And if any of you, turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the Hereafter.'³⁴⁰ This verse prohibits apostasy, but the punishment stated is in the afterlife. However, another punishment is mentioned in the Hadith of the Prophet, when he says, 'whom-ever changes his religion, kill him'.³⁴¹

Jurists of Islamic law always try to avoid the death penalty for this offence since there may be doubt about the law of proof.³⁴² Some jurists argue that the Prophet himself did not apply the death penalty to people who converted from Islam during his life, and so the punishment for apostasy should not be the death penalty.³⁴³ During the time of the Prophet, there was one case where a person committed apostasy and the Prophet asked him to leave

³³⁵ The Quran 49:9.

³³⁶ Lippman (n 262) 48.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ The Quran 2:217.

³⁴¹ Ibn Hajar al-Asqalani A, *Fath al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī* (Vol. 6, Al-Maktaba a Salafiyyah, 2015) (Arabic source). There is significant discussion surrounding Apostasy. See this source for more information.

³⁴² Bassiouni (n 106) 133.

³⁴³ Ibid.

Medina.³⁴⁴ Some companions of the Prophet al-Nakh'i also argue that the punishment for apostasy is not the death penalty. The *Málikí* school believes that an apostate should not be sentenced to the death penalty because apostasy is a sin that will be punished in the afterlife.³⁴⁵ Ibn Taymiyya argues that the punishment of this offence is categorised under *ta'zír* punishment.³⁴⁶ On the other hand, the *Hanafí* and *Sháfi'í* schools believe that this offence is punishable using the punishments of *hudúd*, which includes the death penalty.³⁴⁷

3.5.2.2 Qişáš Crimes

The word *qişáš* originates from the Quran when Allah says, 'O you who believe! *qişáš* (the law of equality in punishment) is prescribed for you in cases of murder: the free for the free, the slave for the slave, and the female for the female'.³⁴⁸ *Qişáš* crimes refer to 'the equivalent infliction of bodily harm against the individual who has committed the [criminal] act by the victim or his family'.³⁴⁹ It may also mean that punishment can be equivalent to the criminal act. Thus, if a criminal act harms an individual physically, it is categorised as a *qişáš* crime because it is a violation against an individual's rights.³⁵⁰ In this sense, the offender must be punished in an equivalent way. The relevant Quranic verse stipulates that 'We ordained for them, a life for a life and an eye for an eye and a nose for a nose ... but he who shall forgo it out of charity will atone thereby for some of his past sins.'³⁵¹ In this Quranic verse, if the right of an individual has been violated, he or she may waive the infliction of an injurious punishment on the offender.³⁵² Another right of the victim relating to *qişáš* crimes is to receive compensation from the offender before filing a suit in court.³⁵³ Compensation can result in breaking the cycle of violation and lead to reconciliation with recognition of the act and responsibility, and the acceptance of an apology from the offender.³⁵⁴

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ As cited in Lippman (n 262)

³⁴⁷ See Ibrahim B Syed, 'Is Killing an Apostate in the Islamic Law?' (2001) Islamic Research Foundation International, Inc <<https://www.irfi.org/articles/articles>> accessed 5 April 2020.

³⁴⁸ The Quran 2:179.

³⁴⁹ Nagaty Sanad, *The Theory of Crime and Criminal Responsibility in Islamic law; Sharia* (The Office of the International Criminal Justice, The University of Illinois at Chicago 1991) 61.

³⁵⁰ Bassiouni (n 106) 139.

³⁵¹ The Quran 5:45.

³⁵² Bassiouni (n 106) 140.

³⁵³ Ibid.

³⁵⁴ Ibid.

Qisās crimes can be divided into two categories. The first includes the crimes of murder, intentional homicide, unintentional homicide, and homicide by mistake. The second category includes physical injury or maiming, both intentional and unintentional, or injury by mistake.³⁵⁵

3.5.2.3 *Ta'zír* Crimes

Jurists of the Islamic schools define *ta'zír* offences using the general principles and objectives of the Quran, Sunnah, and *ijmá'* (consensus).³⁵⁶ Thus, *ta'zír* offences lie within what *Sharí'ah* forbids. For instance, trafficking in human beings is prohibited in Islamic criminal law, but there is no specific punishment mentioned in the main sources. The evidence of the prohibition is the Hadith Al-Quadis (sacred words) where Allah said, 'I will be an opponent to three types of people on the Day of Resurrection: 1. One who makes a covenant in My Name, but proves treacherous; 2. One who sells a free person and eats his price; and 3. One who employs a labourer and takes full work from him but does not pay him for his labour.'³⁵⁷

Benmelha describes how a *ta'zír* crime can be applied to the concept of a *ta'zír* punishment as follows. a) If the criminal act does not meet the conditions and requirements of *hudúd* or *qisās* punishments. For example, if someone does not repay a contracted loan to the owner within the specific time frame set, this cannot be classed as theft but is classed as a *ta'zír* crime. b) In cases of the failure to prove *hudúd* or *qisās* during the judicial procedure, and the trial is in doubt. c) When the condemned act is prohibited whether in the Quran or Sunnah but no punishment is mentioned, such as the case of trafficking human beings or bribery crimes. d) When acts violate the security and welfare of a society, or breach moral norms in it, such as preventing children from going to school to obtain knowledge.³⁵⁸ However, punishments given out for *ta'zír* crimes must not contradict rulings in the main sources, or the general principles and objectives of Islamic law.³⁵⁹

Even though these crimes and punishments are legislated by legislative authority or leaders, they are subject to the discretionary powers of a judge to

³⁵⁵ Sanad (n 349).

³⁵⁶ Hakeem (eds) (n 264) 10.

³⁵⁷ Muḥammad ibn Ismā'īl al-Bukhārī, *Sahih al-Bukhari* Hadith No: Chapter: 37, Hadith No: 472 (Maktabat Al-Rushid Riyadh 1427 H) (Arabic source).

³⁵⁸ Ghaouti Benmelha, '*Ta'zír* Crimes in the Islamic Criminal Justice System', in M Bassiouni *The Islamic Criminal Justice System* (Oceana Publications, Inc Dobbs Ferry, 10522, NY 1982).

³⁵⁹ Saeed Ibrahim 'Basic Principles of Criminal Procedure under Islamic Sharia' in Muhammed Haleem *Criminal Justice in Islam Judicial Procedure in the Sharia* (I B Tauris 2003) 20-22.

protect society from criminal acts and to reform the criminals. Thus, *ta'zír* punishments can be either lighter punishments or more severe punishments depending on the criminal act, the elements of the crime, and the behaviour of the criminal. They also take into account the protection of society. Lighter punishments can comprise admonition or a reprimand or threat. Severe punishments can be enforced public disclosure and fines and seizure, or imprisonment, flogging, and even death.³⁶⁰

Ibn Bayyah defines *ta'zír* as the punishment of a sin or offence that is not described or specified in *Sharí'ah* sources but is a sin or offence that becomes punishable because it violates the rights of Allah, the rights of individuals or society, or the rights of the state.³⁶¹ Violation against the rights of Allah, for example, may be breakfasting during Ramadan without a legitimate excuse. An example of the violation of individuals' rights may be an insult or abuse, and violations against a state may be the use of guns in a public place, shooting into the air without committing a crime, and counterfeiting. *Ta'zír* crimes are defined by the state, which estimates and legislates for them in accordance with Islamic criminal law and its authority to preserve stability, peace, and security in society.³⁶² Hence, *ta'zír* crimes are judged based on the needs of a society; thus, the state is responsible for implementing or amending them based on the needs of society with regard to bringing benefit and avoiding harm.³⁶³

Ta'zír punishments are defined as 'a form of discretionary punishment that was to be delivered for transgression against Allah, or against an individual, for which neither fixed punishment, nor penance, was prescribed'.³⁶⁴ The Quran and Sunnah do not use the word '*ta'zír*', but the term was established by jurists who left regulation to the leader of a state or another judge.³⁶⁵ It was their objective to administer deterrent punishments and disciplinary action.³⁶⁶

Bassiouni argues that because *ta'zír* crimes and punishments are not defined by Islamic criminal law, judges hold absolute discretionary powers, a situation

³⁶⁰ Ibid.

³⁶¹ The official website of Abdallah Ibin Bayyah <<http://binbayyah.net/english/islamic-criminal-law/>> accessed 28 April 2019.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Muhammad bin Sahl as-Sarakhsi, *Kitab al-Mabsut* (reprinted Dar al-Ma'rifa Beirut 1342 A.H).

³⁶⁵ Ibid.

³⁶⁶ Ibid.

that breaches the principles of legality.³⁶⁷ However, he adds that there is no hurdle present in the Quran and Sunnah that prevents the establishment and definition of *ta'zír* crimes and punishments. On the other hand, if the enactment and codification of *ta'zír* crimes and punishments are entrusted to the power of the state by a competent authority, this power cannot be absolute but must be within the general principles of Islamic criminal law and its objectives, taking into consideration the needs of society.³⁶⁸ The power of the judge is limited to what is legislated by the state; thus, the power of the judge works as an assessment of the case in question.³⁶⁹ In this regard, Ibin Bayyah explains that *Sharí'ah* leaves the definition of *ta'zír* crimes and punishments to the authority of the state and the judge; this reflects the flexibility of Islamic criminal law, which has been developed and adopted in accordance with the needs of the public, taking into consideration different environments in society and cultures. In addition, this works to enhance the needs of society by allowing competent authorities to establish and implement what society needs.³⁷⁰

3.6 Conclusion

To conclude, this chapter has discussed whether there is compatibility between the tier of other sources of both legal systems under analysis. Compatibility is seen in the fundamentally held notions of both legal systems. Harmonisation is sought in order to facilitate compliance with international treaties, which are, increasingly, playing an important part in the international arena. The general principles of law reflect a balance between the interests of individuals, through the principle of legality, and the interests of society, through the imposition of sanctions on the people who commit crimes. Consensus is also used in both legal systems. Indeed, exploring the opinions of scholars and jurists has worked to achieve justice in the public interest of societies around the world. As we have seen, precedent is commonly used to reach justice if something is not covered in the main sources. There is no doubt that customs are an important source of law for both legal systems and act as a protective shield in cases of unlawful attack by others. It is also important to recognise the importance of respect and equitability between

³⁶⁷ M Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (London: Oceana Publications 1982).

³⁶⁸ Sanad (n 349) 64.

³⁶⁹ Ibrahim (n 359).

³⁷⁰ Ibin Bayyah (n 361) 330.

states for ensuring international peace and security. Thus, it is clear that there is common ground between both legal systems under analysis.

Chapter Four

A Macroscopic View of the Compatibilities and Incompatibilities between the Principles of Islamic Criminal Law and the Principles of the Rome Statute

4.1 Introduction

The general principles of law are codified in chapter three of the Rome Statute as follows. a) *Nullum crimen sine lege*. The principle of 'no crime without law'.¹ b) *Nulla poena sine lege*. 'No punishment without law'.² c) Non-retroactivity. 'No punishment will be applied before the law was enacted and entered into force.'³ The principle of individual criminal responsibility is mentioned in Article 25. Other principles are indicated in different parts of the Statute such as *non-bis in idem*, namely a person shall not be tried twice for the same criminal conduct. Further principles are the principle of the presumption of innocence and the principle of equality before the law.⁴ It is valid to say that the jurisdiction of the Rome Statute is based on certain universal principles⁵ that derive from international conventions and different national legislation.⁶

Most state delegations who attended the Rome meeting recognised the importance of legally codifying certain main principles and, in doing so, the international community made a great leap forward towards establishing an international treaty that sought to embody these principles of law in the arena

¹ The Rome Statute Article 22.

² The Rome Statute Article 23.

³ Ibid Article 24.

⁴ Article 66 of the Rome Statute places emphasis on the presumption of innocence. Article 27 also provides that '1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

⁵ 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) 3 UN Doc A/CONF/183/13 192-194; 'Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998) UN Doc A/CONF/183/10 192.

⁶ Per Saland, 'International Criminal Principles in the International Criminal Court' in Roy S Lee (ed), *The Making of The Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 197; see also J C Ochoa, 'The Settlement of Disputes Concerning States Arising from the Application of the Statute of the International Criminal Court: Balancing Sovereignty and the Need for an Effective and Independent ICC' (2007) 3 International Criminal Law Review.

of international justice.⁷ Ambos explains that the adoption of these principles 'was an attempt to merge the criminal justice systems of more than 150 States into one legal instrument that was more or less acceptable to every delegation present in Rome'.⁸ These main principles were also agreed on during the negotiation stage by Muslim and Arab countries.⁹ This was done on the grounds that the main general principles of law embodied in the Rome Statute are also found in Islamic criminal law.¹⁰ Parallel principles found in Islamic criminal law are: a) no crime and no punishment without law; b) the principle of non-retroactivity; c) the principle that a person shall not be tried twice for the same criminal conduct (*non-bis in idem*); d) the principle of the presumption of innocence; e) the principle of equality before the law; and f) the principle of individual criminal responsibility. Some of these principles are codified in the Rome Statute, such as the principle of the presumption of innocence, which is included in Part 6 under text that deals with the rights of the accused.¹¹

Although these general principles of law are assumed to be universal, some academics argue that Islamic criminal law may not be compatible with modern international law. One such argument focuses on the view that Islamic criminal law does not follow a comprehensive criminal legal system because it derives its rules from God's commands and prohibitions.¹² Another suggests that '[Islamic criminal law is] the result of a speculative attempt by pious scholars working during the first three centuries of Islam, to define the will of Allah. In self-imposed isolation from practical needs and circumstances they produced a comprehensive system of rules, largely in opposition to existing legal practice which expressed the religious ideal.'¹³ Furthermore, as noted by the General Assembly of the UN's Working Group on the Universal Periodic

⁷ Kai Ambos, 'General Principles of Criminal Law in The Rome Statute' (1999) 10 Criminal Law Forum 1.

⁸ Ibid.

⁹ 'Report of the Preparatory Committee on the Establishment of an International Criminal', (n 5) 192.

¹⁰ M Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (1st ed, Cambridge University Press 2013) 125.

¹¹ The Rome Statute Article 66.

¹² Max Rodenbeck, 'Islam Confronts its Demons' in *The New York Review of Books* (April 2004) <<https://www.nybooks.com/articles/2004/04/29/islam-confronts-its-demons/>> accessed 14 May 2019; Steven C Roach, 'Arab States and the Role of Islam in the International Criminal Court' (2005) 53 *Political Studies Association* 143; Kaltner, J, *What Non-Muslims Should Know, Revised and Expanded* (Augsburg Fortress, Publishers 2016)16..

¹³ J Coulson, 'The State and the Individual in Islamic Law' (1857) 6 *International and Comparative Law Quarterly* 49, 57.

Review, in its seventeenth session in 2013, *Sharí'ah* is not codified in order to regulate the rights of individuals.¹⁴

Kelly claims there are many issues that play a role in preventing the harmonisation of Islamic criminal law with international criminal law.¹⁵ He interfaces these issues with the application of *Sharí'ah* in the Muslim world. One issue cited is that there are different levels of applying punishments in *Sharí'ah*. These issues depend on the concept of culture that is accepted in different Muslim countries and the different approaches of the Islamic schools of jurisprudence. In addition, Kelly adds that the provisions of international criminal law are derived from common and civil law, while Islamic criminal law is derived from and based on the Islamic religion.¹⁶ Thus, difficulties arise in accepting Islamic criminal law at international tribunals. These views have developed because of the prevalence of the following ideas. a) The severe *hudúd* punishments of *Sharí'ah* are not consistent with Human Rights laws.¹⁷ b) There are differences in the practices of Islamic countries in the application of *Sharí'ah*. For instance, some authorities of those countries do not explicitly include human rights principles in their legislation and exercise unlawful practices against some groups/individuals in their territories. c) There is a rigid interpretation of human rights in Islamic law.¹⁸

It has been argued that controversy still surrounds the work of the United Nations Council of Human Rights in addressing and tackling distressing conflicts that are currently occurring in some areas of the world, and that this situation is leading to an increasing disrespect for human rights laws in the public sphere.¹⁹

¹⁴ The United Nations General Assembly's Working Group on the Universal Periodic Review, Seventeenth Session (21 October 2013) paragraph 1 A/HRC/WG.6/17/SAU/2 3.

¹⁵ Michael J Kelly, 'Islam & International Criminal Law: A Brief (In) Compatibility Study', (2010) *Pace International Law Review* 1,22; see also Christopher Hale, 'Does the Evolution of International Criminal Law End with The ICC?: The Roaming ICC, a Model International Criminal Court for a State-Centric World of International Law' (2008) 35 *Denver Journal of International Law & Policy* 429.

¹⁶ Kelly (n 15).

¹⁷ See Elizabeth McArthur and Manfred Nowak, *The United Nations Convention Against Torture*, (Oxford University Press 2008) 45; see also Markus Beham, *Islamic Law and International Criminal Law* (Nijhoff 2013) 360.

¹⁸ Rudiger Lohiker, *Islamisches Recht*, (UTB GmbH 2011).

¹⁹ Subedi, S P, *The Effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights* (Routledge, London/New York 2017). Subedi discusses the lack of commitment to human rights by some countries and the violation of individuals' rights. He argues that there is a lack of commitment to human rights laws by some countries, but this might be because of the feeble mechanisms of UN Human Rights mechanisms. Subedi suggests economic sanctions against non-complying countries and that the international community should consider establishing an international Human Rights Court.

Baderin argues that these views have obliged Muslim scholars to adopt a defensive position about the application of *Sharí'ah* as it relates to international obligations.²⁰ Nevertheless, The Cairo Declaration on Human Rights in Islam was formed by some Muslim/Arab countries that are parties of The Organization of the Islamic Conference (OIC).²¹

Kamali argues that the application of *Sharí'ah* in different ways by Muslim jurists reflects its flexibility and the extent to which it is accepted by the diverse cultures of the Muslim world.²² Moreover, Breiner argues that the different views of Muslim jurists can be a blessing for the Muslim community.²³ This is because judges can choose the most appropriate view of jurists working on the case in question using 'eclectic choice'.²⁴

Baderin contends that the growing influence of Muslim nations who adopt different schools of Islamic jurisprudence has led to agreement, *ijmá'*, on the general principles of law that meet the demands of Muslim communities, especially in relation to international considerations.²⁵ Elewa Badar outlines some reasons for misconceptions among some Western writers about Islamic criminal law, noting that a lack of available literature about Islamic law for Westerners has meant that Western writers may not be able to grasp Islamic criminal law in detail.²⁶ However, Badar illustrates two points of similarities between the two legal systems: Islamic criminal law shares the same general principles that exist in international criminal law; and just as international criminal law owns its general rules, Islamic criminal law also has its own objectives called *Maqased a-Sharí'ah* (the objectives of *Sharí'ah*).²⁷ Malekian suggests that there is no reason not to address compatibilities and incompatibilities between the two systems.²⁸ Malekian also notes a convergence between the two legal systems and argues that international criminal law should not ignore Islamic criminal law in its international

²⁰ Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003)10-12.

²¹ The Cairo Declaration on Human Rights (2004), entered into force in 2008.

²² Mohammad Kamali *Principles of Islamic Jurisprudence* (3rd edn, The Islamic Texts Society 2003) 169-170.

²³ B Breiner 'A Christian View of Human Rights in Islam, Two Papers on Sharia' in Mashood Baderin (eds), *The Purpose of Shariah* (Birmingham CSIC papers).

²⁴ Baderin (n 20) 33.

²⁵ Ibid.

²⁶ Mohammed Elewa Badar, 'Islamic Law (Sharia) and the Jurisdiction of the International Criminal Court' (2011) 24 (2) *Leiden Journal of International Law* 411-433 <<http://dx.doi.org/10.1017/S0922156511000082/>> accessed 18 April 2018.

²⁷ Ibid.

²⁸ Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Brill's Arab and Islamic Laws Series 2011) 344.

conventions. He also explains that both legal systems share international concepts, such as the prohibition of international crimes and seeking peace in the world, even though there are some contentious points.²⁹ Islamic criminal law can be understood as an effective legal system containing 'moral and religious principles'.³⁰

In this regard, one may say that even if there is a different application of Islamic criminal law among Muslim countries, this does not mean that Islamic criminal law should be seen as an inconsistent legal system. This is because the different applications of *Shari'ah* reflect Muslims' understanding of *Shari'ah* in different cultures. For example, Indonesia's culture is different to that of Pakistan or Arabic culture, for instance. Thus, Islamic law per se should not be assessed according to its application but according to its understanding, since a rigid application may not reflect the real essence of *Shari'ah*.

Thus, for the purposes of the current study, examining the general criminal principles of law that exist between the two legal systems using Western-based methods can lead to a detailed understating of the potential compatibilities between Islamic criminal law and international criminal law. This endeavour seeks to open up dialogue for finding consistencies at an international level in order to promote stability and peace in the world, and achieve the tenets of human rights. Consequently, this chapter aims to examine the compatibilities and incompatibilities between the general criminal principles of law of the Islamic and international systems from a macroscopic viewpoint.

4.2 The Principles of 'No Crime without Law' and 'No Punishment without Law'

4.2.1 The Rome Statute

These principles are more commonly known as *nullum crimen sine lege* and *nulla poena sine lege* and appear in Part Three of the General Principles of the Rome Statute, Articles 22 and 23.³¹ Article 22(1) provides that there is no criminal responsibility for an act or conduct unless it has already been defined 'at the time it takes place' within the jurisdiction of the Court as a criminal act. These principles do not only protect individuals' rights but are against unlawful

²⁹ Ibid.

³⁰ Elena Namli, 'Universal Rights versus Sharia? Reflections on the Moral and Legal Dimensions of Human Rights Law and Sharia' (2013) 8 Religion and Human Rights 139.

³¹ The Rome Statute.

intervention by the state, which works to reinforce the legitimacy of the state.³² Broomhall explains that 'the Statute's articulation of legality principles not only protects the accused from a possible overreaching by the Court's judges, but provides certainty to states as to the extent of their obligations under the Statute's provisions'.³³

These principles not only protect individual rights but also constitute the fundamental constitutional foundation of the separation of three powers, executive, judicial, and legislative, at both national and international level.³⁴ At international level, the ICC Statute provides 'a constitutional directive to the Court's organs' whether this is executive or judicial and it respects legality principles within the practice of roles'.³⁵ However, the idea of restricting the powers of judges to resort to judicial analogy in order to seek the definition of crimes within the Court's jurisdiction (as stated in Article 22, Paragraph 2)³⁶ is opposed in Islamic criminal law.³⁷ This is because this rule minimises the power of the Court's judges to use analogy in order to reach justice. Moreover, this idea may not be absolute because Paragraph 3 of Article 22 stipulates that 'this Article i.e. 22 shall not affect the characterisation of any conduct as criminal under international law independently of this Statute'.³⁸

Bassiouni notes that the principle of no crime without law was accepted in the Roman legal system and is accepted in most civil legal systems worldwide, but that it prevents a reliance on judicial analogy. Islamic law and common law can rely on judicial analogy if there is ambiguity of law in the case in question.³⁹ Akendy argues that judicial analogy can be used in the Syrian crisis to define the use of chemical weapons by the Head of the Syrian Government against the Syrian population, although the definition of the crime in the Statute refers

³² Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge Studies in International and Comparative Law 2009) 303-306.

³³ Bruce Broomhall, 'Article 22, *Nullum Crimen Sine Lege* in Commentary on The Rome Statute of the International Criminal Court' in Leila Nada Sadat (ed) *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transitional Publisher, Inc Ardsley New York 2002).

³⁴ Ibid 186.

³⁵ Ibid.

³⁶ The Rome Statute Article 22(2) provides that 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In cases of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'

³⁷ Osama Ghanem Alobaidi, 'The International Criminal Court: an Arab Perspective' (Unpublished Thesis, Washington University 2000).

³⁸ The Rome Statute Article 22.

³⁹ Bassiouni (n 10) 35. Markus Dubber & Tatjana Hörnle, *Oxford Handbook of Criminal Law*, (2014).

to 'poisonous weapons'.⁴⁰ Moreover, it has been argued that the most significant principle in international criminal law is to provide individuals with sufficient notice of their unlawful conduct, even though the crimes are not strictly defined. This is because individuals must be made aware of the nature of their international criminal conduct.⁴¹ The Pre-Trial Chamber at the ICC in *Prosecutor v. Katanga* used this principle (i.e. *nullum crimen sine lege*) in its broader interpretation when it interpreted the crimes committed in this case, and characterised them as crimes that fell within the jurisdiction of the ICC (as 'other inhumane acts') according to Article 7(1)(k), 'as a violation of international customary law and against human rights'.⁴²

These principles have been confirmed in many international instruments such as Article 11(2) of the Universal Declaration of Human Rights and Article 15 of The International Covenant on Civil and Political Rights. The significance of these principles has been respected and adopted into international conventions and national laws.⁴³ In addition, these principles are embodied in the Arab Charter of Human Rights in Article 15, which emphasises that there is no crime and no punishment without law.⁴⁴

4.2.2 Islamic Criminal Law

'No crime without law' and 'no punishment without law' mean that no crime or punishment can exist without a law that has been issued and is applied.⁴⁵ Islamic sources of law stipulate these principles specifically in order to preserve individual rights. These principles are considered inherent in *Sharí'ah* law because they establish legal principles connected with criminalisation and punishment.⁴⁶ They also embrace the idea that criminal acts must be prohibited in *Sharí'ah* (the Quran and Sunnah or by Islamic law, which has been issued and is applied). In other words, a statement of prohibition must be known to the individual; this gives him or her knowledge

⁴⁰ D Akendy, EJIT Talk <<https://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people/>> accessed 9 December 2017.

⁴¹ Neha Jain, 'Judicial Law Making and General Principles of Law in International Criminal Law' (2016) 57 Harvard International Law Journal 111,147.

⁴² *Prosecutor v Katanga et al.* (Judgment 2008) (ICC-01/04-01/07-717) (30) <https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF> accessed 18 December 2017.

⁴³ The Universal Declaration of Human Rights (1948) Article 11(2) and The International Covenant on Civil and Political Rights (1966), entered into force in 1976, Article 15.

⁴⁴ The Cairo Declaration on Human Rights in Islam (1990).

⁴⁵ Bassiouni (n 10) 126.

⁴⁶ Badar (n 26).

that the act has been criminalised and will be punished.⁴⁷ The result of these principles is the assertion that a person is free to act unless certain acts have been prohibited. Moreover, the enforcement of this principle embodies respect for human rights and achieving justice.⁴⁸

The legal basis for this principle in Islamic criminal law can be found in the main sources of Islamic criminal law. Some verses in the Quran and other sources of *Sharī'ah* indicate the legal principle outlined above. For example, in the Quran, Allah says, 'And never do we punish any people until we send a Messenger'.⁴⁹ In the Sunnah, the Prophet Mohammed is reported as saying the following in his Farewell Sermon.

O People, just as you regard this month, this day, this city, as sacred, so regard the life and property of every Muslim as a sacred trust. Return the goods entrusted to you to their rightful owners. Hurt no one so that no one may hurt you. Remember that you will indeed meet your Lord, and that He will indeed reckon your deeds. Allah has forbidden you to take usury (interest); therefore, all interest obligations shall henceforth be waived. Your capital, however, is yours to keep. You will neither inflict nor suffer any inequity. Allah has judged that there shall be no interest and that all the interest due to Abbas ibn Abdul Muttalib (the Prophet's uncle) shall henceforth be waived.⁵⁰

The Arab Charter of Human Rights emphasises that these principles should be applied and respected. In this Charter, Article 6 stipulates that 'There shall be no crime or punishment except as provided by law and there shall be no punishment in respect of an act preceding the promulgation of that provision. The accused shall benefit from subsequent legislation if it is in his favour.'

These principles are included in the Basic Law of Saudi Arabia, Article 38, which also emphasises and embodies the provisions of *Sharī'ah* law, and indicates that there is no crime and punishment without a law that has already been issued and applied.⁵¹

⁴⁷ Ibrahim Saeed Hasan, 'Basic Principles of Criminal Procedure under Islamic Sharia' in Muhammad Abdul Haleem, Adel Omar Sherif and Kate Daniels, *Criminal Justice in Islam and Judicial Procedures in the Sharia* (I B Tauris 2003) 17.

⁴⁸ Bassiouni (n 10) 35.

⁴⁹ The Quran 17:15.

⁵⁰ The Sunnah website <<https://sunnah.com/muslim>> accessed 9 December 2017. This website consists of most of the Hadiths of the Prophet Mohammed collected from reliable Arabic sources.

⁵¹ The Basic Law of Saudi Arabia (1992), Article 38.

Islamic criminal law contains the principle and confirms this in its main sources, since Allah will not punish anyone for an act unless he sends his messenger to tell people about the prohibited deeds and permissible deeds. This is by way of a revelation to His Messenger, as Allah revealed to the Prophet Mohammad, and includes the crimes of *ḥudúd* and *qisás*.

4.2.3 Compatibilities and Incompatibilities

In Islamic criminal law, crimes listed under *ḥudúd* and *qisás* have been established by Allah; thus, they are established from divine power. Crimes listed under *ta'zír* have been deemed by legislative authorities using the concepts of Islamic law. Since the emergence of Islam, the former have been classed as fixed, whilst the latter fall under the discretionary power of component authorities of a state. In this respect, a state will consider the principles of legality within its laws to protect individuals' rights and to respect the rule of law. Some compatibility can be found between Islamic criminal law and the ICC Statute in that both legal systems confirm and embody the legality of the same principles in their sources in respect of their protection of individuals' rights and the rule of law. This indicates that both legal systems respect the human rights of freedom and innocence in that no one shall be prosecuted and punished without recourse to provisions that have been issued within the law. In addition, in terms of their application: a) legislative authorities in both legal systems are responsible for issuing legal principles, and are concerned with codifying these legal principles; b) judges in both legal systems cannot proceed with the trial of a person if the law does not include the definition of a crime and its punishment, or invoke legal principles; and c) the prosecution authorities in both legal systems are prohibited to carry out the pursuit of individuals without identifying legal principles.

4.3 The Principle of Non-Retroactivity

4.3.1 The Rome Statute

This principle is considered in the Rome Statute under Article 24(1), which provides that criminal responsibility within the Statute will not be applied retroactively to prior conduct.⁵² Saland, who was the Chairman during the negotiations for adopting the criminal principles of the Rome Statute, states that when the International Law Commission drafted their principles in 1994

⁵² The Rome Statute Article 24(1).

they adopted the term 'act' and 'omission' in Article 21(1).⁵³ But these terms may refer to 'contentious crimes', namely war crimes, crimes of genocide, crimes against humanity, and crimes of enforced disappearance, which are continuing.⁵⁴ All these crimes and their elements were established before the ICC Statute was established. Thus, there remained the crucial question of how the ICC could comply with the principle of non-retroactivity while crimes were still being enacted, namely crimes that began before the establishment of the ICC Statute. Some delegations rejected the terms after they were translated into their own languages. Saland suggested the term 'conduct' be used, because the term 'conduct' may be employed to refer to crimes outside the Court's jurisdiction until the Court's provisions enter into force. He also suggested that matters can be settled by the Court's judges.⁵⁵

It is significant to note that Paragraph 1 of Article 24⁵⁶ has a strong relationship with Paragraph 1 of Article 11.⁵⁷ Both assert the application of non-retroactivity for ICC jurisdiction. The latter paragraph provides that the meaning relates to 'crimes committed', while the former paragraph, namely Article 24(1), provides that individuals shall not be criminally responsible for conduct committed prior to the ICC Statute entering into force. This relates to 'criminal conduct' and Article 11(1).⁵⁸

Paragraph 2 of Article 24 also provides exceptions for applying the non-retroactivity principle.⁵⁹ One exception can be when the law of the ICC is changed or amended before the release of a final judgment during an investigation or during prosecution from the Court. If the law changed is in favour of the accused, the latter law shall be applied.⁶⁰ Roosevelt points out that this exception 'is an extension of the general rule that it is impermissible

⁵³ Per Saland, 'International Criminal Law Principles' in Roy S Lee (ed), *The International Criminal Court The Making of the Rome Statute: Issues Negotiations Results* (Kluwer Law International 1999) 196.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ The Rome Statute Article 24 1) provides that 'No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute'.

⁵⁷ The Rome Statute Article 11(1) stipulates that 'The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute'.

⁵⁸ Eleanor Roosevelt, 'General Principles of International Criminal Law' in Leila Sadat (ed) *The International Criminal Court and the Transformation of International Law* (Translation Publisher Inc., Ardsley, New York 2002) 185.

⁵⁹ The Rome Statute Article 24(2) provides that 'in the event of a change in the law applicable to a given case prior to a final Judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply'.

⁶⁰ The Rome Statute Article 24(2).

to adopt legislation either criminalizing acts which were legal when committed or aggravating the crime or punishment therefore'.⁶¹

Another exception is articulated in Article 17(2), which provides that when domestic courts are unable or unwilling to prosecute criminals or exercise their jurisdiction over crimes (within the ICC jurisdiction), the ICC will exercise its jurisdiction even though a state is not a state party of the Court.⁶² This is evident in the *Burundi* case. In this case, the Pre-Trial Chamber III of the ICC stated the following.

In this regard, the Chamber considers that a national investigation merely aimed at the gathering of evidence does not lead, in principle, to the inadmissibility of any cases before the Court, considering that, for the purposes of complementarity, an investigation must be carried out with a view to conducting criminal prosecutions. According to Article 1 of the Statute, the fundamental purpose of the Court is to prosecute those responsible for the most serious crimes of international concern in a manner 'complementary to national criminal jurisdictions'.⁶³

Thus, on the basis of this wording, national investigations that are not designed to result in criminal prosecutions do not meet the admissibility requirements under article 17(1) of the Statute.

The non-retroactivity principle is framed by several international instruments, including Article 11(2) of The Universal Declaration of Human Rights, which provides the following.

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.⁶⁴

Another international instrument designed to ensure the application of the principle is the International Covenant on Civil and Political Rights. Article 15 of this Convention (1) notes this point.⁶⁵

⁶¹ Roosevelt (n 58).

⁶² When the Security Council refers the situation to the Court. See Kai Ambos, 'General Principles of Criminal Law in The Rome Statute' (1999) 10 Criminal Law Forum 1.

⁶³ The Pre-Trial Chamber III (Judgment 9 November 2017) ICC-01/17-X (152).

⁶⁴ The Universal Declaration of Human Rights (1948) Article 11(2).

⁶⁵ The International Covenant on Civil and Political Rights (1966), entered into force in 1976, Article 15(1).

4.3.2 Islamic Criminal Law

The non-retroactivity principle is an inherent principle in Islamic criminal law. It means that the conduct being criminalised, and the punishment administered according to Islamic criminal law, cannot be applied retroactively.⁶⁶ This refers to provisions issued in the Quran and Sunnah and laws already made using concepts contained therein. It also means that no one shall be punished for any act that is not already covered by Islamic provisions.⁶⁷

This principle in Islamic criminal law aims to, first of all, achieve justice and fairness. This is done by announcing criminal acts and punishments so that people know what these acts are and the general punishments administered for committing these acts. This relates to a general rule in Islamic law that provides that deeds, acts, and speech are permissible unless they have otherwise been prohibited under the provisions of *Sharī'ah* and Islamic law.⁶⁸ Second, the rejection of retroactivity in Islamic criminal law ensures important protection of human rights.⁶⁹ The laws of Saudi Arabia are based on Islamic law, and Article 38 of its Basic Law provides the following.

Punishment shall be restricted to the actual offender. No crime shall be established as such and no punishment shall be imposed except under a judicial or law provision. No punishment shall be imposed except for acts that take place after en-action of the law provision governing them.⁷⁰

However, there is one exception to the application of this principle in Islamic criminal law that relates to the rights of the accused. This means that if the accused benefits from previous laws, then his or her punishment will remain unchanged.⁷¹ An example of this is when the accused has committed a criminal act that has been punished by Law X (the previous law) but after arrest and trial a new Law XX is issued that has a higher level of punishment than the previous law.⁷² There is a good example of how this principle works in the Quran. Prior to the introduction of Islam, men were allowed to marry two sisters at the same time, but when Islam was introduced this became

⁶⁶ Muhammed Abo Zahra, *al-Jārima wa al-uqubā fi al-Islam* (Dar al-fikr al-arabi, Egypt, 1998) 133 (Arabic source).

⁶⁷ Ibid.

⁶⁸ Badar (n 26) 423.

⁶⁹ Ibid.

⁷⁰ The Basic Law of Saudi Arabia (1992) Article 38.

⁷¹ Abo Zahra (n 66) 362.

⁷² Muhammad Munir, 'The Principle of Legality in Islamic Criminal Justice Systems' (2015) 1 Islamic Criminal Law 107.

prohibited. However, the Quran says, 'And two sisters in wedlock at the same time, except for what has already passed. Allah is oft forgiving, most merciful.'⁷³ Thus, if a man had already married two sisters before he converted to Islam, then he was allowed to continue with this state of affairs and was not subject to the new law retrospectively.⁷⁴

The legal basis of this principle in Islamic criminal law exists in the Quran when Allah says, 'Messenger who gave good news as well as warning that mankind, after (the coming) of the messenger, should have no plea against Allah, for Allah is exalted in power, wise.'⁷⁵ Another Quranic verse says, 'Allah has pardoned what is past; but whoever returns [to violation], then Allah will take retribution from him. And Allah is Exalted in Might and Owner of Retribution.'⁷⁶ In the Sunnah, the Prophet Mohammed is asked by those who used to drink alcohol before they converted to Islam whether or not they will be punished, but the Prophet replies that Islam eliminates all that has preceded.⁷⁷

4.3.3 Compatibilities and Incompatibilities

The non-retroactivity principle is adopted in both legal systems and is inherent for protecting the rights of the accused. Both legal systems seem to meet on exceptions relating to non-retroactivity when the principle relates to the rights of the accused. The rights of the accused in Islamic criminal law are not codified but are referred to in separate sources of Islamic law, while the rights of accused in the Rome Statute are articulated in Article 67.⁷⁸

The non-retroactivity principle cannot be applied to *hudúd* and *qişás* crimes in Islamic criminal law with regard to Muslims who have committed such crimes. This is because the definition and penalties for both crimes have been fixed since the birth of Islam and are considered stable because they are regulated by the Quran and are considered to be sacred provisions given by Allah. Both types of crimes are punished in life and in the hereafter. The former carries punishments relating to the violation of Allah and are outlined in the Quran; the latter aims to ensure victims' rights in order to maintain peace and prevent crime.

⁷³ The Quran 4:23.

⁷⁴ Bassiouni (n 10).

⁷⁵ The Quran 4:165.

⁷⁶ The Quran 17:15.

⁷⁷ Cited in Munir (n 72).

⁷⁸ Article 67 of the Rome Statute 'Right of the Accused'.

Furthermore, the punishment of crimes in Islamic criminal law is independent. This means that the crimes of *qişáş* and *hudúd* do not need acceptance or ratification from states and there is no time limit of the termination of punishments, while the crimes and punishments in international criminal law need the support of a number of states to be applicable within an international treaty and, moreover, need co-operation between states to enforce the treaty provisions in question.⁷⁹

4.4 A Person Shall Not be Tried Twice for the Same Criminal Conduct (*ne bis in idem*)⁸⁰

4.4.1 The Rome Statute

This principle is classed as a general rule in the Rome Statute.⁸¹ It is known as *ne bis in idem* and is articulated in Article 20, which stipulates in Paragraph 1 that 'except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court'.⁸² This paragraph prevents the ICC from putting a person on trial who has been tried before. Paragraph 2 of the same Article⁸³ prevents other courts from doing the same, whether national or international.⁸⁴ In this sense, it should be noted that the courts described in this Article are the national courts of ICC member states and all national courts, whether they are member states or non-member states. Paragraph 3 of the same Article 20 provides exceptions to this principle: where the procedures of courts intend to protect the accused from criminal responsibility within the ICC jurisdiction, and where the procedures of

⁷⁹ Malekian (n 28) 162.

⁸⁰ This term is taken from the Roman Law of Maxim. This principle is also known as 'double jeopardy' in the US constitution; see Gerard Conway, '*Ne Bis in Idem* in International Law' (2003) 3 (2) International Criminal Law Review 217.

⁸¹ There are different views with respect to *ne bis in idem*. Some view this as a rule of international criminal law, while others recognise it as principle of international criminal law.

⁸² The Rome Statute Article 20; M N Morosin, 'Double Jeopardy and International Law: Obstacles to Formulating a General Principle' (1995) 64 Nordic Journal of International Law 261; Munir (n 72) explains that these principles are considered to be universal and constant, while general rules are classed as debatable and changeable because they are based on the needs of society.

⁸³ The Rome Statute Article 20(2) provides that 'no person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court'.

⁸⁴ Lorraine Finlay, 'Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of The Rome Statute' (2009) U C Davis Journal of International Law & Policy 221; John Rosenthal states that The ICC cannot protect the principle of double jeopardy, as quoted from 'A Lawless Global Court: How the International Criminal Court Undermines the UN System' (Hoover Institution Press 2004).

the previous court have raised doubts about its ability to operate independently or impartially with respect to the norms recognised by international law.

Bassiouni and Wise also note that *ne bis in idem* cannot be applied as an absolute approach because a state may take its own interests into consideration rather than the interests of the international community.⁸⁵ Moreover, Conway states that '[it] in turn may reflect a belief that recognition of an international *ne bis in idem* principle would adversely affect the sovereignty of states'.⁸⁶ Thus, the state can prosecute and start judicial proceedings before its national courts if the crime constitutes a serious violation of its national security. Violations of this principle may raise controversy over what crimes constitute a threat to national security.

The Rome Statute aims to punish the criminal conduct of high-status people, whether these people work in an official, military, or civilian capacity. Thus, the Statute deems that national courts must operate independently and fairly because high-level people may be able to influence court decisions and avoid punishment.⁸⁷

This principle has also been articulated in previous international instruments. Article 14(7) of the International Covenant on Civil and Political Rights provides that a person shall not be tried again for the same offence that he or she has already been tried for 'in accordance with the law' in a court of a state.⁸⁸ Article 16 of the Arab Charter on Human Rights indicates that it is not acceptable to put a person back on trial who has already been prosecuted and convicted or acquitted before a court for the same act.⁸⁹ Moreover, Article 10(2) of the International Criminal Tribunal for Yugoslavia and Article 9 of the International Criminal Tribunal for Rwanda cites the same intentions as those given in Paragraph 3 of Article 20 of the Rome Statute: both focus on the proceedings and procedures of previous courts where they did not operate

⁸⁵ M Bassiouni and E M Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht, Martinus Nijhoff Publishers 1995) 26, 42.

⁸⁶ Conway (n 80) 217. Conway notes that reasons may be related to the variety of different approaches taken by national legal systems in the world to extradition. Thus, it seems difficult to adopt this principle at international level.

⁸⁷ An example of this was seen in the situation in the Republic of Burundi. See The ICC Pre-Trial Chamber III (Judgment 9 November 2017) (01/17-x (152) (152)); see also Public Redacted Version of 'Decision Pursueant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi ICC-01/17-x-9-US-Exp. Pre Trial Chamber III (25 October 2017) (187).

⁸⁸ The International Covenant on Civil and Political Rights (1966), entered into force in 1976, Article 14(7).

⁸⁹ The Arab Charter on Human Rights (2004), entered into force in 2008, Article 16.

fairly or independently within the international norms of the law. Any variation of the formula may not change the goal itself, which is that criminals should not escape punishment.⁹⁰ This same concept is regulated in the Arab Charter on Human Rights in Article 16, which recognises that all member states of the Charter must agree that a person should not be tried more than once for the same crime. This Article goes further to provide rights to challenge the legality of a second trial and demand the defendant's release.⁹¹

4.4.2 Islamic Criminal Law

The principle of *ne bis in idem* as it works in Islamic criminal law means that when a person is prosecuted, tried, and then convicted or acquitted before a court for the same conduct, they must not again be prosecuted and tried for the same criminal conduct.⁹² This principle is an inherent principle in Islamic criminal law. Its aim is to protect the human rights of individuals and so ensure that they are 'free from double jeopardy within criminal law'.⁹³ However, there are exceptions to the application of this principle in Islamic criminal law: a) if a verdict is based on false witnesses or counterfeit documents; and b) when important documents/evidence come to light after the event of the verdict, and when these documents/evidence are crucial to the case (such as new facts or new evidence). These rules are designed to achieve justice and prevent criminals from escaping their deserved punishment, and to compensate the victim.⁹⁴

The legal basis of this principle in Islamic law is seen in the following Quranic verse: 'And no bearer of burdens shall bear another's burden; and if one heavily laden calls another to bear his load, nothing of it will be lifted even though he be near kin.'⁹⁵ The interpretation of this verse, according to Al-Qurtubi, is that no one shall be punished twice for one crime.⁹⁶

⁹⁰ Conway (n 80) 217, 244.

⁹¹ This Article states that 'Anyone against whom such proceedings are brought shall have the right to challenge their legality and to demand his release. Anyone who is the victim of unlawful arrest or detention shall be entitled to compensation.'

⁹² Muṣṭafā al-Zulmī, *al-Mas'ūliyyah al-Jinā'iyyah fī al-Sharī'ah al-Islāmiyah* (Dār al-Nashr al-Ḥasan 2014) 13, 18 (Arabic source).

⁹³ Malekian (n 28) 350.

⁹⁴ al-Zulmī (n 92) 389.

⁹⁵ The Quran 35:17.

⁹⁶ Muhammed al-Qurtubi, *al-Jamī' li ahkam al-Quran* (al-Risālah 2006) (Arabic source). <<http://waqfeya.com/book.php?bid=2538>> accessed 9 December 2017 (Arabic source).

4.4.3 Compatibilities and Incompatibilities

The principle that a person shall not be tried twice for the same crime is formulated in the Rome Statute and in Islamic criminal law. However, in the Rome Statute, it is a provision that does not belong to general criminal principles mentioned in Part Three of the ICC Statute but only to the rules of international criminal law. The exception to this principle in Islamic criminal law focuses on procedures, documents, and witnesses for the case, whilst Article 20 of The Rome Statute focuses on the work of the Court, meaning that if there is doubt about the fairness of the previous trial, in respect of independence and impartiality, then this principle shall be applied. Thus, does Article 20(3)(a) mean that the Court can interfere with the intent of previous judges? Further, does the Court have the right under international law to evaluate the previous rulings of national courts? Article 84 of the Rome Statute partially corresponds to Islamic criminal law in terms of its focus on new facts and new evidence, rather than focusing on the procedures of the previous trial, as mentioned in Article 20.⁹⁷

4.5 The Presumption of Innocence

4.5.1 The Rome Statute

During the drafting of the Rome Statute it was proposed that the principle of the presumption of innocence should fall within Part 3 of the General Principles of the ICC, but instead it was placed in Part 6 in Article 66. This is because the presumption of innocence deals with criminal accountability.⁹⁸ Friman explains that this principle was placed in Part 6 because it was

⁹⁷ The Rome Statute Article 84 stipulates that 'The convicted person or, after death, spouses, children, parents or one person alive at the time of the death of the accused who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final Judgment of conviction or sentence on the grounds that: a) New evidence has been discovered that: i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46. 2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate: a) Reconvene the original Trial Chamber; b) Constitute a new Trial Chamber; or c) Retain jurisdiction over the matter, with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the Judgment should be revised.'

⁹⁸ M Cherif Bassiouni 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) Cornell International Law Journal 443.

included in previous international criminal tribunals under their Rules of Procedure and Evidence,⁹⁹ and in the International Covenant on Civil and Political Rights in Article 14(2).¹⁰⁰

The principle as it is outlined in the Rome Statute, Article 66, is articulated in three paragraphs. Paragraph 1 provides that a person is presumed innocent until he or she has been proved guilty in front of the Court within its applicable law.¹⁰¹ This paragraph outlines the rights of the accused as follows.

a) The accused can make a statement before the Court, and he or she can present evidence, but the oath cannot be sworn. (The principle of an 'oath' is used in Islamic law and in common law jurisdiction, but it is not used in civil law jurisdiction.) The oath is not used in ICC Court trials.¹⁰²

b) The accused can request temporary release subject to special circumstances under the estimation of the Court's judges.¹⁰³

c) The accused is allowed to be detained in a place apart from convicted criminals.

d) The accused has the right to remain silent during the investigation stage and during the trial stages.

e) The burden of proof shall be upon the Prosecution of the Court, and it must prove that the accused is guilty beyond reasonable doubt. This rule was asserted in The Pre-Trial Chamber II in the case of *Jean-Pierre Bemba*.¹⁰⁴

The presumption of innocence is, in the ICC Statute, a general principle used during all stages of criminal procedures, up until a defendant is judged guilty or innocent by the Court. It is articulated in Articles 66 and Articles 67 of the Rome Statute, which outline the rights of the accused. Paragraph 2 of Article 66 provides that 'the onus is on the Prosecutor to prove the guilt of the

⁹⁹ Hakan Friman, 'Rights of Persons Suspected or Accused of a Crime' in Roy S Lee (ed) *The International Criminal Court: The Making of The Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 251-252. See International Criminal Tribunal for the former Yugoslavia (1993) Article 21; the International Criminal Tribunal for Rwanda (1994) Article 21.

¹⁰⁰ The International Covenant on Civil and Political Rights (1966) entered into force in 1976.

¹⁰¹ The Rome Statute Article 66(1).

¹⁰² Hakan Friman, 'Rights of Persons Suspected or Accused of a Crime' in Roy S Lee (ed) *The International Criminal Court: The Making of The Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 251-252.

¹⁰³ William Schabas, *An Introduction to the International Criminal Court* (4th ed, Cambridge University Press 2011) 219.

¹⁰⁴ *The Prosecutor v Bemba*, Pre-Trial Chamber II Judgment ICC-01/05-01/08.2009 (15 June 2009) (31) and (215). The Chamber states that 'Lastly, in making this determination the Chamber wishes to underline that it is guided by the principle *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, *mutatis mutandis*, to all stages of the proceedings, including the pre-trial stage'.

accused'. This outlines the duties of the Court Prosecutor to disclose evidence; thus, the accused has the right to know what this evidence is so that he or she can begin a defence.¹⁰⁵ Consequently, this paragraph should be read in accordance with Article 16 paragraph(1), which notes that when the Prosecutor wants to start an investigation, he or she should understand that the burden of proof is upon him or her. The *Lubanga* Judgment of 2012 notes there must be no interpretation of the presumption of innocence, as outlined in Article 66.¹⁰⁶

The idea of the presumption of innocence has been adopted from various national criminal laws into international law; thus, international organisations such as the Security Council, the General Assembly of the United Nations, and the Human Rights Council may work as one to achieve justice at international level.¹⁰⁷ Schabas argues that the presumption of innocence must be agreed 'unanimously by the judges' decision in the court because of the seriousness of the charges and the available sentences'.¹⁰⁸ He adds that the decisions made by Court judges on the presumption of innocence shall exclude any reasonable doubt, because if there is reasonable doubt this may be enough to presume the defendant innocent according to the context of Paragraph 3, Article 66¹⁰⁹ The presumption of innocence was given consideration in international treaties before the establishment of the Rome Statute. The European Court of Human Rights articulated this principle in their commentary on *Barbera, Messegue and Jabardo v. Spain* in 1988.¹¹⁰ This principle is also regulated in many international instruments; for instance, in Article 14(2) of the International Convention on Civil and Political Rights¹¹¹ and in Article 14 of the European Convention for the Protection of Human

¹⁰⁵ Friman (n 102) 251.

¹⁰⁶ *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06) Trial Chamber I (Judgment 14 March 2012) 914 vii).

¹⁰⁷ Schabas (n 103) 219.

¹⁰⁸ Ibid.

¹⁰⁹ The Rome Statute Article 66(3) provides that 'In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.'

¹¹⁰ *Barbera, Messegue and Jabardo v Spain* (1988) Series A No. 146 (77). The European Court of Human Rights (1998) defines the presumption of innocence as follows: 'it requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.'

¹¹¹ International Covenant on Civil and Political Rights (1966), entered into force in 1976.

Rights.¹¹² In the Arab world it is also regulated in Article 33 of the Arab Charter on Human Rights.¹¹³

4.5.2 Islamic Criminal Law

The presumption of innocence in Islamic criminal law means that '[an accused] is innocent until a court ruling against him'.¹¹⁴ It is also defined as 'the original certainty that means a person is innocent of any charges against him/her until proven otherwise in a court'.¹¹⁵ The origin of certainty is that a person is born without sin, crime, and obligations from others, or any established punishment on his or her conscience.¹¹⁶ Kamali refers to this as one of the maxims of Islamic jurisprudence. Maxim means 'non-liability' (*al-aslu bar'at al-dhimma*).¹¹⁷ This principle also means that a person is innocent of a crime until a court rules his or her guilt using lawful evidence and without any doubt.¹¹⁸ Thus, doubt is interpreted as being in favour of the accused.¹¹⁹

Questions may arise as to why the presumption of innocence is considered a basic principle but not a rule in penal legislation in Islamic law. A scholar argues that it is one of the fundamental rights of individuals in criminal law legislation. Moreover, because an accusation against a person touches their freedom, integrity, and reputation, then the accusation must be constrained by lawful evidence, which is ruled on by a fair and just court, without any doubt.¹²⁰ Bassiouni states that if individuals are prosecuted and punished without law, then individuals should be presumed innocent.¹²¹

The application of the presumption of innocence in Islamic criminal law belongs also to the rights of the accused. This principle is divided into three categories in its application in Islamic criminal law. The first category relates

¹¹² The Convention for the Protection of Human Rights and Fundamental Freedoms (1950), entered into force in 1953.

¹¹³ Arab Charter on Human Rights (2004), entered into force in 2008.

¹¹⁴ Ibrahim Al-Qatawneh, 'The Presumption of Innocence: Between Theory and Practice' (2015) 44 *Journal of Law, Policy and Globalization* 46.

¹¹⁵ Ibn Hajar Al-'Asqalani A, *Fath al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī* (Vol. 6, Al-Maktaba a Salafiyyah, 2015) (Arabic source).

¹¹⁶ *Ibid.*

¹¹⁷ Kamali (n 22) 411.

¹¹⁸ *Ibid.*

¹¹⁹ Majed Kather Ahamd, *Ifṭirād al-bāriḥā* (Tikreet University, Iraq 2007) 421 (Arabic source).

¹²⁰ M Cherif Bassiouni, 'Crimes and the Criminal Process' (1997) 12(3) *Arab Law Quarterly* 269.

¹²¹ Bassiouni (n 10).

to the fencing-in of the rights of the accused. The purpose of this fence can be as follows.

a) To protect the freedom, integrity, and reputation of the accused from any violation, and to ensure that no authority or other individuals interfere with the rights of the accused.

b) So that the accused is not required to present 'positivity of proof' of his or her innocence.¹²²

The second category relates to the rights of the plaintiff to consider whether the accused is innocent using litigation. Thus, the accuser must prove by litigation of lawful evidence. The third category relates to judicial procedures. Procedures and processes are embedded in the rights of the accused, and the first of these is the presumption of innocence, according to legislation.¹²³ This is an inherent principle of the rights of the accused, which may serve to limit judicial errors and prevent the abuse of authority.¹²⁴ It is emphasised that no person can be convicted without lawful evidence presented in a fair and at a just court, and if there is doubt, then this is interpreted in favour of the accused.¹²⁵

Under Islamic criminal law the presumption of innocence is applicable in 'criminal procedure, civil litigation and it extends to religious matters'.¹²⁶ Nevertheless, under Islamic law, at pre-trial or when under investigation, the accused cannot be placed in detention because the accused is still presumed innocent. The detention system was not recognised at the beginning of Islam because an accusation cannot be sufficient to place the accused in detention.¹²⁷ A recent application of the presumption of innocence in a modern Islamic state was seen when the Supreme Court of the United Arab Emirates ruled that in cases of doubt or where there is insufficient evidence, it could not apply the punishment of *ḥudūd*. This was an opportunity for judges and scholars of Islamic criminal law to deliver sound legal judgments.¹²⁸

The legal basis of this principle in Islamic criminal law is found in the second source of Islamic law, the Sunnah. It is said that the Prophet Mohammed said,

¹²² Al-Qatawneh (n 114).

¹²³ Ibid.

¹²⁴ Bassiouni (n 10) 126.

¹²⁵ Badar (n 26) 425.

¹²⁶ Kamali (n 22) 77.

¹²⁷ Lippman Matthew and (eds) *Islamic Criminal Law and Procedure: An Introduction* (Praeger 1998) 61.

¹²⁸ Zakariyah Luqman, 'Applications of Legal Maxims in Islamic Criminal Law with Special Reference to Sharia Law in Northern Nigeria' (D. Phil. Thesis, University of Wales 2009).

'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.'¹²⁹ The Prophet Mohammed also said, 'Your lives, properties and honour are sacred trust upon you until you meet your Lord on the Day of Resurrection.'¹³⁰ The Prophet notes that if there is doubt about evidence, a judge must 'Avoid condemning the Muslim to *hudúd* 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).'¹³¹ In respect of the burden of proof, the Prophet says, 'The burden of proof is on him who makes the claim, whereas the oath [denying the charge] is on him who denies'.¹³²

In addition, the Arab Charter on Human Rights Article 7 stipulates the right of persons to be presumed innocent. It provides that 'The accused shall be presumed innocent until proved guilty at a lawful trial in which he has enjoyed the guarantees necessary for his defence.'

4.5.3 Compatibilities and Incompatibilities

The presumption of innocence is an inherent principle of Islamic criminal law and reflects human rights as set out in the ICC Statute. Article 66(3) of the Rome Statute does not give judges of the Court the right to cancel an accusation during a trial, but it does give judges the assurance that reasonable doubt can bring down the accusation. In this respect, Islamic criminal law goes further because it gives the accused the right to go back to an accuser who has used counterfeit documents or false witnesses so that he or she can claim compensation and move to stop false suits.

The presumption of innocence is a basic principle of Islamic criminal law, and is deemed a rule in the Rome Statute, and can be compatible in both legal systems as follows.

- a) Both legal systems agree on the presumption of innocence at all stages of investigation and trial until a verdict is given in a case.
- b) Both legal systems affirm that the accused is not required to present 'positive proof' to resist the accusation.

¹²⁹ Ahmad al-Bahigi, *The 40 Hadiths of Imam Al-Nawwi*, quoted from Bassiouni (n 10).

¹³⁰ Ibid.

¹³¹ Ali Al-Mansur, *Nizam a-tājrīym wa al-lūqubā fi al-Islam*, (Zahraa Medina, 1976) 128.

¹³² Ibid.

- c) Reasonable doubt is not a base of conviction to prosecute and convict the accused; thus, reasonable doubt is interpreted in favour of the accused.
- d) Both legal systems reject assumptions that may include the idea that an accused committed a crime.
- e) The burden of proof in both legal systems is placed upon the accuser or the prosecuting authority.
- f) The presumption of innocence in both legal systems is a fundamental human right.

4.6 The Principle of Equality Before the Law

4.6.1 International Criminal Law

The principle of equality before the law is enacted in numerous international conventions and is accepted and respected by many civilizations worldwide. In the West, this principle originated from the work of Aristotle, who described it as a 'corrective of the law'.¹³³ The basic idea advocated by Aristotle is that a legal regulator has the right to formulate laws, but that these laws might breach their purpose of enactment if the principle of equality before the law is not also applied.¹³⁴ Aristotle's idea of equality before the law began to be widely used, and is now internationally recognised and regulated in international treaties and in public international law.¹³⁵ After the First World War in 1919, a proposal was presented by the Japanese delegation at the Paris Conference to discuss and codify the principle of equality before the law in the Covenant of the League of Nations, but the proposal was rejected by some delegations after the President of the United States, Wilson, announced that the terms of codification of the right of equality had not been accepted.¹³⁶

The idea to codify the principle of equality emerged again later, at an international level, during many international conferences and, specifically, when the Charter of the United Nations was established. Human rights organisations began to emphasise the principle of equality, and the second and third paragraphs of the UN Charter read as follows.

¹³³ *Encyclopaedia of Public International Law* (Vol. II, North-Holland 1992) para 109.

¹³⁴ *Ibid.*

¹³⁵ Paul Gordon Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (2nd edn, Boulder/Oxford, Westview Press 1996) 99.

¹³⁶ See 'Professional Training Series No. 9 in Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' 634 United Nations 2003.

ii) to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and;

iii) to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.¹³⁷

The term 'equality' in the West implies the same treatment of people, even though differences between these people may exist.¹³⁸ Some describe this principle as seeking to attain the 'absence of discrimination'.¹³⁹ Discrimination can be defined as 'any act or conduct which denies to certain individuals equality of treatment with other individuals because they belong to particular groups in society'.¹⁴⁰ In this respect, Dworkin differentiates the right to equal treatment from the right to be treated as an equal. The former means rights that seek to enable the distribution of opportunities, rules, and respect, etcetera equally among individuals and/or imposing equal burdens on individuals, while the latter draws attention to inequalities relating to money, education, job status, etcetera that emerge in societies.¹⁴¹

The principle of equality before the law is affirmed in various international instruments including the following.

- a) The Universal Declaration of Human Rights (1948) Article 1.¹⁴²
- b) The Convention on the Prevention and Punishment of the Crime of Genocide (1948).¹⁴³
- c) The International Covenant on Civil and Political Rights (1966) Article 26.¹⁴⁴

¹³⁷ The Preamble of the Charter of the United Nations (1941), entered into force in 1945 <<https://www.un.org/en/sections/un-charter/preamble/index.html>> accessed 25 April 2019.

¹³⁸ P Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton University Press 1990) 39.

¹³⁹ F Bayefsky, 'The Principle of Equality or Non-discrimination in International Law' (1990) 11 *Human Rights Quarterly* 5.

¹⁴⁰ Elena Andreevska and Etem Aziri, 'Principles of Equality in International Law: The Right to Equality' (2009) (2) *Lex Et Scientia* 228. See also Weiwei Li, *Equality and Non-Discrimination Under International Human Rights Law* (The Norwegian Centre for Human Rights/Li Weiwei 2004).

¹⁴¹ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 226.

¹⁴² The Universal Declaration of Human Rights (1948), Article 1 provides that 'All human beings are born free and equal in dignity and rights.'

¹⁴³ The Genocide Convention (1948), Article II prohibits committing acts that aim to destroy a group of people in whole or in part based on religion, nationality, or ethnic origins.

¹⁴⁴ The International Covenant on Civil and Political Rights (1966), Article 26 stipulates that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as

d) The International Covenant on Economic, Social and Cultural Rights (1966) Article 2.¹⁴⁵

e) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).¹⁴⁶

It can be noted that The Universal Declaration of Human Rights comprises provisions emphasising the equality principle as follows.

a) Article 2 talks about the prevention of discrimination between individuals in all aspects, stipulating that 'everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'

b) Article 8 refers explicitly to the right of equality between individuals to resort to the competent national courts in cases of a violation of rights granted by the constitution or by law. It stipulates that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.

c) Article 10 refers to the right to a fair trial, stipulating that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

Article 14 of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides for the right of individuals to receive fair compensation in the event that they become victims of torture by the authorities of the respective States. The Article per se obliges states to implement this international obligation. It stipulates that 'each State Party shall

race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

¹⁴⁵ The International Covenant on Economic, Social and Cultural Rights (1966), Article 2(2) affirms the right of equality to all individuals 'to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

¹⁴⁶ The Preamble of The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) provides the following: 'Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms.'

ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.¹⁴⁷

The Arab Charter on Human Rights affirms this principle in Article 32 as follows: 'the State shall ensure that its citizens enjoy equality of opportunity in regard to work, as well as a fair wage and equal remuneration for work of equal value.'

This celebration of the principle of equality before the law in international conventions reveals a desire to apply justice to all individuals without discrimination. The principle of equality before the law is one of the elements of international justice; thus, states are obliged to implement it. If there is any defect in the implementation of this principle, it creates a defect in the fundamental rights of individuals. The principle of equality before the law is also dealt with by scholars, who note that there are differences in its adoption and application among different societies. However, the principle denotes these main elements: a) it is a common human and moral principle; b) it aims to achieve the absence of discrimination between people; and, c) it aims to reach justice.

4.6.2 Islamic Criminal Law

The principle of equality before the law in Islamic criminal law is an inherent principle, since its legal basis is derived from the main sources. The Quran states, 'O mankind, indeed we have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.' The Sunnah includes the Hadith of the Prophet Mohammed, which says the following.

'All mankind is from Adam and Eve. An Arab has no superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab; white has no superiority over black, nor does a black have any superiority over white; [none have superiority over another] except by piety and good action. Learn that every Muslim is a brother to every Muslim and that the Muslims constitute one brotherhood. Nothing shall be legitimate to a Muslim which

¹⁴⁷ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Article 14.

belongs to a fellow Muslim unless it was given freely and willingly. Do not, therefore, do injustice to yourselves. Remember, one day you will appear before God and answer for your deeds. So beware, do not stray from the path of righteousness after I am gone.¹⁴⁸

Another example in the Sunnah concerns Aisha (the Prophet's wife) who reports that the Quraish had become anxious about a Makhzumi woman who had committed theft. The passage reads as follows.

Who will speak to Allah's Messenger about her? They said: Who dare it, but Usama, the loved one of Allah's Messenger. So Usama spoke to him. Thereupon Allah's Messenger said: Do you intercede regarding one of the punishments prescribed by Allah? He then stood up and addressed (people) saying: O people, those who have gone before you were destroyed, because if any one of high rank committed theft amongst them, they spared him, and if anyone of low rank committed theft, they inflicted the prescribed punishment upon him. By Allah, if Fatima, daughter of Mohammad, were to steal, I would have her hand cut off.

The same Hadith transmitted on the authority of Ibn Rumh, uses the words 'Verily those before you perished'.¹⁴⁹

According to Al-Gelah and Abdul-Wahb, there are disparities between individuals in society with regard to ability, capability, and resources; thus, Islamic criminal law emphasises that the principle of equality before the law is applicable to all individuals, regardless of differences of wealth among individuals. Islamic criminal law affirms de facto the equality of rights and duties, so that no privileges shall be ascribed to any individual before Islamic criminal law.¹⁵⁰

The principle of equality in Islamic criminal law applies in all political, economic, social, and legal fields. Furthermore, the adoption of this principle in Islamic criminal law must be applied to all individuals equally, without any discrimination. The Quran and Sunnah are directed to all humanity without any discrimination, regardless of religion, race, colour, or gender. In this aspect, it is clear that Islamic criminal law does not discriminate between individuals before the law, and that all individuals must be treated equally

¹⁴⁸ The Prophet Mohammad's Last Sermon <www.islamreligion.com website> accessed 25 April 2019.

¹⁴⁹ The Sunnah website, 1688, Book 29, Hadith 13 <<https://sunnah.com/muslim/29/13>> accessed 25 April 2019.

¹⁵⁰ Aseem al-Ghallaḥ and Mohamed Abdul-wahab, *an nūzum a-siyāsīyāh* (5th edn, Dar- al-Ndāh Egypt 1412 H) 152-153 (Arabic source).

before its law. This applies in order to achieve principles of justice brought about by Islam itself, to promote social harmony in Muslim societies, and to achieve political stability.

The principle of equality before the law is established in the main sources of Islamic criminal law and has a spiritual meaning that states that people are equal in their rights and duties. Thus, Islamic criminal law alludes to the idea of equality, which leads to the principle of equality before the law. This principle has legitimacy because it is derived from the main sources of Islamic law. It is applied in procedural aspects as well as in substantial ones to prevent discrimination and is applied in practice by states. It is a legal right for all individuals and groups under Islamic law.

4.6.3 Compatibilities and Incompatibilities

Although both legal systems have adopted and regulated the principle of equality before the law, there are some notable differences, namely in Islamic criminal law, the sources of law and some laws are different from those practised in international criminal law. Islamic laws are classed as divine laws, while international criminal laws are classed as secular laws, agreed on between states. In Islamic criminal law, the adoption of this principle stands, even if Muslim states have not regulated it into their domestic laws, or if it is not ratified within certain international conventions. It can be noted that both legal systems have the same factual meaning of the principle of equality before the law, which means providing rights and opportunities as well as imposing duties equally to all individuals of society, not the distribution of wealth, jobs, and education equally among individuals.

4.7 The Criminal Responsibility of Individuals

The idea of criminal responsibility in international criminal law is mainly derived from the jurisprudence of former international courts, such as the International Tribunals of Rwanda and Yugoslavia, as well as the work of various legal scholars. This section examines the source of the idea as it appears in Islamic criminal law and discusses the idea in relation to Islamic international law. This is undertaken by looking at definitions of personal criminal responsibility, different forms of criminal responsibility, and how criminal responsibility is enshrined in the laws of both legal systems. The discussion begins by looking at Islamic law's provisions and then the Rome Statute's provisions. This is because some theories in international criminal

law are not mentioned in Islamic law such as control over crime and joint enterprise responsibility.

4.7.1 The Principles of Personal Responsibility

4.7.1.1 Islamic Criminal Law

The concept of criminal responsibility in Islamic criminal law is primarily individual.¹⁵¹ It is based on the principle of personal responsibility.¹⁵² This principle is regulated in the following Quranic verse: 'No soul shall bear another's burden.'¹⁵³ In Islamic criminal law, there is no confusion between the principle of personal criminal responsibility and responsibility for a criminal act committed by others.¹⁵⁴ An individual must be responsible for both the physical element of the crime and the element of intent to commit the crime. The physical element must be established for his or her unlawful conduct, and the element of intent must be established in relation to the offender's will to commit the unlawful conduct. For instance, if someone who runs a gun shop sells weapons to others who intend to commit a crime, and these weapons are used to commit crimes, the salesman will be responsible for providing weapons for the crime, if intent to supply for the purposes of crime can be proven; then the salesman becomes an indirect participant.

Another example is when a person who is responsible for feeding another, a prisoner for instance, prevents the prisoner from having access to food and leaves him or her for dead. Then the person who is responsible for feeding is responsible for an omission of duty.¹⁵⁵ This means that individuals must bear the consequences of any unlawful conduct committed, whether this is intentional or unintentional, depending on the awareness they have of the crime they are accused of.¹⁵⁶ Thus, no one can be responsible for a crime if they have not been directly or indirectly involved in unlawful conduct, either as the principal perpetrator or as an accessory.¹⁵⁷ This approach is based on the

¹⁵¹ Abo Zahra (n 66) 24

¹⁵² Muṣṭafā al-Zulmī, *al-Mas'ūliyyah al-Jinā'iyah fī al-Sharī'ah al-'islāmiyah*, (Dār al-Nashr al-Ḥasan 2014) 37 (Arabic source).

¹⁵³ The Quran 35:18.

¹⁵⁴ A ḥmad Bahansī, *al-Mas'ūliyyah al-Jinā'iyah fī al-Fiqh al-'islāmī*. (Dār al-Shurūq) 55-59 (Arabic source).

¹⁵⁵ In the Quran 5:2, Allah says, 'And co-operate in righteousness and piety, but do not co-operate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty.'

¹⁵⁶ Mohammad Saiful, 'Islam, Criminal Accountability and Juvenile Offenders: A Study Under Islamic Principles: International Law and the Children's Act 2013' (2015) International Journal of Ethics in Social Sciences 66.

¹⁵⁷ Nagaty Sanad, *The Theory of Crime and Criminal Responsibility in Islamic Law Sharia* (Office of International Criminal Justice, The University of Chicago 1991) 71.

following Quranic verse: 'whoever killed a human being should be looked upon as though he had killed all mankind.'¹⁵⁸ In another Quranic verse, Allah says, 'Each soul earneth on its own account.'¹⁵⁹ Furthermore, Allah says, 'No burdened soul can bear another's burden.'¹⁶⁰ In the Sunnah, the Prophet says, 'the reward of deeds depends upon the intentions and every person will get the reward according to what he has intended.'¹⁶¹

Criminal conduct (*actus reus*) and criminal intent (*mens rea*) form the main components of the principle of criminal responsibility in Islamic criminal law. Special emphasis is placed on the former because no crime can be committed without exerting a material element (whether this is physical or uttered).¹⁶² The latter (criminal intent) has been discussed extensively by researchers, who have surmised that it 'encapsulates elements including, but not limited to, a state of evil in the mind of a person who conducts unlawful acts for a wrongful purpose, causing harm knowingly and willingly to another's body, causing psychological harm, or harm against property belonging to another.'¹⁶³

Criminal conduct in Islamic criminal law is defined in accordance with the consequences of the unlawful conduct of an individual, undertaken with knowledge of what is forbidden or criminalised.¹⁶⁴ It also encapsulates the omission of conduct that is obligated by Islamic criminal law when there is a specific duty, such the work of a policeman, for instance.¹⁶⁵ With regard to omission, the *Hanbalī* and *Shāfi'ī* schools believe that the principle of omission can be used in order to establish criminal responsibility; for example, when the leader of an army decides not to rescue injured soldiers during a war.¹⁶⁶ The Malki school argues that when a person is obliged to undertake certain acts stipulated in the teachings of Islamic criminal law, the accused can be

¹⁵⁸ The Quran 5:32.

¹⁵⁹ The Quran 6:164.

¹⁶⁰ The Quran 35:18.

¹⁶¹ Muḥammad ibn Ismā'īl al-Bukhārī, *Sahih al-Bukhari* (Maktabat Al-Rushid Riyadh 1427 H) (Arabic source).

¹⁶² Mohamed Elewa Badar & Iryna Marchuk, 'A Comparative Study of the Principles Governing Criminal Responsibility in the Major Legal Systems of the World: England, the United States, Germany, France, Denmark, Russia, China, and in the Islamic Legal Tradition' (2013) 1:48 *Criminal Law Forum* 1.

¹⁶³ *Ibid.*

¹⁶⁴ Sanad (n 157) 71.

¹⁶⁵ Ali Rashid, *al-qanūn al-Jinā'ī* (Dar al-Nhda Cairo 1986) 103.

¹⁶⁶ M Chrerif Bassiouni (ed), *The Islamic Criminal Justice System* (New York: Oceana Publications 1982) 175.

held liable for his or her actions because failure to perform obligatory acts is subject to the principle of the criminal responsibility of individuals.¹⁶⁷

The causal nexus between criminal conduct and the results of unlawful conduct or omission can be the main criterion that distinguishes between direct perpetration and indirect perpetration, and can define the link between the results of the conduct.¹⁶⁸ It can also be the measure that tracks the results of the crime back to conduct or omission attributed to the perpetrator.¹⁶⁹ Thus, these conditions must exist to give rise to criminal responsibility.

Jurists of Islamic criminal law distinguish between the concept of will and intent. Establishing 'intent' concerns assessing whether the offender has aimed to achieve a certain result from his or her conduct, while 'will' means the tendency to carry out unlawful physical conduct.¹⁷⁰ In Islamic criminal law, the former implies intentional crimes, but the latter can include unintentional crimes.¹⁷¹ For example, if a person starts to fight someone else with a knife, and the recipient of the attack tries to stop the attack, but the original perpetrator dies.

4.7.1.2 The Rome Statute

The principle of personal responsibility is covered in the Rome Statute in Article 25 paragraphs (1) and (2) as follows.

- 1) The Court shall have jurisdiction over natural persons pursuant to the Statute.
- 2) A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with the Statute.

Paragraph (1) of the Statute demonstrates that the jurisdiction of the Court regarding the principle is individual and shall be over natural persons. Paragraph 2 of the Statute confirms that individual criminal responsibility shall be over natural persons who have committed criminal conduct within the Treaty provisions. It clarifies two types of individual criminal responsibility: a) the criminal responsibility of the criminal conduct committed by the direct doer, and (b) the criminal liability of the omission. This can be understood by the wording of 'responsible' and 'liable'. Furthermore, Paragraph (3)(a) of Article

¹⁶⁷ Ibid.

¹⁶⁸ Bahnasi (n 154) 42-53.

¹⁶⁹ Ibid

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

25 covers both a person who directly commits the physical conduct and the person who acts on a request to commit a prohibited crime.¹⁷² This can be understood in accordance with Article 30(2)(a) of the Rome Statute, which provides that criminal intent requires both intent and knowledge on the part of the accused, and both must lead to the carrying out or involvement in criminal conduct, or committing a crime via another person. The term 'knowledge' is identified by the Statute itself in Article 30(3) to mean that 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'¹⁷³ The intent of the accused is also defined as the recognition of the accused of the risk relating to the actions he or she carries out, and being satisfied with the results of his or her conduct.¹⁷⁴

4.7.2 Forms of Criminal Responsibility¹⁷⁵

4.7.2.1 Islamic Criminal Law

In Islamic criminal law, participation in the undertaking of a crime can refer to the role of a group of persons who share a purpose, even though each member of the group may have his or her individual reasons for undertaking

¹⁷² This paragraph provides that 'in accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible'. See Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 958.

¹⁷³ This Article provides that '1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'

¹⁷⁴ Barbara Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the Ad Hoc Tribunals' (2012) 12 (1) *International Criminal Law Review* 70.

¹⁷⁵ The joint enterprise for criminal responsibility may attribute back to the International Criminal Tribunal for Yugoslavia in the Appeal Chamber Judgments of the *Tadic* case. The Tribunal found that crimes could be committed by groups, namely collectively. It mentions that 'the crimes are often carried out by groups or individuals acting in pursuance of a common design'. This was based on the interpretation of the term 'commit' in Article 7(1) which does not exclude the crime of common design; see Judgment *Tadic* (IT-94-1) (Judgment Appeals Chamber 15 July 1999) (185); see also Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 *Journal of International Criminal Justice* 159. Complicity in international criminal law may mean that crimes can be committed by a complicit instigator who had ordered or prepared or facilitated the crimes, while the physical conduct had been committed by someone else, namely the perpetrator. Thus, the one who is complicit is responsible for his actions in committing crimes under international criminal law; see also Elies Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 35.

criminal conduct.¹⁷⁶ Thus, the idea of criminal responsibility here encapsulates crimes that are committed by more than one person, where each person shares a common purpose with the others, and where they also possess individual reasons for undertaking crime. An example of this is when three persons agree to participate in carrying out a crime: one brings the victim to the crime scene, another puts the victim in a secure place, and another kills the victim. In this scenario, criminal conduct is carried out in three main phases, and criminal intent would be measured by the court according to the role each person plays in undertaking the crime.¹⁷⁷ The elements for measuring criminal intent in the group of persons are: a) knowledge held by the accused of the crime and an awareness of the final aims of the crime; b) the will of the accused in carrying out his or her role in facilitating the crime; and c) the means used to undertake the crime.¹⁷⁸

Jurists of Islamic criminal law distinguish between *Al-Fail Al-Asli* (the principal offender) and *Al-Muan* (the accessory). The former refers to the main person who undertakes the physical criminal act.¹⁷⁹ The latter refers to the role played by a person in facilitating, instigating, ordering, soliciting, inducing, and planning to commit the crime.¹⁸⁰ The principal is responsible for his or her conduct, whether moral or physical, and the accessory is responsible for his or her criminal acts. The basis of this is found in the Hadith of the Prophet Mohammed, who says, 'There is no obedience to a created being if it is disobedience to Allah the Exalted.'¹⁸¹ This means that an order from one person to another to kill is considered a prohibited crime stipulated in the Quran by Allah.

Jurists of Islamic criminal law consider various criteria in order to establish criminal liability in participation crimes. The first criterion is that there must be a group of people, namely more than one person.¹⁸² The second is that the group must commit the same crime with shared intent existing between the principal and the accessories to carry out the criminal conduct. For example, if one person gives a gun to another, and the latter kills a victim, both people are accountable, providing shared intent can be established.¹⁸³ The person

¹⁷⁶ Abo Zahra (n 66) 192.

¹⁷⁷ al-Zulmī (n 152) 147.

¹⁷⁸ Abo Zahra (n 66) 192-194.

¹⁷⁹ According to the *Hanfi*, *Malki*, *Sháfi'i*, and *Hanbli* schools. See al-Zulmī (n 152) 147-154.

¹⁸⁰ Ibid 147-154.

¹⁸¹ Muḥammad ibn Ismā'īl al-Bukhārī, *Sahih al-Bukhari* Hadith No: 6830 (Maktabat Al-Rushid Riyadh 1427 H) (Arabic source).

¹⁸² The jurists here are the *Hanfi*, *Malki*, *Sháfi'i*, and *Hanbli* schools. See Bahnasi (n 154) 59.

¹⁸³ Ibid.

who commits the physical act is classed as the principal and the person who gives the gun is the accessory.¹⁸⁴ The third criterion is that there must be a causal nexus that binds the acts of everyone in the group who participates in carrying out the crime.¹⁸⁵ If one member of the group does not complete his or her role/act, and the crime is not completed, then that person is not classed as a participant in the crime. The causal nexus requires prior agreement, namely an agreement of intent by the group to carry out the criminal conduct. Differences between the participants' conduct do not affect the role each has as a fundamental participant if they share the intent to commit the crime.¹⁸⁶ For example, if two persons attack another person, and one attacker holds the victim while the other kills the victim, then if the holder knows the intent of their accomplice to kill the victim, he or she is classed as a participant in carrying out the crime. However, if the catcher does not know the intent of his or her accomplice, the catcher is classed as an accessory to the crime. Thus, jurists divide participation into categories: the first is direct participation and the second is indirect participation in undertaking the crime.

Direct participation refers to a crime directly undertaken by the offender using his or her will.¹⁸⁷ Indirect participation refers to when a crime is mediated by another person's will.¹⁸⁸ For instance, when a person holds the victim and the other person murders the victim using a knife. In this scenario both are responsible.¹⁸⁹ However, jurists of Islamic criminal law class some acts as being the complete responsibility of the doer, as follows.

- a) If the means used is the means that kills.¹⁹⁰
- b) Murder by suffocation.¹⁹¹
- c) Murder by fire.¹⁹²
- d) Murder by withholding food, drink, or medication.¹⁹³
- e) Murder by incitement.¹⁹⁴

¹⁸⁴ al-Zulmī (n 152)147.

¹⁸⁵ Ibid.

¹⁸⁶ Abo Zahra (n 66) 291.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ al-Zulmī (n 152) 183.

¹⁹⁰ Badar and Marchuk (n 162) 1–48.

¹⁹¹ Sanad (n 157).

¹⁹² Abo Zahra (n 66) 291.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

The *Malki*, *Hanbalí*, and *Sháfi'í* schools deem that an indirect participant can be classed as being a directly liable participant if he or she participates in any of the above criminal acts. The *Hanfi* school places extra conditions upon indirect participation: if the indirect participant intentionally undertakes the crime with his or her knowledge and capacity, being aware of the potential consequences of the crime, then he or she can be held responsible as a direct participant.¹⁹⁵ If a participant is classed as an aide or facilitator, or acts with sedition or as an instigator, all these are classed as indirect participation in undertaking a crime because the participants have not actually physically executed the criminal conduct; however, they share intent with the direct perpetrator of the crime.¹⁹⁶ If an aide convinces a victim to come to the crime scene and another person is waiting for the victim, ready to kill him, both are responsible because they share intent, even though one person aided and the other executed the crime.¹⁹⁷

Facilitator can refer to a person who provides a direct offender with the means to commit the crime, whether the means are intangible such as an idea or a plan, or tangible such as weapons. The facilitator differs from the seditious inducer because the former may exercise a degree of power or will over the main perpetrator, while a seditious inducer may or may not hold that kind of power.¹⁹⁸ Inducing a crime means that a person in a group creates the idea of undertaking a crime in another person's mind.¹⁹⁹ Incitement refers to the experienced influence one person has over another person that persuades that person to commit a crime, whether this incitement was practised using a promise or by offering temptation.²⁰⁰ There can be both positive and negative incitements made to undertake crime: positive incitements include offering money; negative incitements include using threat or force to control the offender's will.²⁰¹

All these categories of participation, according to Abo Zahra, require a shared mental element between group members to carry out criminal conduct, even though the goals of the crime may not actually be completed. Second, each person must have a role to play, and must play this role when undertaking the

¹⁹⁵ al-Zulmī (n 152) 147.

¹⁹⁶ Abdul qader Awda, *a-tashri' al-Jiyn'ai fi al-Islam muqarānh bi al-qanon al-wādāi* (al-Risālah Beirut 2000) 86 (Arabic source).

¹⁹⁷ Ibid.

¹⁹⁸ Ghāith al-Fakhri, *al-Ishtirāk fi al-Jarāymāh fi al-figh al-Islami* (Jamiat Bin Gazi, Morocco 1993) 219 (Arabic source).

¹⁹⁹ Abo Zahra (n 66) 409.

²⁰⁰ al-Fakhri (n 198) 219.

²⁰¹ Abo Zahra (n 66).

crime. Third, all the persons must be aware and have knowledge of the wrongful criminal conduct and its subsequent results.²⁰²

Abo Zahra also mentions that the *Sháfi'í*, *Málikí*, and *Ḥanbalí* schools believe that if a group of people kills a person, then all are subject to be punished based on each one's conduct/role in committing the crime. An example of such a scenario is when two people act together. For instance, if one selects a civilian house and the other places a bomb in the house. In this case, both are responsible for the crime. The first person is classed as an indirect participant and the other is classed as a direct doer in carrying out the crime.²⁰³ This concept of Islamic criminal law can be seen in the Rome Statute,²⁰⁴ specifically in Article 25(3)(d).²⁰⁵ This Article deals with the notion of individual criminal responsibility, using the term 'commit' to distinguish between the direct doer (the principal) within paragraph (3) sub-paragraph (a) and the indirect doer (accessory) within paragraph (3) sub-paragraphs (b) and (d).²⁰⁶ The latter is subject to the theory of control over the crime,²⁰⁷ which requires criminal conduct and criminal intent. Criminal conduct refers to control over the crime by the indirect doer, and criminal intent refers to the intent of the indirect doer in conducting the criminal act with knowledge and awareness.²⁰⁸

4.7.2.2 The Rome Statute

The forms of criminal responsibility are covered in the same Article, namely 25 in paragraph (3) as follows.

²⁰² Abo Zahra (n 66).

²⁰³ Abo Zahra, (n 66).

²⁰⁴ Interpretation of The Rome Statute is governed by the Geneva Convention of Treaties (1969) according to Article 31(2)(3), with emphasis on rules in international law and between parties. In addition, interpretation is consistent with customary international law. The responsibility for omission is left to the Court's discretion to decide on a case-by-case basis, according to Article 25(3) of The Rome Statute. This can be deduced from the Pre-Trial Chambers Decision on the Confirmation of Charges in the *Prosecutor v Thomas Lubanga Dyilo* case (ICC-01/04-01/06) (Judgment 14 March 2012) (965), when the Court adjudicated on omission liability but did not select the required elements of omission liability.

²⁰⁵ The Rome Statute Article 25(3)(d) stipulates that 'In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.'

²⁰⁶ Elies Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 93.

²⁰⁷ J Ohlin, E van Sliedregt, and T Weigend, 'Assessing Control Theory' (2013) 26 (3) *Leiden Journal of International Law* 725-746; see also Neha Jain, 'Control Theory of Perpetration in International Criminal Law' (2011) 12 (1) *Chicago Journal of International Law* 158 <<https://ssrn.com/abstract=1865842>> accessed 16 May 2019.

²⁰⁸ Sliedregt (n 206).

In accordance with the Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution is intentional and shall either:
 - i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - ii) Be made in the knowledge of the intention of the group to commit the crime.
 - e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
- 4) No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.²⁰⁹

The term 'commit' is used in the ICC Statute instead of the term 'perpetration' and as interpreted by the Court's judges in the *Lubanga* case.²¹⁰ Article 25(3)

²⁰⁹ Rome Statute Article 25

²¹⁰ The Court judges in the *Lubanga* case suggested that Article 58(1)(a) provides for more than just undertaking a physical act. Criminal responsibility can constitute responsibility for omission and responsibility for incitement, aiding, and/or inducing. Article 85(1)(a) uses the

includes the idea of the forms of criminal responsibility, omission of liability, and attempted responsibility, whether incitement, aiding, or inducing.²¹¹ Indirect commission is stipulated in Article 25(3)(a) as occurring when '[a person can be held responsible if he/she] commits a crime [within the Statute's jurisdiction], whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible'.²¹² This Article, namely 25(3)(a), covers indirect commission jointly; for example abetting and aiding, which requires a common purpose to carry out the crime. Other forms of indirect persuasion, such as ordering or instigating, do not require a common purpose to carry out the crime.²¹³

Article 25(3)(b) provides that if a person orders, induces, or solicits another person or a group of persons to commit or attempt to commit a crime, then he or she can be held responsible, since soliciting and inducing are classed as forms of commission in criminal behaviour according to the provisions of the Rome Statute.²¹⁴ Soliciting or inducing constitutes more than private inducement. It can include public inducement such as a hate speech that supports criminal conduct. This principle is illustrated in the judgment of the Trial Chamber II of the ICC in *The Prosecutor v. Ahmad Muhammad Harun* case.²¹⁵ Thus, the physical element (*actus reus*) of the inducer can be seen through agitator speech.²¹⁶ Ordering is identified in Article 25(3)(b) as a form of criminal responsibility. Ambos explains that whoever orders someone to commit a crime that falls under the provision of the ICC Statute is classed as

term 'committing' to indicate that if the Court has reasonable reason to believe that the accused has committed a crime within the Court's jurisdiction, he or she will be liable under Article 25 of the Treaty provisions. See *Prosecutor v Thomas Lubanga Dyilo*: The control of the crime theory is unsupported by the text of the Statute (ICC-01/04-01/06) (Judgment 14 March 2012) (7).

²¹¹ Article 25(3)(a). There is significant discussion about the 'control over crime theory' and 'common purpose theory' in the Rome Statute. However, this section discusses the general concepts of forms of criminal responsibility with a magnifying glass since there is limited space.

²¹² The Rome Statute Article 25(3)(a).

²¹³ Goy (n 174) 53.

²¹⁴ The Rome Statute Article 25(3)(b).

²¹⁵ *The Prosecutor v Ahmad Muhammad Harun (Ahmad Harun) & Ali Muhammad Al Abd Al-Rahman (Al Kushayb)* (ICC-01/04-01/07) (Judgment pursuant to article 74 of the Statute 7 March 2014) (57) (93). The Chamber states that '... there are reasonable grounds to believe that, in his public speeches, Ahmad Harun not only demonstrated knowledge of the methods used by the Militia/Janjaweed, which attacked civilians and pillaged villages, but also personally encouraged the commission of such illegal acts, which he considered "justified or excusable"'.

²¹⁶ Goy (n 174). Although The ICC Treaty does not talk explicitly about the term 'planning', it has the right to prosecute persons who plan ideas, whether abstract or concrete ideas. This can be considered under the notion of assisting, aiding, or abetting, and offers a broader idea of the term 'plan'.

an indirect offender because orders to carry out a crime can be derived from others who hold higher positions of authority than the person who undertakes the crime.²¹⁷ These persons will be held responsible under sub-paragraph (b) of Article 25(3).

Facilitating, aiding, assisting, and abetting are forms of criminal responsibility according to the Rome Statute under Article 25(3)(c), whether they are practised in an attempt to undertake criminal behaviour physically, provide tangible material or abstract means, or transmit evil ideas to the offender.²¹⁸ Ambos and Goy suggest that 'facilitating' should mean any degree of assistance provided, whether substantial or not.²¹⁹ However, Werle argues that the conditions for aiding or assisting a crime should be classed as 'substantial' in relation to the crime committed.²²⁰ Sliedregt talks about the 'mental dynamics' of being an accessory, and argues that some acts used to facilitate a crime do not require the knowledge of the offender.²²¹ Sliedregt refers to the case of the Pre-Trial Chamber of the ICC in the case of *The Prosecutor v. Germain Katanga* to highlight who can be classified as a direct offender or not. The judges in this case ruled that some orders differ in relation to direct participation because some may not only originate from high-level persons but also from those who control the army, for example.²²²

Schabas argues that inducing, soliciting, ordering, and instigating should all be classed as overlapping forms of criminal responsibility, as derived from national laws.²²³ Goy agrees with Ambos to class the person who passes the order as an indirect perpetrator (accessory) within sub-paragraph (b) because knowledge and will are required from someone who commits/attempts to commit a criminal act. Thus, orders that originate from high-level persons constitute a violation of two responsibilities: first, he or she (the person who orders) violates his duties to prevent his subordinates from committing crimes;

²¹⁷ Kai Ambos, 'Article 25, Individual Criminal Responsibility', in Otto Triffterer (ed) *Commentary on The Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (update to 2nd edn, C H Beck, Munich 2008) 743.

²¹⁸ The Rome Statute Article 25(30)(c).

²¹⁹ Ambos (n 217), Goy (n 174).

²²⁰ Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 969.

²²¹ Sliedregt (n 206) 128.

²²² *The Prosecutor v Germain Katanga* No. (ICC-01/04-01/07 7) (Trial Chamber II Judgment March 2014) (236).

²²³ William Schabas, *An Introduction to The International Criminal Court* (4th edn, Cambridge University Press 2011) 109.

and second, the person who orders abuses his or her power by requesting others to commit crimes.²²⁴

Another concept dealt within the ICC's jurisdiction is that of control over a crime, namely 'a division of the essential tasks for the purpose of committing a crime between two or more persons in a concerted matter'.²²⁵ The concept of control over a crime requires an agreed common plan by each participant in the crime.²²⁶ For example, these elements include supplying the means or mechanisms that assist in committing crimes, such as weapons, leading subordinates to the crime scene, moving the tools of crime to the crime scene, controlling subordinates' activities, and coordinating the roles of subordinates.²²⁷ The ICC looks at the theory of control over the crime and distinguishes between the crimes of the direct offender, namely the principal, and those of the indirect offender, namely the accessory. Criminal conduct can appear via the capacity and control of the indirect offender, and criminal intent can appear via the intentions and awareness of the indirect offender.²²⁸

Moreover, Article 25(3)(c) includes indirect commission using another person. Thus, if a person who is subordinate does not know the true nature of the criminal conduct they have undertaken because he or she is under eighteen years old, for example, the principal is responsible for acts or omissions that may have prevented criminal conduct.²²⁹

Furthermore, under the ICC Statute, individual criminal responsibility arises in cases where there is a group of persons who undertake a common purpose,

²²⁴ Goy (n 174).

²²⁵ *The Prosecutor v Thomas Lubanga Dyilo, Lubanga* (ICC-01/04-01/06-803-tEN 332) (Confirmation Decision of The Pre-Trial Chamber February 2007) (167) and (342).

²²⁶ Sliedregt (n 206).

²²⁷ *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, (ICC-10/04-01/07) (Decision of The Pre-Trial Chamber I on the Confirmation of Charges September 2009) (526).

²²⁸ Goy (n 174). Goy distinguishes between committing a crime jointly with others and committing a crime jointly with another person. She suggests that Article 25(3)(a) covers committing criminal conduct jointly with one or more persons. The Pre-Trial Chamber interprets joint commission as co-perpetration, depending on the theory of control over the crime. It means that committing, co-perpetration, and principal offending constitute forms of *actus reus*, namely physical conduct. Thus, co-perpetration requires a common purpose or plan among persons and a shared awareness, with their acceptance of the results of the criminal conduct. Committing a crime with another person means that the indirect offender of the criminal conduct may be an innocent person who may not be responsible. He or she is then excluded from criminal responsibility. Regarding any physical conduct, the indirect doer must control the will of the direct doer. There must be a common purpose or plan between the members of the group that aims to carry out the criminal conduct. With regard to criminal intent, the indirect doer must recognise their control over the will of the direct doer as well as over the crime to be committed, and know that the act they aim to commit is criminalised. They must also be aware of the consequences of the crime.

²²⁹ The Rome Statute Article 25(3)(c).

as outlined in Article 25(3)(d).²³⁰ In these cases, some conditions are required, as follows: a) a common purpose emphasis on the physical element of the group activities when they work with one or more purpose to commit or attempt to commit international crimes, as noted in the Rome Statute; b) an emphasis on the mental element of the purpose, namely the group possesses knowledge and awareness about undertaking criminal activity or furthering criminal activity. Moreover, every member of the group must know and understand that the act they aim to commit is criminalised, and must also show they have knowledge of the sequence of the crime, which indicates that the group is aware about the aimed-for results of the criminal act.²³¹

Sub-paragraph (e) explains that this is whoever, 'In respect of the crime of genocide, directly and publicly incites others to commit genocide'. Sub-paragraph (f) talks about the following.

Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.²³²

Werle explains that these sub-paragraphs refer to the incitement to genocide, which may be classed as 'perverting the course of justice', 'because neither incitement to genocide nor attempt can be classified as modes of participation, but should rather be classified as inchoate crimes'.²³³ He argues that if there is a lack of intent to commit genocide in order to destroy a group of people, the co-perpetrator may not be held responsible for genocide since genocide crime requires a specific intent to commit the crime.²³⁴

To summarise, in terms of the forms of criminal responsibility, both Islamic criminal law and the provisions of the Rome Statute distinguish between the direct undertaker and indirect undertaker of criminal acts. The Court's Treaty considers the part played by control over an indirect participant in a crime. According to Article 25(3), it is not necessary for there to be a shared common

²³⁰ The Rome Statute Article 25(3)(d).

²³¹ Sliedregt (n 206) 147.

²³² There is an addendum to this sub-paragraph that stipulates that 'In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.'

²³³ Werle (n 220) 956.

²³⁴ Ibid.

purpose between the direct offender and the indirect offender; however, Islamic criminal law requires a common purpose to establish the criminal responsibility of the indirect offender. Moreover, although there is a divergence of views concerning forms of individual responsibility in both legal systems, all forms of criminal behaviour noted in the Rome Statute Article 25 can also be dealt with as forms of individual responsibility in Islamic criminal law.²³⁵

4.7.3 Command Responsibility

4.7.3.1 Islamic International Law

Commanders' responsibilities arise in cases of war or in armed conflict, and their actions are covered by Islamic international law. Commanders must follow the rules governing a war situation; however, they may sometimes breach their duties. Islamic international law, in general, prohibits the waging of war²³⁶ except in cases of defence.²³⁷ It provides the means to settle matters in order to solve a conflict situation; for instance, negotiation, mediation, and arbitration.²³⁸ However, the desire of parties in a war to achieve victory can lead to the parties committing crimes.²³⁹ Islamic international law deems that commanders are responsible if they violate its rules.

Islamic international law places obligations upon commanders, whether military or non-military, to fulfil the rules of war as well as the rules contained in agreements made between Muslim and non-Muslim countries.²⁴⁰ The following Quranic verse places emphasis on complying with concluded

²³⁵ The attempt to commit crimes is criminalised in The Rome Statute under Article 25(3)(f). This is because international crimes are classed as serious and heinous crimes. Two types of attempt are dealt with in this sub-paragraph. First, attempts not completed due to circumstances beyond the will of the doer. Sliedregt (n 206) provides an example of this when a pilot aims to download a bomb on a city and the bomb does not explode. Second, if the doer wants to decline voluntarily from committing a crime and makes concrete efforts to do so, whether by notifying responsible authorities or by preventing the criminal conduct, this person cannot be punished under The Rome Statute 153.

²³⁶ Majid Khadduri, *War and Peace in the Law of Islam* (The Johns Hopkins Press 1955) 98, 103.

²³⁷ Mashood Badrein, 'The Evolution of Islamic Law of Nations and Modern International Order: Universal Peace through Mutuality and Co-operation' (2000) *The American Journal of Islamic Social Science* 57. This issue is also considered in The Quranic verse (2:190): 'And fight in the way of Allah those who fight you but transgress not the limits. Truly, Allah likes not the transgressors.' See chapter five of this study.

²³⁸ Malekian (n 28) 177.

²³⁹ Wahbeh Al-Zuhili, 'Islam and International Law' (2005) *International Review of the Red Cross* Volume 87, Issue 858 (Religion) 269.

²⁴⁰ Badr, G, 'Islamic Law: A Survey of Islamic International Law Contracts and Litigation in Islamic Law' (1982) 76 *Proceedings of the American Society of International Law* 56.

agreements (because Islamic international law considers Allah to be party to any concluded agreements) as follows.

Verily those who swear allegiance to thee swear allegiance really to Allah, the hand of Allah is above their hands, so whoever does not break faith to those who fulfil what they have pledged to God, He will one day give a mighty reward.²⁴¹

In Islamic international law, command responsibility is usually established during times of war or conflict.²⁴² In this respect, Muslim scholars view concluded agreements to be both religious and legal obligations under Islamic international law.²⁴³ In addition, Islamic international law binds Muslims to their contracts and prohibits them from breaking these agreements according to the Quranic verse, as follows: 'O you, who believe, fulfil your[all] contracts.'²⁴⁴ Another Quranic verse urges the faithful to 'Be faithful to your pledge to God, when you enter into a pact.'²⁴⁵ The Prophet also says, 'All Muslims are bound by their obligations except an obligation that renders lawful the unlawful and the unlawful lawful.'²⁴⁶ Thus, commanders are also held responsible to the following Quranic instructions.

Let there be no compulsion in religion. Truth stands clear from error; whoever rejects Evil and believes in God has grasped the most trustworthy handhold that never breaks, and God hears and knows all things.²⁴⁷

Muslim commanders who find themselves in a situation of warfare or armed conflict must comply with the following obligations.

- a) To respect human rights as stipulated under Islamic international law (*siyar*).²⁴⁸
- b) To commit to legal duties.

²⁴¹ The Quran 48:10; see also A Mayer, *Law and Religion in the Muslim Middle East* (Oxford University Press 1987).

²⁴² Malekian (n 28) 391.

²⁴³ Ibid 40.

²⁴⁴ The Quran 5:1.

²⁴⁵ The Quran 2:229.

²⁴⁶ Abu Dawood Suliman a-sājistāni, *Sunan Abī Dāwūd* (Dar al-Risālah 1430 H) Hadith No 799; see also M Cherif Bassiouni, *Protection of Diplomats Under Islamic Law* (Cambridge University Press 1980) 74.

²⁴⁷ The Quran 2:256.

²⁴⁸ The principles of Siyara are explained in chapter three of this study.

c) Not to claim that they do not know what to do either by ignorance or omission in violation of Islamic international law.²⁴⁹

The Prophet said, 'Move forward in the Name of God, by God, and on the religion of God's Prophet. Do not kill an elderly, or a child or a woman, do not misappropriate booty, gather your spoils, and do good for God loves good doers.'²⁵⁰ In 633, the Caliph Abo Baker, who was the ruler of the Islamic state in Madinah, ordered the commanders of Muslim armies, and their subordinates who were responsible for repelling attack from the Byzantines, as follows.

Be just, break not your plighted faith, mutilate none, slay neither children, old men, nor women, injure not the date-palm nor burn it with fire, nor cut down any fruit-bearing tree: slay neither flocks nor herds nor camels except for food: perchance you may come across men who have retired into monasteries, leave them and their work in peace.²⁵¹

Thus, ignorance of legal obligations of Islamic international law whether by commanders or subordinates in a situation of war does not preclude establishing criminal responsibility and judicial prosecution in relation to prescribed punishments.²⁵² Islamic international law imposes certain rules upon commanders. The rules that apply before a war are listed as follows.

a) There shall be notification to the enemy asking them to surrender; if this request is rejected then commanders shall notify the enemy about the war.²⁵³

b) Commanders are also responsible for notifying and warning their subordinates about conduct that is prohibited during the war, such as mass killing or the demolition of public buildings.²⁵⁴

Thus, commanders are responsible for preventing and repressing cruelty, torture, and starvation because the Prophet said, 'fairness is prescribed by God in every matter, so if you kill, kill in a fair way.'²⁵⁵

²⁴⁹ Muhammad Youssef Moussa, *Islam and Humanity's Needs of It* (Supreme Council for Islamic Affairs 1992) 409.

²⁵⁰ Quoted from al-Zuhili (n 239) 282.

²⁵¹ Quoted from al-Zuhili (n 239) 282; see also Robert Traer, Hussain, *Human Rights in Islam* (1989) Islamic Studies Vol. 28, No. 2. 117

²⁵² Ibid.

²⁵³ A al-Nadāwy, *sharḥ Kitāb al-siyar al-kabir li-Muḥammad ibn al-Ḥasan al-Shaybani* (Vol. 1, Dar al-qalm, Damascus, 1994) 49 (Arabic source).

²⁵⁴ Ibid.

²⁵⁵ Muhammad Hamidullah, *Muslim Conduct of State* (Muhammed Ashraf Kashmir Bazar, Lahore 1954) 195.

In Islamic international law commanders have a commitment to keeping public buildings intact, as well as trees, farms, and places of worship.²⁵⁶ Furthermore, pretending to surrender is not allowed, neither is committing treason before the enemy, whether or not this is designed to defeat or to deceive the enemy.²⁵⁷ Commanders and subordinates are both also responsible for distinguishing between combatants and non-combatants.²⁵⁸ This aims to avoid the killing of innocent people and civilians who do not participate in war, and is based on the Quranic verse which says, 'If one of your enemies asks for asylum, grant it to him.'²⁵⁹ Islamic international law also requires Muslim commanders to treat wounded civilians or combatants.²⁶⁰ The Prophet said, 'Do not kill any old people, children, women, monks, or people who are in places of worship.'²⁶¹ The First Caliph, Abo Baker, who ruled after the death of the Prophet, ordered commanders and soldiers to do the following.

Stop, O people, that I may give you ten rules for guidance on the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies; do not kill a woman, a child, or an aged man; do not cut down fruitful trees; do not destroy inhabited areas; do not slaughter any of the enemies' sheep, cow or camel except for food; do not burn date palms, nor inundate them; do not embezzle (e.g. no misappropriation of booty or spoils of war) nor be guilty of cowardliness ... you are likely to pass by people who have devoted their lives to monastic services; leave them alone.²⁶²

At the end of a war, commanders must show respect to dead bodies whether or not they are those of the enemy or those of the Islamic army.²⁶³ This concept is also expressed in Articles 120 and 121 of the Second Geneva Convention 1949, which deals with the laws and rules of war.²⁶⁴

²⁵⁶ Ahmed Al-Dawoody, *The Islamic Law of War Justification and Regulations* (1st edn, Palgrave Macmillan 2011) 60.

²⁵⁷ Hamidullah (n 255) 197.

²⁵⁸ Ibid.

²⁵⁹ The Quran 9:6.

²⁶⁰ Hamidullah (n 255) 192.

²⁶¹ Muḥammad ibn Ismā'īl al-Bukhārī, *Sahih al-Bukhari* Hadith No. 256 Vol. 4 Book 052, (Maktabat Al-Rushid Riyadh 1427 H) (Arabic source).

²⁶² Quoted in Islamic law and the rules of war website <<http://www.thenewhumanitarian.org>> accessed 5 June 2108.

²⁶³ Ali ibn Muhammad Māwardi, *al-Ahkām as-sultāniyyah* (al-watān Cairo 1980) 53 (Arabic source).

²⁶⁴ The Geneva Conventions, Articles 121 and 122.

Islamic international law gives rights to soldiers or subordinates to refuse orders from commanders who violate its rules of war. The basis of this approach comes from the Prophet's words that said, 'There is no obedience to a created being if it is disobedience to Allah the exalted.'²⁶⁵ This means that commanders must be held accountable if they want to violate the rules of war, and subordinates may have to follow legal duties in rejecting commands from their commanders. This concept may be found in Article 33(2) of the Rome Statute, which stipulates that 'For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.' However, Article 28(b)(i) of the Rome Statute assumes that commanders know about prohibited conduct and places criminal responsibility on a superior if he or she 'either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes'.²⁶⁶

Islamic international law requires its commanders to know the rules before involving themselves in cases of war. This includes knowledge of what is prohibited and what is permitted in cases of war.²⁶⁷ In Islamic international law, there is no scenario in which commanders can ignore its rules in relation to committing mass killing or violating the rules of war. Islamic international law requires actors to repress violators and to start judicial procedures before a court after the end of the war.²⁶⁸ In addition, commanders must know of the rules of war as mentioned in the Quran and Sunnah. Before the Rome Statute came into force, The Geneva Convention Protocol I 1977 Article 87 was used by the international community to make commanders responsible for repressing serious violations of conduct during war.²⁶⁹

4.7.3.2 The Rome Statute

The responsibility of commanders and other superiors is covered in Article 28 of the ICC Treaty as follows.

²⁶⁵ Muḥammad ibn Ismā'īl al-Bukhārī, *Sahih al-Bukhari* (Maktabat Al-Rushid Riyadh 1427 H) (Arabic source).

²⁶⁶ The Rome Statute Article 28(b)(i) stipulates that "The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes."

²⁶⁷ Hamidullah (n 255) 195.

²⁶⁸ *Ibid.*

²⁶⁹ The Geneva Convention Protocol I Article 86 reads as follows: 'Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention.'

a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

b) With respect to superior and subordinate relationships not described above, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The Rome Statute deals with a commander's duty not to violate the rules of war. Article 28(a)(i) provides a narrow concept relating to the responsibility of commanders. Paragraph (a) sub-paragraph (i) of this Article provides that commanders have to know the violations included in the Statute's provisions.²⁷⁰ Article 28(a)(ii) of The Rome Statute goes further to oblige commanders to take necessary measures to repress subordinates from committing crimes, but it is not clear whether this refers to actions taken during

²⁷⁰ The Rome Statute Article 28(a)(i) .

the war, at the end of the war, or after the war.²⁷¹ Furthermore, the subparagraph of this article includes crimes committed by subordinates within its jurisdiction. This differs from Islamic international law, which deems that if there are no results of criminal acts, there shall be no punishment.²⁷² These rules also correspond with Article II of the Convention on the Prevention and Punishment of the Crime of Genocide.²⁷³ There is also a Quranic verse that does not allow the killing of those who surrender, are wounded, sick, prisoners of war, or people who lay down their weapons. The verse says, 'And if they incline to peace, incline thou also to it and trust God.'²⁷⁴

Saland explains that Article 28(b) outlines the responsibilities placed on both military commanders and civil politicians.²⁷⁵ However, the responsibilities of military commanders assume that they have to know if their subordinates are about to commit international crimes. Moreover, the Rome Statute places responsibility on commanders to take necessary measures in order to prevent crimes. The responsibilities of civil politicians assume that they must know about the violations committed by subordinates and that they ignored their legal duty in repressing such crimes.²⁷⁶ This provides a broad domain of commander responsibility, but obliges commanders to be responsible for the crimes committed by their subordinates, whether they are/were committed in places of fighting or not committed in places of fighting.

The jurisdiction of ICC Article 28(b) places responsibility on commanders, whether military or political. It holds them liable if they do not exercise their duties; for example, to maintain control over subordinates.²⁷⁷ Cassese argues that commanders or superiors must be under legal obligation, must possess powers to prevent crimes, and are responsible for the omission.²⁷⁸

²⁷¹ The Rome Statute Article 28(a)(ii).

²⁷² Badar and Marchuk (n 162) 1-48.

²⁷³ UN Convention on the Prevention and Punishment of the Crime of Genocide (1951) Article II states that 'In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.' This is similar to what is mentioned in the Geneva Conventions 76-77 and 87 of the First Protocol of the Convention.

²⁷⁴ The Quran .8:61

²⁷⁵ Per Saland 'International Law Principles' in Roy S Lee (ed) *The International Criminal Court: The Making of The Rome Statute* (Kluwer Law International 2002) 213.

²⁷⁶ Ibid.

²⁷⁷ Schabas (n 103) 232.

²⁷⁸ Antonio Cassese, *International Criminal Law* (3rd edn, Oxford University Press 2013) 181.

It can be concluded that Islamic international law and the Rome Statute both place a burden of criminal responsibility upon commanders who violate rules of war. However, criminal responsibility for commanders under Islamic international law is subject to religious duties as well as legal, social, and political commitments. Religious duty is emphasised in the Quranic verse that stipulates the following.

And do not kill anyone whose killing Allah has forbidden, except for a just cause. And whoever is killed wrongfully (Mazluman) intentionally with hostility and oppression and not by mistake, we have given the authority to demand *qişáş* (the law of equality in punishment) or to forgive, or to take *diyah* (blood money).²⁷⁹

In Islamic international law, there is a legal and political commitment to adhere to the words and actions of the Prophet in cases of war. These duties encapsulate the idea that the Quran cannot contradict itself when it commands Muslims not to initiate war and to seek peace, except when Muslim territory is attacked according to the Quranic verse that states, 'there is the law of equality i.e. *qişáş*. Then whoever transgresses prohibitions against you, you transgress likewise against him.'²⁸⁰ Social duty refers to maintaining the reputation of Islam by complying with certain provisions. In the Rome Statute, the criminal acts of commanders are narrowly described and, in this respect, Islamic international law needs to be codified.

4.7.4 Exclusion from Individual Criminal Responsibility

Islamic criminal law and international criminal law recognise some instances that may preclude the establishment of criminal responsibility for individuals. These instances are infancy, insanity, intoxication, duress, necessity, and self-defence.²⁸¹ Such instances work in defence of the individual in the absence of capacity or knowledge.²⁸² Capacity refers to the ability of the accused to carry out criminal conduct with an awareness of the consequences. Knowledge refers to the understanding an individual has of the criminal conduct and its consequences. In some cases, an individual knows that criminal conduct is prohibited but has committed a crime without will.²⁸³ The discussion below will examine the grounds for excluding an individual from

²⁷⁹ The Quran 17:33.

²⁸⁰ The Quran 1:194

²⁸¹ Lippman (n 127) 54-55.

²⁸² Abo Zahra (n 66) 326.

²⁸³ Ibid.

criminal responsibility, and the commonalities and non-commonalities between Islamic criminal law and international criminal law (particularly the Rome Statute) in this respect.

4.7.4.1 Infancy

Islamic criminal law precludes infants from being criminally liable. It also precludes juveniles from being punished with stricter punishments, such as those prescribed for *qisās* and *hudūd* crimes.²⁸⁴ This means that a child/infant cannot be criminally liable for his conduct.²⁸⁵ A juvenile, however, is defined as ‘a person who has not attained the age of maturity as specified by Islamic jurisprudence’. This alludes to physical maturity and mental maturity.²⁸⁶ Jurists of Islamic schools have different views regarding the selection of a specific age to establish criminal responsibility, but they all agree that an infant under the age of seven must not bear criminal liability because he or she has a lack of criminal capacity, conscience, and mental maturity; thus, (*mens rea*) mental capacity is absent.²⁸⁷ However, while an infant who is above seven years old to the onset of puberty is not deemed to be completely responsible, he or she can bear partial responsibility but not for *hudūd* and *qisās* crimes.²⁸⁸ The *Hanfi*, *Shāfi’ī*, and *Ḥanbalī* schools argue that a juvenile who is aged fifteen can be found criminally responsible because he has reached puberty and can differentiate between good and bad. The *Mālikī* school states that a juvenile under the age of eighteen cannot be criminally responsible because placing criminal responsibility upon a juvenile aged under eighteen does not meet the main conditions for establishing criminal responsibility, which are: a sound mind, conscience, and puberty. Thus, the juvenile lacks these conditions.²⁸⁹

The basis of excluding persons who are under the age of eighteen from criminal responsibility has precedent in the following Quranic verse: ‘But when the children among you come of age, let them (also) ask for permission, as do

²⁸⁴ Saiful (n 156) 66.

²⁸⁵ Sanad (n 157) 89

²⁸⁶ S Tellenbach, ‘Fair Trial Guarantees in Criminal Proceedings under Islamic, Afghan Constitutional and International Law’ (2004) Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 929.

²⁸⁷ Saiful (n 156).

²⁸⁸ Sanad (n 156) 90. Sanad suggests that the parents or the legitimate agent of the child who is under the age of puberty must bear financial responsibility through his or her father or guardian.

²⁸⁹ R Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press 2005) 23.

those senior to them (in age): thus, does Allah make clear His Signs to you: for Allah is full of knowledge and wisdom.'²⁹⁰ The Hadith of the Prophet Mohammed also states that 'There are three categories of people who are not responsible: a child until he reaches the age of puberty, a sleeper until he awakes, and insane until he become sane.'²⁹¹

Different views exist among Islamic schools about the age of puberty in Islamic countries at a domestic level. However, some of these countries have ratified the Convention on the Rights of the Child and have reformed their domestic legislation to be consistent with the Convention. For instance, the Saudi Arabian Government has reformed its laws to fall within the provisions of the Convention and has established a juvenile court and juvenile custody for those who have committed crimes and are under eighteen years old.²⁹²

There could be compatibility between Islamic criminal law and the Rome Statute regarding exclusions to criminal responsibility for all persons aged under eighteen, as stipulated in Article 26 of the ICC Treaty. This Article specifies that the Court has no jurisdiction over persons who were under eighteen at the time they committed criminal conduct.²⁹³ During discussions at The Rome Conference, Saland understood that different views existed among participating states regarding the specific age of criminal responsibility. Some state delegations wanted to set criminal responsibility at the time of a person's maturity, and others wanted to set the age at fifteen, in accordance with their domestic laws because in some countries men aged fifteen can serve in military conscription. Also, some delegations argued that juveniles who participate in committing criminal acts should be responsible according to the jurisdiction of the Court.²⁹⁴

It should be noted that although international conventions acted as sources of the ICC Treaty during negotiations for adopting the Rome Statute, there was no discussion during negotiations about Article 37 of the Convention on the Rights of the Child. In addition, there were no discussions about Article 6 of

²⁹⁰ The Quran 24:59.

²⁹¹ Ahmed ibn Hānbal, *Musnad Ahmad ibn Hānbal*, tāhqqeq Abdullah a-turkyal (Risālah 2001).

²⁹² See the official website of the Ministry of Justice in Saudi Arabia <<https://www.moj.gov.sa/Documents/Regulations/pdf/77.pdf>> accessed 22 September 2019; see also M Munir, 'Rights of the Child: An Islamic Perspective on Preventing Violence, Abuse, and Exploitation of Children and Pakistani Law' (2014) XXXVIII Hamdard Islamicus 33 <<https://ssrn.com/abstract=2538104>> accessed 16 May 2019.

²⁹³ The Rome Statute Article 16 provides that 'The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.'

²⁹⁴ Saland (n 275).

the International Covenant on Civil and Political Rights. These Articles provide that capital punishment must not apply for persons under eighteen.²⁹⁵ However, the Rome Statute states that persons aged eighteen can be criminally responsible.

4.7.4.2 Insanity

In Islamic criminal law insanity excludes someone from being criminally responsible, but the person must be suffering from insanity at the time they commit their crimes.²⁹⁶ The basis of excluding persons who are insane from criminal responsibility originates from the Hadith of the Prophet when he says, 'There are three categories of people who are not responsible: a child until he reaches the age of puberty, a sleeper until he awakes, and the insane until he becomes sane.'²⁹⁷ Two main principles are applied in this respect. First, there must be an absence of ability to discriminate between lawful conduct and unlawful conduct by the doer. Second, insanity prevents a person from being aware of his cognition and his abilities.²⁹⁸

Jurists in Islamic criminal law differentiate between prolonged insanity and short-term interrupted insanity. Prolonged insanity excludes criminal responsibility, since a person's cognition and ability to control conscious thought and conduct is in a state of collapse.²⁹⁹ In instances of sporadic insanity, if the criminal act was committed when a person was insane, then criminal responsibility cannot be established.³⁰⁰ In cases where the offence was committed when the person was sane, criminal responsibility can be established even if he or she becomes insane after committing the criminal act.³⁰¹

The *Ḥanbalī* and *Shāfi'ī* schools believe that insanity that sets in after a criminal act has been committed does not affect criminal responsibility; thus, the trial cannot be suspended. The *Mālikī* and *Hanfi* schools believe that insanity that sets in after a crime has been committed is grounds for

²⁹⁵ UNCRC (1989) The United Nations Convention on the Rights of the Child <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>> accessed 16 May 2019; see also ICCPR (1966) International Covenant on Civil and Political Rights <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 16 May 2019.

²⁹⁶ Sanad (n 157) 92.

²⁹⁷ ibn Hnbal (n 291).

²⁹⁸ Sanad (n 157).

²⁹⁹ Abo Zahra (n 66).

³⁰⁰ Ibid.

³⁰¹ Sanad (n 157).

suspending a trial until the defendant becomes well in mind and capacity.³⁰² It can be stated that in the Rome Statute, insanity is not explicitly discussed as grounds for excluding criminal responsibility under the provisions of Article 31(1)(a); there is also no discussion about whether insanity affects the commencement or halting of a trial.³⁰³ However, the ICC Treaty discusses the impact of insanity on criminal responsibility and a trial. It states that the defendant is not criminally responsible if a) a person was not aware and did not know how to discriminate criminal conduct, and/or b) if there is a lack of ability to exercise capacity to control criminal conduct.³⁰⁴

Article 31(1)(a) of the ICC Treaty stipulates that mental disease can exclude criminal responsibility if two conditions are met.³⁰⁵ The first is that the mental illness must have destroyed a person's mind; the second is that the mental illness must have destroyed the person's capacity.³⁰⁶ Van Sliedregt notes that this provision covers two concepts: the first being the 'optional criterion' and the second the 'cognitive criterion'. The former means that the mental disease must affect a person's mind and ability to discriminate between legal conduct and illegal conduct. The latter means that a person's capacity to control his or her conduct must fall within 'the requirements of law'.³⁰⁷ Although Article 31(1)(a) of the ICC Treaty does not explicitly mention insanity, the treaty per se covers the issue of insanity. However, the provisions provide a broader interpretation of mental illness that covers issues concerning mental illness and the accused.

The ICC Treaty stipulates that the accused must provide evidence to prove mental illness,³⁰⁸ but in Islamic criminal law, the burden of proof is placed on the prosecution authority to prove insanity.³⁰⁹ Placing the burden of proof upon the accused in international criminal law is deemed acceptable because it is recommended that a defence attorney works on behalf of the accused during the trial stage according to Article 67(1)(d).³¹⁰ However, in Islamic criminal

³⁰² Lippman (n 127).

³⁰³ This is because the Rome Statute does not explicitly mention the term 'insanity'.

³⁰⁴ Ibid.

³⁰⁵ The Rome Statute Article 31(1).

³⁰⁶ Ibid.

³⁰⁷ Sliedregt (n 206) .

³⁰⁸ Ibid.

³⁰⁹ Abo Zahra (n 66).

³¹⁰ The Rome Statute Article 67(1)(d) stipulates the following: 'Subject to Article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the choosing of the accused, to be informed if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.'

law, it is not necessary for a defence attorney to be hired during the trial stage, because the judge and prosecutor are responsible for providing the truth. In addition, the ICC Treaty does not explore the issue of mental illness that occurs after a crime has been committed. However, both legal systems agree that insanity and mental illness can destroy a person's ability and capacity to control his or her conduct and to discriminate between lawful and unlawful conduct. Moreover, in both legal systems, illnesses such as epilepsy, neurological illness, or retardation exclude criminal responsibility.³¹¹

4.7.4.3 Intoxication

In Islamic criminal law, cases of intoxication are dealt with according to whether they fall into the category of voluntary intoxication or involuntary intoxication. In other words, Islamic jurists differentiate between those whose become intoxicated because of free choice and free will, and those who become intoxicated by coercion or by force. An intoxicated person is defined as 'a person who cannot distinguish between the sky and the earth and is not able to identify a man from woman'.³¹² Substances that cause intoxication are defined as all substances that veil the human mind, control his or her behaviour, or make a person lose his or her will and choice. Substances that cause intoxication are forbidden in the Islamic religion and include alcohol and narcotics.³¹³

Jurists from the *Sháfi'í* and *Ḥanafí* schools state that individuals who are intoxicated and have committed crimes are not responsible for their criminal conduct because they lack capacity and are not able to control their behaviour and actions. This applies whether the individual becomes intoxicated according to free will or was coerced.³¹⁴ Jurists from the *Málikí* and *Ḥanbalí* schools argue that voluntary intoxication constitutes complete responsibility for all foreseeable crimes.³¹⁵ In other words, if a voluntarily intoxicated individual commits criminal conduct or omission, he or she will be responsible for his or her conduct and actions. However, jurists from this group differentiate between voluntary intoxication and involuntary intoxication in the context of three scenarios.³¹⁶ These scenarios are as follows: if a person was

³¹¹ Lippman (n 127).

³¹² This definition has been described by the *Malki* school. See Khalid A Owaydhah, 'Justifications and Concept of Criminal Liability in Shariah' (2014) 3 (2) *Humanities and Social Sciences Review* 55.

³¹³ Sanad (n 157) 92.

³¹⁴ M Cherif Bassiouni *Islamic Criminal Justice System* (New York: Oceana 1982) 188.

³¹⁵ Sanad (n 157) 93.

³¹⁶ Bahnasi (n 154) 225.

coerced into being intoxicated, if a person consumed an intoxicant mistakenly, and in cases where a person has taken an intoxicant as a prescribed medication.³¹⁷ Bahnasi differentiates between incidents of intoxication and mental illness as follows: the latter requires that the burden of proof of insanity is placed upon the prosecutor or the plaintiff, because the accused is unable to defend himself or herself due to losing their mind, whilst the former requires that the burden of proof is placed upon the accused to justify that intoxication was forcible or involuntarily.³¹⁸

In light of the above discussion, it appears there may be some compatibility between Islamic criminal law and the Rome Statute with regard to the issue of voluntary intoxication, which is classed as not excluding criminal responsibility. Article 31(1)(b) of the Rome Statute stipulates that voluntary intoxication does not provide a defence.³¹⁹ The latter is dealt with similarly in Islamic criminal law. In the Rome Statute, involuntary intoxication provides 'a complete defence' of the criminal responsibility of the accused.³²⁰ Sliedregt explains that the status of intoxication of the accused must have a noxious effect on the mind and capacity, even relating to the use of drugs.³²¹ This means that if the accused knows the effects of the substance he or she takes, then he or she will be criminally responsible. Second, a person must lose control and capacity. In this case, intoxication does not lead to mitigation and is a 'complete defence' of criminal responsibility in the Rome Statute. Third, the act of taking intoxication shall not be voluntary because voluntary intoxication establishes complete criminal responsibility.³²² It should be noted that the Rome Statute does not recognise cases of taking intoxication by coercion or by force, while Islamic law considers these situations as cases for excluding criminal responsibility.

4.7.4.4 Duress and Necessity

In Islamic criminal law, duress means the use of violent coercion to change a person's will and abilities. This is practised by a perpetrator on a victim and results in the victim committing unlawful conduct.³²³ Hence, the victim's will and ability are restricted thus, the element of free will (the mental element) is

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ The Rome Statute Article 31(1)(b).

³²⁰ The Rome Statute Article 30(1)(b).

³²¹ Sliedregt (n 206) 230.

³²² Ibid.

³²³ Sanad (n 157) 94.

absent.³²⁴ The basis for considering duress as a reason to exclude criminal responsibility is found in the following Quranic verse: 'Allah does not burden any human being with more than he is well able to bear.'³²⁵

Bahnasi distinguishes between physical duress and moral duress. Physical coercion means that the person under duress is threatened by (physical) force by another to commit unlawful conduct, and the person under coercion is unable to avoid the threat.³²⁶ Moral duress means a threat is issued using violent words to oblige a person to commit unlawful conduct in accordance with the whim of the person issuing the threat. Bahnasi also states that offending under duress can be a case for the exclusion of criminal responsibility in the following conditions.

- a) Physical coercion must be conducted by another person who is in a position to enforce that person to commit unlawful conduct, namely the coercion of a person who has less physical power.
- b) The unlawful conduct avoids imminent death or serious harm.
- c) The unlawful conduct of the person under duress avoids *hudúd* or *qişás* crimes; for instance, using duress to ask for money cannot originate from being in a position of duress.³²⁷

Islamic criminal law distinguishes between duress and necessity. In cases of necessity, unlawful conduct may be undertaken in order to avoid greater harm.³²⁸ Necessity requires four conditions to exclude criminal responsibility. First, the defendant must prove the greater harm he or she intended to avoid and whether this involves another person or circumstances beyond the will of the defendant. Second, the defendant must prove that he or she could not use any other reasonable alternative conduct to avoid the greater harm. Third, the defendant must prove that his or her unlawful conduct was practised out of necessity.³²⁹ Fourth, the defendant must prove that he or she has committed the unlawful conduct in good faith to avoid greater harm.³³⁰ The difference between duress cases and necessity cases is that duress causes a person to lose their will and ability, while in necessity cases a person does not lose their will or ability but must commit the unlawful conduct to avert a greater harm or

³²⁴ Ibid.

³²⁵ The Quran 2:286.

³²⁶ Bahnasi (n 154) 249.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Abo Zahra (n 66) 370.

³³⁰ Owaydhah (n 312) 61.

a greater crime.³³¹ Moreover, unlawful conduct committed by a person out of necessity is committed without physical coercion from another person. Thus, necessity is used to avoid a greater harm or a greater crime.³³²

Islamic jurisprudence requires certain conditions for the consideration of necessity cases. First, there should be two evils that the defendant must choose between, and the defendant must have chosen the action that resulted in the least damage.³³³ Second, the defendant must prove that the unlawful conduct committed aimed to prevent greater harm or a greater crime from being committed.³³⁴ For example, if a person is in the process of killing a group of people using a pistol and the defendant kills the person wielding the pistol, this is done out of necessity to avoid the greater harm, which would be all the people being killed.³³⁵

Duress and necessity in the Rome Statute are dealt with in Article 31(1)(d).³³⁶ This Article provides that unlawful conduct undertaken under duress or necessity is within the jurisdiction of the Court. This suggests that both cases would also be dealt with under ICC jurisdiction. Article 31(1)(d) outlines criteria under which duress and necessity can be classed as grounds for excluding criminal responsibility. The first criterion relating to the conduct of threat is as follows.

- a) A threat must be issued by force.
- b) The threat must aim to inflict 'imminent death or of continuing or imminent serious bodily harm against a person [himself] or another person'.³³⁷
- c) The threat shall result in the person not being able to control his or her will. Thus, the measure of the unlawful reaction may be subject to the interpretation

³³¹ Abo Zahra (n 66) 519.

³³² Eli Sugarman et al. (eds), *An Introduction to the Criminal Law of Afghanistan* (Stanford Law School 2011) 46.

³³³ Sanad (n 157) 94.

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ The Rome Statute Article 31(1)(d) stipulates that 'The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control.'

³³⁷ The Rome Statute Article 31(1)(d).

of the Court's judges, who must assess the reaction of the defendant in relation to the offensive act.³³⁸

The second criterion is that the unlawful conduct of the defendant must be reasonable and necessary to avoid a greater harm. This means that the conduct must be as follows.

a) Reasonable. The meaning of 'reasonable' is described in the subparagraph as avoiding the threat of imminent death or imminent harm.³³⁹

b) Not done out of vengeance. The conduct must be to avoid a greater harm. In other words, the person's conduct should be less or parallel to the act that he or she intended to avert.³⁴⁰

According to Ambos, the concept of 'threat' belongs to both concepts, namely duress and necessity, but 'reasonable reaction' belongs to necessity. Thus, the ICC Treaty deals with both concepts.³⁴¹ Duress denotes that the defendant was unable to confront the threat because of the prevention of will. Necessity relies on 'a choice of evils'.³⁴² Duress may be considered an excuse since the defendant cannot be resistant, while necessity is classed as justification since the defendant faces a scenario of two bad situations.³⁴³ However, duress can be classed as justification in two scenarios. First, when it avoids major or greater harm than the act sought to be averted; second, if the act of the defendant was reasonable.³⁴⁴

Slidregt considers two factors concerning the status of duress and necessity in the ICC Treaty. The first has an interpretive element that requires the following: a) the unlawful conduct of the defendant to be reasonable; and b) the unlawful conduct of the defendant must not aim to inflict greater harm than that sought to be averted. The second factor is 'a volitional element' that is bound to the mental and physical elements.³⁴⁵

Article 31(1)(d) illustrates mechanisms that can be used for exercising duress or necessity. The first mechanism is that duress or necessity involves a third person or others. The second is that it is 'constituted by other circumstances

³³⁸ Slidregt (n 206) 259.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ K Ambos, 'General Principles of Criminal Law in The Rome Statute' (1999) 10 Criminal Law Forum 1.

³⁴² Slidregt (n 206) 259.

³⁴³ Ambos (n 341) 28.

³⁴⁴ Slidregt (n 206).

³⁴⁵ Ibid.

beyond that person's control'. Thus, circumstances determine whether the person was under threat (duress) or he or she committed the crime because of necessity.

Both the Rome Statute and Islamic criminal law indicate that duress and necessity are cases for excluding criminal responsibility. For duress, both legal systems emphasize that a loss of will under duress is the most significant requirement to diminish liability for criminal conduct. Moreover, in cases of duress, duress must be practised by a third party, by human beings or by animals, or be due to circumstances beyond the defendant's will. In the case of necessity, both legal systems agree that a person must face two evils and that unlawful conduct should be reasonable to avoid greater harm.

4.7.4.5 Self-Defence

In Islamic criminal law, there are two types of self-defence: self-defence undertaken by individuals and the right of self-defence of a Muslim state.³⁴⁶ Because this section deals with exclusions to criminal responsibility for individuals, it does not cover the right of self-defence of a Muslim state.³⁴⁷ Self-defence undertaken by an individual is the inherent legal right of a person to save his own life or to save another person's life, honour, and property when under threat. The defender's conduct is given legitimacy as lawful conduct.³⁴⁸ The basis of considering self-defence as a legal right of individuals is the Hadith of the Prophet Mohammed when He says, 'Those of you who see vice should change it with their hands; if they were unable then with their tongue; and if they were also unable, then with their heart; and this is the lowest manner of belief.'³⁴⁹

Islamic criminal law distinguishes between conditions relating to the offensive act and conditions relating to the reaction of the defender (in self-defence). Conditions relating to an offensive attack from an assailant are as follows. First, there must be an unlawful attack on the personal life, honour, and property of the defendant, or against another's life, honour, and property.³⁵⁰ Second, the attack must be imminent. Third, the attacker must use force to commit the unlawful conduct, namely the attack must not be easy to resist

³⁴⁶ A Hamid and Khin Maung Sein, 'Islamic International Law and the Right of Self-Defense of States' (2009) 67 (2) *Journal of East Asia & International Law* 67.

³⁴⁷ Ibid.

³⁴⁸ Sanad (n 157) 94.

³⁴⁹ Cited in Sanad (n 157)

³⁵⁰ Abo Zahra (n 66) 517.

except by using force, namely using self-defence.³⁵¹ This is because the attacker loses the right of protection of his life because of his unlawful attack against the person.³⁵²

Conditions relating to the reaction of the defender are as follows. First, the attack must not be simple to avoid, namely the defender cannot resist the attack except by killing the attacker or injuring him.³⁵³ Second, the defender's conduct must be within the principle of proportionately, namely the user of self-defence must not overstate his conduct against the attacker. Moreover, the defender must use a proportionate degree of reaction (force). Self-defence was dealt with by the Prophet Mohammed when a man came up to the Prophet asking him what to do 'if a person comes to me wanting to take my money'. The Prophet replies, 'Try to remind him of Allah.' The man then asked, 'What if he does not respond?' The Prophet then said, 'Ask the nearby Muslims to help you.' The man then asked, 'What if there are no Muslims close to me?' The Prophet then said, 'Rely on the Imam (authority).' Then the man asked, 'What if the Imam (authority) is far away from me?' The Prophet then said, 'Fight him until you protect your money and then you become martyr in thereafter.'³⁵⁴ In addition, the defender's reaction must be commensurate with the needs of the defender to avoid risk; namely, the defender can use the same means that the attacker uses.³⁵⁵

Jurists of the *Ḥanafī*, *Málikī*, and *Sháfi'ī* schools believe that self-defence is an absolute right of the defender to save his own life or another person's life.³⁵⁶ The jurists rely on the Hadith of the Prophet when he said, 'The one who is killed defending his wealth is a martyr, the one who is killed defending his family is a martyr, the one who is killed defending his religion is a martyr, and the one who is killed defending his life is a martyr.'³⁵⁷ The *Ḥanbalī* School believes that self-defence is not an absolute right because the offender is required to provide evidence that he or she acted in self-defence. In other words, the burden is upon the defender to provide evidence that unlawful conduct became lawful conduct within the principles of self-defence.³⁵⁸

³⁵¹ Ibid.

³⁵² Peters (n 289) 25.

³⁵³ Abo Zahra (n 66) 522.

³⁵⁴ Cited in Daily Hadith Online <<https://abuaminaelias.com/dailyhadithonline/>> accessed 16 May 2019.

³⁵⁵ Hamid and Sein (n 346) .

³⁵⁶ Abo Zahra (n 66).

³⁵⁷ Cited in Daily Hadith online <<https://abuaminaelias.com/dailyhadithonline/>> accessed 20 August 2019

³⁵⁸ Ibid.

the Rome Statute outlines a similar idea of self-defence in terms of explaining the requirements of the reaction of the defender, and the requirements of the attacker's conduct, with regard to the means used by the defender to prevent the attack. Self-defence is regulated in the Rome Statute in Article 31(1)(C) as follows.

The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.³⁵⁹

This article encapsulates two criteria. The first criterion concerns the offender's acts against the attack. The offender's conduct must be reasonable. This is interpreted in terms of the reactions of the defender that are necessary to repulse the attack; moreover, these acts must be proportionate to avoid the risk.³⁶⁰ The meaning of 'reasonable' can comprise a subjective element and an objective element, and considers what another cautious person would do in the same circumstances.³⁶¹ The subjective element may be applied to examine the offender's reaction; thus, was it justifiable conduct within the notion of self-defence?³⁶²

The second criterion concerns the means used by the defender to repulse the attack: the offender's conduct must be proportionate to the attacker's conduct. Proportionality limits the right of self-defence to the following criteria.

- a) The means used by the defender must not result in extreme conduct.
- b) The means used by the defender must be equivalent to the offensive conduct of the attacker, namely the means must lead to repulsing the risk and not cause an atrocious crime. Keijzer and Sliedregt note that the right of self-defence in the Rome Statute should encompass crimes of genocide and crimes against humanity because the element of acknowledgement and the element of intent can exist in self-defence cases. Moreover, there is not

³⁵⁹ The Rome Statute Article 31(1)(c).

³⁶⁰ Sliedregt (n 206) 236.

³⁶¹ Ibid.

³⁶² Ibid.

evident reason for excluding these crimes from the concept of self-defence in the Rome Statute, taking into consideration that the defender can commit these crimes to avoid genocide and crimes against humanity.³⁶³

c) The offensive act must be i) imminent, ii) undertaken with force, and iii) unlawful conduct. Moreover, (iv) the attack cannot be avoided except by the defender using force.³⁶⁴

Article 31(1)(c) of the Rome Statute regulates self-defence cases to encapsulate these rights as follows.

a) The right of a person to defend his life.

b) The right of a person to defend in the protection of his or her property.

c) The right of a person to defend another person's life.

d) The right of a person to defend another person's property or defend other property under two conditions: first, when that property is necessary to save a person's life or other people's lives; and second, when the property 'is essential for accomplishing a military mission'.³⁶⁵ The latter can be extended to maintaining the peace and security of a state in a war situation.³⁶⁶

4.8 Conclusion

This chapter has shown that both legal systems include human rights principles, which seek to protect the interests of humanity for the achievement of justice and stability in societies. In this respect, compatibility exists between the aforementioned principles. Thus, certain principles apparent in both aim to protect human rights from forms of injustice. Indeed, both legal systems place emphasis on human rights rather than political considerations, regardless of culture, religion, ethnic origin, and language. This means that both legal systems embody certain universal principles that serve the same objectives. As Bassiouni mentions, '[it is] necessary to conclude that Islamic criminal law is fully compatible with international criminal law.'³⁶⁷

Islamic criminal law establishes certain fixed principles. These principles such as no crime and no punishment without law, non-retroactivity, the presumption of innocence, and *ne bis in idem* must be respected and applied. They are evidently mentioned in international criminal law provisions, namely the Rome

³⁶³ Ibid.

³⁶⁴ Ibid.

³⁶⁵ The Rome Statute Article 31(1)(c).

³⁶⁶ Sliedregt (n 206) 234.

³⁶⁷ Bassiouni (n 10) 147.

Statute. The Rome Statute deems these principles to be international rules that must be respected and not breached. Thus, both legal systems share a podium of commonalities that promote and ensnare these principles to be universally accepted.

In sum, both legal systems present features that make the principles universal. These features are as follows. a) The principles have been adopted in different areas of the world, although the peoples of each area may have different cultures, ethnic backgrounds, and interests; thus, these areas have adopted the principles on the international stage. b) The acceptance of the principles in the international phase promotes uniformity not just between states, but also between peoples.

Part Three
Comparative Approach

Chapter Five War Crimes

5.1 Introduction

In international law, the main distinction between *jus in bello* and *jus ad bellum* is that the former aims to protect the fundamental rights of victims and wounded and sick people during armed conflict, whether the conflict is international or internal. *Jus in bello* governs the way war is conducted. For example, it prohibits attacks on medical units, and other methods of conflict such as 'no quarter'.¹ The protection of victims and the wounded and sick in war is regulated in the first Geneva Convention of 1864 and then in the Geneva Conventions of 1949 and its Additional Protocols 1977.² *Jus ad bellum* seeks to limit the conditions under which war can take place between states.³ The UN Charter deems that states must commit to the provisions of the Charter in accordance with Article 2(4), which provides that '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 Nations.'

Jus in bello 'addresses the reality of a conflict without considering the reason for legality of resorting to force'.⁴ In other words, it refers to the laws of warfare or the laws of armed conflict, one example of which is The Hague Treaty of 1899. It is a branch of international law that governs the rules of war between states in armed conflict.⁵ It also governs situations of internal armed conflict.⁶ Indeed, international armed conflict law places obligations on individuals and military soldiers who are involved in armed conflict, and stipulates how military leaders and soldiers deal with and conduct fighting. However, domestic internal disturbances that lead to violent conduct are not covered by international law of armed conflict.⁷

¹ The International Humanitarian Law Database and Customary International Humanitarian Law ICRC Website <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_ru> accessed 1 May 2019.

² Geoffrey Best, *War and Law* (Clarendon Press, Oxford 1994); see also Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press 1995) 14.

³ *Ibid.*

⁴ *Ibid.*

⁵ Best (n 2).

⁶ International Humanitarian Law Database (n 1).

⁷ Antonio Cassese, *International Criminal Law* (3rd edition Oxford 2013) 67. International armed conflict means the following, according to common Article 2 para 2 of the Geneva Conventions: 'if one party uses force of arms against another party. This shall also apply to all cases of total or partial military occupation even if this occupation meets with no armed resistance. The use of military force by individual persons or groups of persons will not

International criminal law is also a branch of international law⁸ that governs international crimes committed by perpetrators and which seeks to prosecute these crimes before the ICC. The ICC seeks to prosecute and punish perpetrators who have violated the provisions of the ICC Statute as outlined in Article 8(2)(b)⁹ and related provisions of international or internal conflicts as mentioned in the Geneva Conventions.¹⁰

The protection of people and property from violence and destruction in armed conflict is covered in international criminal law and in Islamic international law. Historically, at the level of international law, the first steps were taken in the fifth century to address these issues by the formation of the Theodosian Code.¹¹ Further attempts to legislate to ensure civilian protections were made in 697 when the Abbot of Iona, Adomnán, proposed a code known as the Law of the Innocents. Moreover, in 857 Charles took initiatives to protect people and property in warfare.¹² By the fourteenth century, the idea of protecting civilians and property from violence and destruction had evolved, especially because of the work of scholars such as Hugo Grotius, Balthazar, and Francis Lieber.¹³ In 1907, these ideas were codified in law via the Convention Respecting the Law and Customs of War on Land (The Hague Convention).¹⁴ After World War I, the definition of war crimes became regulated internationally by the Military International Tribunals (Nuremberg) in Article 6(b).¹⁵ Further steps were taken by the international community to establish the Geneva Convention 1949 and Additional Protocols in 1977.¹⁶ After this, the international instruments of the International Criminal Tribunals

suffice.' See Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press 1995) 41

⁸ Ibid.

⁹ This paragraph covers other serious violations of the applicable international provisions of customary law.

¹⁰ Ibid.

¹¹ See Rory Cox, 'A Law of War? English Protection and Destruction of Ecclesiastical Property during the Fourteenth Century' (2013) 128 *The English Historical Review* 1381 <<https://0-doi-org.wam.leeds.ac.uk/10.1093/ehr/cet277/>> accessed 25 October 2018.

¹² Ibid, Cox.

¹³ Omar Yousaf, 'IHL as Islamic Humanitarian Law: A Comparative Analysis of International Humanitarian Law & Islamic Military Jurisprudence amidst Changing Historical Contexts' (2012) 24 *Florida Journal of International Law* 439.

¹⁴ The Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex, Regulations Concerning the Laws and Customs of War on Land (18 October 1907) <<https://ihl-databases.icrc.org/ihl/intro/195/>> accessed 25 October 2018.

¹⁵ Agreement for Prosecution and Punishment of Major War Criminals of the European Axis and establishing the Charter of the International Military Tribunals (UNTS 1951) 279.

¹⁶ The Geneva Conventions, see Red Cross <<https://www.redcross.org.uk/about-us/what-we-do/protecting-people-in-armed-conflict/geneva-conventions/>> accessed 24 October 2018.

ICTY/ICTR and the Rome Statute of the International Criminal Court were established.¹⁷ In Islamic international law, international crimes are prohibited and punishable. The expansion of Islamic territories across the world has been based on the importance of interrelationships with other states, namely between Muslim and non-Muslim states.¹⁸ Jurists who specialise in Islamic international law have made significant contributions in this field, including Abo Hanifa 767, Abo Yusuf 798, Al-Shaybani 805, and al-Sarakhsi 1096. All have recognised the need to regulate the affairs of Muslim states with other non-Muslim states.¹⁹ Indeed, jurists began to record legal incidents, especially in international relations. This has helped to promote the regulation of the domestic and international affairs of Muslim states. Such a process has been undertaken as part of *siyar* (as outlined in chapter three).

The international community has continued to place emphasis on the subject of the protection of people and property in armed conflict by setting out provisions in the Rome Statute.²⁰ Article 8 of the ICC's jurisdiction covers war crimes as noted in the Hague Convention 1907. The ICC has jurisdiction over war crimes, whether they are committed in internal conflict or in international armed warfare, according to Article 8(2).²¹ In addition, the 'isolated acts committed by individuals, and soldiers acting without direction or guidance from higher up [may not constitute war crimes]'.²² This differentiates between war crimes, crimes against humanity, and genocide because war crimes can be committed if there is no armed conflict.²³ War crimes require 'a nexus' between the act perpetrated and the conflict.²⁴

¹⁷ The International Tribunals of the ICTY; see *Prosecutor v Duko Tadi* The Trial Chamber (Case No. IT-94-1-T) (7 May 1997) (627). The Court ruled that 'The Appeals Chamber has stated that, by incorporating the requirement of an armed conflict, "the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law", having stated earlier that, "[s]ince customary international law no longer requires any nexus between crimes against humanity and armed conflict ... Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal." Accordingly, its existence must be proved, as well as the link between the act or omission charged and the armed conflict.'

¹⁸ Mohammad T Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff, The Hague 1968) 35.

¹⁹ Labeeb Ahmad Bsoul, 'Historical Evaluation of Islamic Law of Nations/Siyar: Between Memory and Desire' (2005) Spring 48. The term 'Siyar' is derived from Al-Shaybani's book *Al-Siyar Al-Kabir* in the eighth century.

²⁰ The Rome Statute of the International Criminal Court (the Rome Statute) 17 July 1998, entered into force on 1 July 2002.

²¹ Article 8(2) of the Rome Statute.

²² William A Schabas, *An Introduction to the International Criminal Court* (4th edn. Cambridge University Press 2011) 227, 229.

²³ *Ibid.*

²⁴ *Ibid.*

The Rome Statute covers war crimes mentioned in other international treaties. These crimes constitute a) grave breaches of the Geneva Conventions 1949, b) serious violations of the laws and customs applicable in international armed conflict, c) serious violations of Article 3 common to the four Geneva Conventions 1949, and d) other violations of the laws of war that apply in non-international armed conflicts.

Whether regarding international or non-international armed conflicts, Islamic international law deals with both *jus ad bellum* and *jus in bello*.²⁵ The former refers to the 'justifications for resorting to war', while the latter governs 'the rules regulating the conduct of war'.²⁶ The latter provides protection to specified people, for example women, children, medics, and the clergy. It also prohibits attacks against certain buildings such as medical units and religious places. In such a context, this section now focuses on the provisions of the Rome Statute and a consideration of how Islamic international law deals with the *jus in bello* concept.

Algase maintains that Islamic international law 'strikes a balance between military necessity and respect for human life in a manner which gives a higher priority to saving the lives of non-combatants'.²⁷ The protection of civilians and property in Islamic international law began when the Prophet Mohammed received the revelation from Allah, and when the progress of the Prophet's life was recorded from 610 to 623, after which time accounts were also made by The Prophet's companions.²⁸ Later on, jurists of Islamic international law developed these laws, placing emphasis on the protection of civilians and property from violence and destruction during war and in peacetime. Islamic international law deems that solving issues should be undertaken using peaceful means such as negotiations, dialogue, and arbitration.²⁹

Kamali notes that Islamic international law says that a 'Muslim army shall respect the proportionality principle when the war is necessary as self-defence'.³⁰ Algase argues that 'In cases of war, Islamic international law

²⁵ A Guillaume, *The Life of Muhammed* (Oxford University Press 1955) 241.

²⁶ Ahmed Al-Dawoody, *The Islamic Law of War Justifications and Regulations* (Palgrave 2011) 4.

²⁷ Roger C Algase, 'Protection of Civilian Lives in Warfare: A Comparison Between Islamic Law and Modern International Law Concerning the Conduct of Hostilities' (1997) *Military Law and Law of War Review*, Vol. 16, Issues 2 and 3, 245-266.

²⁸ Noel J Coulson, *A History of Islamic Law* (Edinburgh University 1964) 9.

²⁹ Farhad Malekian, *Principles of Islamic International Law: A Comparative Search* (2nd edition Brill 2011) 177; see also Farhad Malekian, *The Concepts of Islamic International Criminal Law: A Comparative Study* (Springer 1994) 201.

³⁰ Mohammad H Kamali, *The Right to Life, Security, Privacy and Ownership in Islam* (Islamic Texts Society, Cambridge, London 2008) 54. There is a piece of Quranic evidence in this

considers the balance of humanitarian aspects and the necessary military actions with regard to the proportionality principle as it prohibits acts against civilians'.³¹ Thus, Islamic international law considers war as a last resort when there is no alternative to the resolution of issues. This is according to the following Quranic verse: 'Fighting is prescribed for you, and you dislike it. But it is possible that you dislike a thing which is good for you, and that you love a thing which is bad for you. God knows and you know not.'³² Another Quranic verse encourages peace and not to resort to war: 'And if they incline to peace, incline thou also to it, and trust God.'³³

Both international criminal law and Islamic international law prohibit war crimes by providing protection for civilians and prisoners of war, preventing the use of prohibited weapons, preventing the destruction of property, protecting humanitarian assistance workers and their facilities, protecting the environment, and preventing the use of human shields in warfare. Both laws also address the declaration of war in warfare. This means that the two legal systems deal with the provisions and rules governing *jus in bello* (rules governing the conduct of war) in order to prevent war crimes.

This chapter aims to undertake a comparative approach between international criminal law and Islamic international law, and to consider the extent to which Islamic international law is compatible with international criminal law for the prevention of war crimes. In other words, do both legal systems share some commonalities for prohibiting war crimes? If so, how and what are the provisions of Islamic international law in this respect? The main purpose of undertaking this approach is to discover how the jurisdictions of both legal systems deal with international crimes, and to learn how both legal systems aim to prevent heinous international crimes. Such a purpose should find the answer to the research question in terms of examining the compatibility and incompatibility between the two jurisdictions.

5.2 The Protection of Civilians

The Rome Statute stipulates provisions that grant protection for civilians from serious violations during international conflict and non-international conflict. Under the Rome Statute, the jurisdiction of war crimes covers grave breaches and serious violations of the Geneva Conventions and the customary laws of

regard because Allah says 'Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors.' The Quran 2:190.

³¹ Algase (27).

³² The Quran 2:216.

³³ The Quran 8:61.

war, whether international or non-international.³⁴ Grave breaches and violations involving war crimes are stipulated in Article 8 of the Rome Statute, and the Geneva Conventions and Additional Protocols. The features of these provisions encompass violations already mentioned in several international conventions as follows.

a) Article 8(1) provides that 'the Court shall have jurisdiction in respect of war crimes, in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.

b) Article 8(2)(a) covers grave breaches of the Geneva Conventions 1949.

c) Article 8(2)(b) covers others serious violations of laws and customs applicable in international armed conflict.

d) Article 8(2)(c) covers serious violations of common Article 3 of the Four Geneva Conventions in non-international armed conflict.

e) Article 8(2)(d) covers international armed conflicts, excluding situations such as internal disturbances or tensions.

f) Article 8(2)(e) covers other serious violations of the laws and customs applicable in non-international armed conflicts.

It is important to examine these protections in detail. This examination is undertaken as shown below.

5.2.1 Protection from Killing and Torture

The Rome Statute stipulates provisions to protect civilians during hostilities in international and non-international conflicts when these violations are against civilians and conducted by soldiers of an army 'as part of a plan or policy or as part of a large-scale commission of such crimes' or by individuals of the detaining state.³⁵ The aim is to protect civilians because civilians may be killed in armed conflict as a result of war and military actions.³⁶ Thus, the killing of civilians must be considered according to the means and methods used in armed conflict in order to achieve the aims of the provisions for protecting civilians. The protections granted to civilians in the Rome Statute are given because civilians are not part of hostilities and are non-combatants.³⁷ Article

³⁴ Robert Cryer (ed), *An Introduction to International Criminal Law and Procedure* (Cambridge 2007) 242.

³⁵ The Rome Statute Article 8(1).

³⁶ Cryer (ed), (n 34) 247.

³⁷ Ibid. The term 'non-combatants' is defined by the International Committee of the Red Cross (ICRC) as follows: 'Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.' See the International Database

3(1)(a) of the Geneva Convention IV provides the prohibition of torture in non-international conflict. Article 32 of the Geneva Convention IV prohibits torture in international conflict, stating that 'The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.'

Thus, civilians are protected from 'wilful killing' in international conflict; moreover, killing civilians in non-international conflict is referred to as 'murder'.³⁸ Civilians are also protected from torture. This is prohibited within the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³⁹ Torture is classed as a war crime in the Rome Statute in Article 8(2)(a)(ii).⁴⁰ Torture against civilians constitutes inhuman treatment, whatever the purpose of committing this violation.⁴¹ The jurisdiction of the Rome Statute also prohibits the starvation of civilians because this is classed as a war crime during international conflict according to Article 8(2)(b)(xxv).⁴²

Islamic international law provides protection for civilians during war situations. Civilians are non-combatants if they do not participate or take part in a war, whether by actions, opinions, or transporting supplies.⁴³ Islamic international law distinguishes between combatants and non-combatants, such as women, children, the elderly, and the clergy; these people receive protection during the hostilities of war and at the end of a war.⁴⁴ This idea is considered in the words of the Hadith of the Prophet Mohammad, which says Muslim armies

Customary International Hamartian Law ICRC (n 1). The Committee also provides that the term 'combatants' does not apply in non-international armed conflict.

³⁸ Cryer (ed),(n 34).

³⁹ Article 27(1) of The United Nations Convention against Torture 10 December 1984, entered into force on 26 June 1987.,

⁴⁰ The Rome Statute Article 8(2)(a)(ii) stipulates that 'torture or inhuman treatment, including biological experiments [is a war crime]'.

⁴¹ The Rome Statute Article 8(2)(a)(ii) defines this as follows: 'torture or inhuman treatment, including biological experiments'.

⁴² The Rome Statute Article 8(2)(b)(xxv) says that 'intentionally using the starvation of civilians as a method of warfare [is a war crime] by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions'.

⁴³ Muhammad Hamidullah, *Muslim Conduct of State* (Muhammed Ashraf Kashmir Bazar, Lahore 1954) 207.

⁴⁴ Mohammed E Badar 'Jus in Bello under Islamic International Law' (2013) *International Criminal Law Review Brill* 13. 593-625.

must not 'kill any old person, any child, or any woman, or monks'.⁴⁵ The second Caliph Abo Baker also guided Muslim soldiers in war by deeming the following.

Be just, break not your plighted faith, mutilate none, slay neither children, old men, nor women; injure not the date-palm with fire, not cut down any fruit bearing tree; slay neither flocks nor camels except for food; perchance you may come across men who have retired into monasteries, leave them and their work in peace.⁴⁶

Islamic international law also stipulates how to treat dead bodies when a war ends. These rules are as follows.

- a) The bodies of dead individuals must be buried whether they belong to the Muslim army or to the enemies.⁴⁷
- b) Dead Muslim soldiers are considered martyrs and must be buried with their clothes and blood without washing their bodies.
- c) Dead bodies shall not be cut or put on show, and they shall be delivered to their relatives if there is a request without any charge or demand.⁴⁸

Elderly people must not be killed. However, some jurists argue that if elderly people are involved in warfare situations, in that they plan a war, then they may be killed.⁴⁹ However, this rule was not condoned by the Prophet Mohammed when a 100-year-old man was found to be planning the operations of the battle of Hunayn.⁵⁰ Other jurists believe there is nothing in Islamic texts that allows the killing of an aged person, even if they are planning a war.⁵¹

Islamic international law distinguishes between combatants and non-combatants. It protects civilians during war and those who are old, women, children, farmers, sick people, the disabled, the insane, and the clergy.⁵² The reason given for these categories of immunity is that these people are

⁴⁵ The Hadith of the Prophet Mohammed in Islam: Question and Answer Website; No. 3015 <<https://islamqa.info/en/248850/>> accessed 25 October 2018.

⁴⁶ Shaukat Hussain, *Human Rights in Islam* (Kitab Bhavan 1994) 92.

⁴⁷ Hamidullah (n 43) 246.

⁴⁸ Ibid.

⁴⁹ Ahmed Abu-al-wāfa, *al-Islam wa al-Gharb* (Dar al-nāhda, Cairo 2006) 263.

⁵⁰ Majid Khadduri, *Law of War and Peace in Islam: A Study in Muslim International Law* (London 1940) 104.

⁵¹ Muḥammad al-Shawkānī, *Nayl al-ṣifār min 'aḥādīth Sharḥ Muntaqā al-'khabār* (Dār al-Jīl Beirut 1973) 73 (Arabic source).

⁵² Mohamed Elewa Badar, 'Jus in Bello under Islamic International Law' (2013) *International Criminal Law Review* 593.

generally regarded as not being able to fight,⁵³ or they are physically unable to fight because of a lack of capacity.⁵⁴ The *Málikí* school argues that if women and children or sick people take part in a war by giving advice or by participating in the conflict, they are still protected.⁵⁵ However, Mahmassani notes that the immunity of women and children, and even sick people can be confiscated if they take part in fighting a Muslim army, or if they give advice against a Muslim army.⁵⁶ According to Al-Shaybani, in these cases if women, children, or sick people try to kill a Muslim soldier, the soldier is allowed to kill the attacker in self-defence; but if that person is captured alive, he or she should not be killed.⁵⁷ If the woman is a Queen or a child is a King of the enemy state, and if they are involved in the hostilities, they may also be killed.⁵⁸

Other people who are protected include religious persons, namely the clergy. The Prophet also prohibits the killing of hermits.⁵⁹ In addition, protection is offered to traders and farmers. This rule is based on the words of the second Caliph Umar Ibn Al-Katab: 'Do not steal from the booty; do not betray; do not kill a child; and fear God in the way of the enemy farmers and do not kill them unless they wage war against you.'⁶⁰ In this regard Hamidullah and Al-Dawoody observe that targeting non-combatants is prohibited in the doctrine of Islamic international law because it violates *jus in bello*.⁶¹

5.2.2 Protection from Medical Experiments

Conducting medical experiments against civilians constitutes 'serious violations of the laws and customs applicable in international armed conflict' under the jurisdiction of the Rome Statute in accordance with Article 8(2)(b)(x). Such conduct also constitutes 'serious violations' of the laws and customs applicable in non-international armed conflict in accordance with the same Article under paragraph (2)(e)(xi), whether these experiments involve physical

⁵³ Muhammad Al-Ghazali, *al-wāsit fi al-mādhhāb* (Vol 7, Dar al-Slām, Cairo 1997) 19 (Arabic source).

⁵⁴ Al-Dawoody (n 26) 112.

⁵⁵ Ibid.

⁵⁶ Sobhi Mahmassani, *The Principles of International Law in Light of Islamic Doctrine* (Brill, Martinus Nijhoff Publishers 1966) 302.

⁵⁷ Khadduri (n 50) 104.

⁵⁸ Hamidullah (n 43) 253.

⁵⁹ Al-Dawoody (n 26) 116.

⁶⁰ Muḥammad al-Qurṭubī, *Bidāyat al-Mujtathid wa-Nihāyat al-Maqāsid* (Dār al- Ḥadīth, Maṣr) 204.

⁶¹ Ibid; Al-Dawoody (n 26) 116.

or mental health, or personal integrity.⁶² The prohibition of medical experiments against civilians is justified by medical reasons and the person's interest.⁶³ The rules of Islamic international law were mostly regulated during the life of the Prophet in the seventh century. At the time there were no advanced medicines, but it was deemed that sick people, whether civilians or prisoners of war, should be given basic available care.⁶⁴ They should not be killed or tortured or forced to interfere in the war.⁶⁵

5.2.3 Protection from Sexual Violence

The jurisdiction of the Rome Statute stipulates that sexual violence, rape, enforced prostitution, and enforced sterilisation against civilians all constitute a grave breach of the Geneva Conventions.⁶⁶ This jurisdiction also considers further steps to prevent the inhumane treatment of civilians as stipulated in Article 27 of the Geneva Convention IV and Additional Protocols I and II, which prohibits rape and sexual violence against women. However, Article 27 does not explicitly mention these acts as war crimes.⁶⁷

Sexual violence, adultery, and fornication are forbidden in Islamic criminal law, and punishments for these crimes are set out in divine law. Islamic criminal law does not distinguish between committing adultery and fornication against women who are captive, are civilians of a state in conflict, or citizens of a Muslim state. The prescribed punishment is death for the married person and whipping for a non-married person.⁶⁸ The female victim shall also receive 'bride-money' that is similar in amount to any received by her nearest female relatives.⁶⁹ The acts of sexual violence, adultery, and fornication are prohibited and punishable in Islamic international law whether in international or non-international armed conflict.

⁶² The Rome Statute Articles 8(2)(a)(iii) and 8(2)(b)(x). The latter Article talks about not 'subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons'.

⁶³ Cryer (eds), (n 34) 243.

⁶⁴ Badar (n 44) 609.

⁶⁵ Ibid.

⁶⁶ The Rome Statute Article 8 2)(b)(xxii) reads as follows: 'committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilisation, or any other form of sexual violence also constitutes a grave breach of the Geneva Conventions.'

⁶⁷ Article 27 of the Geneva Convention IV, 12 August 1949, 75 UNTS 31, entered into force on 21 October 1950.

⁶⁸ See chapter four of this thesis.

⁶⁹ Badar (n 44).

5.2.4 The Prohibition of Targeted Attacks Against Civilians

The jurisdiction of the Rome Statute prohibits targeted attacks against civilians by military action in both international and non-international conflict.⁷⁰ The parties of the armed conflict must distinguish between civilians and military personnel during hostilities. The former are those who do not take part in or conduct military actions. Attacking and targeting civilians is criminalised according to Articles 48 and 51 of Additional Protocol I of the Geneva Convention IV.⁷¹ Targeting civilians includes civilian populations, individuals, locations, and properties such as undefended cities, civilian buildings, hospitals, farms, and transportation services that are not military objectives.⁷² Moreover, in international armed conflict, targeting civilians—whether religious individuals, doctors, the wounded, or sick people—is criminalised under the provisions of the Rome Statute. This meets the principles of proportionality that are established as part of customary law.⁷³ In other words, it is important to distinguish between military objectives and non-military objectives. Thus, targeting civilians or civilian buildings constitutes a war crime, even if this results in incidental damage.⁷⁴ Some scholars argue that the evaluation of disproportionate targeting should be examined if civilian damage or injury happens as a result of direct request and with knowledge. In these cases, the proportionality principle cannot be used, and targeting may constitute prohibited acts against civilians.⁷⁵

The main source of Islamic international law offers provisions that prohibit attacks against and fighting with non-combatants because Allah says, ‘And fight in the way of God those who fight against you.’⁷⁶ Hamidullah notes that

⁷⁰ The Rome Statute Articles 8(2)(b)(ix) and 8(2)(c)(iv).

⁷¹ Article 4 of The Geneva Convention IV, 12 August 1949, 75 UNTS 31, entered into force on 21 October 1950; The Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85, entered into force on 21 October 1950; The Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, entered into force on 21 October 1950; The Geneva Convention (IV) relative to the Protection of Civilian Persons in Times of War 12 August 1949, 75 UNTS 287, entered into force on 21 October 1950; Article 48 of the Additional Protocol I stipulates the following: ‘In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.’

⁷² Cryer (ed), (n 34).

⁷³ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge 2009).

⁷⁴ Cryer (ed), (n 34).

⁷⁵ Ibid.

⁷⁶ The Quran 2:190.

anyone who does not directly participate in a war should be protected by the rules governing Islamic international law.⁷⁷ This is because Islamic international law gives people who are not able to fight the right to refuse to enter into fighting or into a war situation.⁷⁸ Furthermore, these people do not constitute a direct threat as soldiers of war do. Participation in war is prohibited for children who have not yet reached puberty or who are under fifteen years old.⁷⁹ This age was deemed fit by Muslim jurists during the time of the Prophet. The Prophet did not accept children under fourteen as soldiers in the battle of Badr in 624.⁸⁰ This age seems to be consistent with the age of children as mentioned in Article 26 of the Rome Statute and Article 77 of the Geneva Convention in its Additional Protocol I.⁸¹ For Muslim jurists, the age limit is based on the following Quranic verse: 'And fight in the way of God those who fight against you.'⁸² Ibin Qudamah and al-Gazali argue that children and women are immune because they are not able to fight because of their inability, whether physical or psychological, to engage in hostilities.⁸³ Other Muslim jurists argue that giving protection to children and women during times of war alludes to the principle of public interest, whereby enemies cannot revenge themselves on Muslim women and children by enslaving them.⁸⁴ People who are unable to fight because they are sick or insane are protected from violence or hostilities in war.⁸⁵ However, if they constitute a danger to a Muslim army, or they become involved in the fighting, they lose their

⁷⁷ Hamidullah (n 43).

⁷⁸ Ibid.

⁷⁹ Al-Dawoody (n 26).

⁸⁰ Guillaume (n 25).

⁸¹ The Geneva Conventions (n 73) Article 77 provide the following: '1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason. 2. The parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the parties to the conflict shall endeavour to give priority to those who are oldest. 3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse party, they shall continue to benefit from the special protection accorded by this article, whether or not they are prisoners of war. 4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, Paragraph 5. 5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.'

⁸² The Quran 2:190.

⁸³ Guillaume (n 25).

⁸⁴ Al-Dawoody (n 26).

⁸⁵ Badar (n 44).

immunity.⁸⁶ In this regard, Al-Dawoody notes that although Muslim jurists are concerned with elaborating the moral aspects of Islamic international law, they still place focus on the rules governing war, as follows.

The jurists were mainly concerned with giving Islamic rulings in order to regulate the conduct of Muslims, rather than explaining the moral or the philosophical rationale of these laws. However, the granted immunity for women and children can be absent if they play a role in fighting a Muslim army in actual battle, but if they are captured alive, they must not be killed.⁸⁷

Thus, according to al-Shaybani, if a woman or child murders or fights against a Muslim soldier, the woman or child cannot be immune because the Muslim soldier can use self-defence.⁸⁸

5.2.5 Protection from Deportation for Civilians and Victims

Transferring, deporting, or confining civilians or victims 'as part of a plan or policy or as part of a large-scale commission' constitutes a war crime within the jurisdiction of the Rome Statute.⁸⁹ The displacement of civilians is prohibited if this does not relate to preventing harm due to international conflict, since international humanitarian law permits the displacement of victims or civilians under certain conditions.⁹⁰ Under Islamic international law, civilians must not be transferred or deported from their own state. Civilians must be treated and respected under the rules of Islamic international law in all times of conflict.⁹¹ These rules also prohibit forced conversion to Islam, and provide for the rights of civilians as follows.

a) They have the right to be free to practice their own religion according to the following Quranic verse: 'Let there be no compulsion in religion, truth stands clear from error, whoever rejects evil and believes in God has grasped the most trustworthy handhold that never breaks and God hears and knows all things.'⁹²

⁸⁶ Abdelaziz Saqr, *al-ala'qat a-Dawliyya'h fi al-Islam waqt al-harb*. (al-fiker al-Islami, Cairo 1996) 73 (Arabic source),

⁸⁷ Al-Dawoody (n 26).

⁸⁸ Ahmad Z Yamani, 'Humanitarian International Law: A General Outlook' (1985) 7 Michigan Yearbook of International Legal Studies 190.

⁸⁹ The Rome Statute Article 8(2)(a)(vii) stipulates 'unlawful deportation or transfer or unlawful confinement'.

⁹⁰ Cryer (ed), (n 34) .

⁹¹ Hamidullah (n 43).

⁹² The Quran 2:256.

- b) Their families, dignity, and customs must be respected.⁹³
- c) There shall be no threat, discrimination, or violence against civilians or their families.⁹⁴
- d) Civilians have the right to contact their relatives or families, unless the connection may cause danger to the Muslim community.⁹⁵
- e) Civilians have the right to subject their affairs to their own courts and legislation, unless there is a threat against security and peace to a Muslim community. If this is the case, then the Muslim army can prosecute them.⁹⁶
- f) They have the right to obtain basic knowledge, and a Muslim community is responsible for providing them with the materials to obtain this.⁹⁷

5.2.6 Protection from Being Taken Hostage

Taking hostages was recognised at international level as an international crime when the international community established The Convention against the Taking of Hostages in 1979.⁹⁸ Taking hostages is prohibited in Article 34 of the Geneva Convention IV. It is a war crime under the jurisdiction of the Rome Statute, which prohibits taking civilians as hostages according to Article 8(2)(c)(iii). This Article develops the principles noted in the Hostages Convention 1979. The Rome Statute provides a more detailed definition and prohibits the taking of hostages in international conflict and non-international conflict as follows.

[it is a war crime when] the perpetrator intended to compel a state, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of [the detained persons].⁹⁹

Islamic international law recognises that taking hostages constitutes a crime against innocent people, whether this act is committed in international conflict, internal conflict, or peacetime. This is because taking hostages goes against the rights of personal dignity.¹⁰⁰ Furthermore, it is not permissible to kill

⁹³ Hamidullah (n 43).

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ The UN Treaty Series, International Convention against the Taking of Hostages (New York) 1316, 17 December 1979, entered into force on 3 June 1983.

⁹⁹ Cryer (ed). (n 34).

¹⁰⁰ Malekian (n 29).

hostages even if the enemy has killed Muslim hostages. Hamidullah states that 'if hostages are exchanged, and the rebels murder the loyal hostages, the rebel hostages may not be punished even when that had been agreed upon, for the guilt is not theirs personally but of their government'.¹⁰¹

Al-Sayih also explains that kidnapping or taking hostages is prohibited in Islamic law because the Quran prohibits holding anyone in order to take advantage or exert pressure on a party in conflict as follows: 'No one shall bear the load of another ... each soul is reckoned with only on its own account.'¹⁰² Al-Sayih also states that 'Kidnapping foreign nationals, whether Muslim or non-Muslim and holding them hostage is contrary to the tenets of Islam and has no support in the Quran or the Hadith.'¹⁰³ In support of this argument, he cites the following Quranic verse: 'We have honoured the children of Adam.'¹⁰⁴

5.2.7 The Right of Civilians to a Fair Trial

Conducting an unfair trial and imposing punishments in times of international conflict against civilians is a war crime under the jurisdiction of the Rome Statute, according to Article 8(2)(a)(iv): 'Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial.' Another Article in the ICC Statute that governs the right of fair trial is 8(2)(c), which talks about 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable'. This Article affirms the provisions of the Geneva Convention I Article 49 paragraph four, Article 50 paragraph four of the Geneva Convention II, the Geneva Convention III Article 130, and the common Article of the Geneva Conventions 3(d).¹⁰⁵ In addition, Article 75(4) of Additional Protocol I of the Geneva

¹⁰¹ Hamidullah (n 43).

¹⁰² The Quran 6:164.

¹⁰³ Abd al-Rāhim al-Sayih is a *Shaykh at Al-Azhar Jārmī*, a member of the High Commission on Islamic Affairs in Cairo, the Memri Website Special Dispatch No.1703 (2007) <<https://www.memri.org/reports/al-azhar-sheikhs-islam-forbids-taking-civilians-hostage/>> accessed 21 October 2018.

¹⁰⁴ The Quran 17:70.

¹⁰⁵ The Geneva Conventions, Article 130 stipulates the following: 'Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.' The International Covenant on Civil and Political Rights Article 14(1) provides the right of people to a fair and public trial in the determination of any criminal charge.

Convention stipulates that 'No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure ...'.

Islamic international law provides for the rights of civilians of the enemy to use their own laws, even when Muslim armies have achieved victory in their territories, and for the rights of non-Muslim persons living in Muslim states.¹⁰⁶ Thus, a Muslim state allows civilians to practice their own laws via their own courts with regard to personal status. The Muslim state is also responsible for the protection of lives, properties, and the supervision of the means of applying justice.¹⁰⁷ Thus, it can be observed that a fair trial may be achieved through the monitoring of the Muslim state over those courts that apply justice. Moreover, if there is a suspicion about the ability to achieve justice, a person can appeal to a leader of the Muslim state or its competent authority.

However, non-Muslims living in a Muslim state must pay an annual tax of between 12 and 48 drachmas. Men who are in receipt of charity, the blind, the disabled, women, and minors are exempt from this tax.¹⁰⁸ The Prophet said that 'whoever oppresses a non-Muslim subject or taxeth him beyond his capacity, then I shall be party to him'.¹⁰⁹

5.2.8 Protection from Making Civilians Fight Against their Government

The jurisdiction of the Rome Statute states that compelling civilians to fight and/or serve against their own army or state is a war crime. This is in accordance with Article 8(2)(b)(xiv).¹¹⁰ Compelling civilians to serve in hostilities is also a crime according to Article 8(2)(a)(v).¹¹¹

Under Islamic international law, forcing civilians and enemy soldiers to fight against their own countries in warfare, or using civilians or soldiers of the enemy to serve for a Muslim state or for a private Muslim person, is not permitted because the first Caliph Abo Baker prevented it. Hamidullah explains that '[it is not permitted] to force civilians or soldiers of the ... enemy,

¹⁰⁶ Hamidullah (n 43) 102.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ The Rome Statute Article 8(2)(b)(xiv) states that it is a war crime to make 'abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party'.

¹¹¹ The Rome Statute Article 8(2)(a)(v) stipulates that it is a war crime to compel 'a prisoner of war or other protected persons to serve in the forces of a hostile power'.

and sending [them] to higher Muslim authorities is regarded as improper and has been disliked since the first Caliph Abo Baker forbade it'.¹¹²

5.2.9 Protection from Enslavement and Forced Labour

Enslavement and forced labour constitute war crimes if committed by parties of an international armed conflict. This has been a crime since the International Tribunal of Yugoslavia noted it in the *Naletelic* case.¹¹³ The instruments of previous international Tribunals act as sources for the Rome Statute in accordance with Article 21(2) of the Rome Statute.¹¹⁴

In the beginnings of Islam, enslavement was permitted under certain circumstances in order to prevent bloodshed.¹¹⁵ However, in general, Islam promotes the abolition of slavery.¹¹⁶ Islamic law deems that mankind is equal in all aspects; thus, it may prohibit any actions that degrade human dignity.¹¹⁷ Consequently, enslavement, whether or not it is practised during international armed conflict or non-international armed conflict can be unlawful in Islamic international law.¹¹⁸ Al-Ghunaimi notes the following.

It is noteworthy that the divine injunctions deal only with the means of emancipation, and do not provide that slavery is an imperative system ... this is due to the fact that Islam tries to solve the problem of slavery on a pragmatic basis ... Islam restricts the cause of slavery and widens the possibilities of freeing the slave.¹¹⁹

He also adds that Islamic international law commands a Muslim army to release prisoners of war after the end of the war, as well as to release slaves.¹²⁰ (There are more details about the perspective of Islamic law regarding slavery in the next chapter.)

In today's world, slavery was abolished under The Convention on Slavery of the United Nations in 1926.¹²¹ The Rome Statute places emphasis on the

¹¹² Hamidullah (n 43) 196.

¹¹³ *Prosecutor v Mladen Naletelic, aka "Tuta" And Vinko Martinovic, aka "Štela"* (ICRY IT-98-34-T Judgment 31 March 2003) (253).

¹¹⁴ The Rome Statute Article 7(1)(c).

¹¹⁵ Malekian (n 29) 229.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Mohammed Al-Ghunaimi, *The Muslim Concept of International Law and the Western Approach* (Martinus Nijhoff 1969) 190.

¹²⁰ *Ibid.* 60.

¹²¹ The Slavery Convention 25 September 1926 entered into force on 9 March 1927 in accordance with Article 12; Supplementary Convention on the Abolition of Slavery, The

criminalisation of slavery as a war crime; but in Islamic international law, discussions still abound regarding what was reported in the early days of Islam and what is considered suitable in the modern world.

5.3 The Protection of Prisoners of War

In ancient times, prisoners of war were enslaved or killed and treated as the booty of the victorious party.¹²² The Münster Treaty in 1648 was the first international treaty to address the rights of prisoners at an international level.¹²³ The 1864 Geneva Convention also treats the subject of prisoners of war. In 1929, the international community established the Geneva Conventions; however, these conventions were not respected by the parties in the Second World War.¹²⁴ The common articles of the Geneva Conventions provide that prisoners should not be killed and that they have the right to be treated humanely.¹²⁵ In this regard, Esgain and Solf argue that Article 3 of the Geneva Convention provides protections for people, whether they are prisoners or civilians, as follows,

At any time and in any place whatsoever ... a) Violence to life and person, in particular, murder ..., mutilation, cruel treatment and torture; b) Taking of hostages, c) Outrages upon personal dignity ...; d) The passing of sentences and the carrying out of executions *without* previous judgment by a regularly constituted court affording all judicial guarantees which are recognised as indispensable by civilised people.¹²⁶

The same protections are provided in the Rome Statute, which considers the violation of the right of prisoners to be a war crime according to Article 8(2)(a).

Slave Trade, and Institutions and Practices Similar to Slavery, the Conference of Plenipotentiaries, convened by Economic and Social Council Res 608(XXI) on 30 April 1956, and in Geneva on 7 September 1956, entered into force on 30 April 1957 in accordance with Article 13.

¹²² Khadduri (n 50) 126.

¹²³ The Netherlands and Spain ratified the Münster Treaty in 1648. The treaty established the idea of the sovereignty of a state. In addition, it established the rights of prisoners in Article I(xiii), which provides that 'all prisoners of war shall be released by both sides of war without payment of any ransom and without distinction or reservation concerning prisoners who served outside the Netherlands and under other standards and flags than those of the Lord's States'. <<http://www1.umassd.edu/euro/resources/dutchrep/14.pdf/>> accessed 21 October 2018.

¹²⁴ The Geneva Convention 1929 in relation to the Treatment of Prisoners of War. See The International Committee of the Red Cross <<https://ihl-databases.icrc.org/ihl/intro/305/>> accessed 21 October 2018.

¹²⁵ Ibid. This Article provides the criteria of the definition of prisoners of war and their rights.

¹²⁶ Albert J Esgain and Waldemar A Solf, 'The Geneva Convention Relative to the Treatment of Prisoners of War 1949: Its Principles, Innovations, and Deficiencies' (1963) 41 (3) North Carolina Law Review 547.

The rights of prisoners also apply in international conflicts.¹²⁷ Moreover, Article 8(2)(a) describes acts that violate the provisions of the Geneva Convention 1949 and covers provisions that refer to the protection of prisoners as outlined in the Geneva Convention 1949.¹²⁸ The Geneva Convention 1864 and The Hague Convention 1899 provide that prisoners shall not be killed. However, these international conventions do not detail punishments to be administered when the provisions are violated.¹²⁹ They do, however, detail the rights of prisoners not to be killed, especially prisoners who surrender and are wounded.¹³⁰

The Third Geneva Convention 1949 and its Protocol I of 1977 details the meaning of 'prisoners of war', recognising them as 'combatants' of an armed conflict of international character.¹³¹ Islamic international law recognises the status of prisoners of war as those who are combatants fighting against a Muslim army, namely combatants, as well as their rights not to be killed and how they must be treated.¹³²

5.3.1 Protections for Prisoners from Killing and Inhumane Treatment

Articles 2 and 13 of the Geneva Convention and its Protocol I (1977) prevent reprisals against prisoners of war, as well as protected peoples. In Islamic international law, prisoners of war are protected from being killed, even if Muslim prisoners have been killed by the enemy.¹³³ This is based on the following Quranic verse: 'It is not for a prophet to have captives [of war] until he inflicts a massacre [upon the enemies of Allah] in the land. Some Muslims desire the commodities of this world, but Allah desires [for you] the hereafter,

¹²⁷ The Rome Statute Article 8(2)(b) stipulates the following: 'other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.'

¹²⁸ The Rome Statute Articles 8(2)(a)(i)(ii) and (b)(v)(vi)(xxi) cover provisions that deal with the protection of prisoners.

¹²⁹ Ray Murphy and Mohamed M El Zeidy, 'Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War' (2009) 9 *International Criminal Law Review* 624.

¹³⁰ The Geneva Convention IV Article 3.

¹³¹ Hilaire McCoubrey, *International Humanitarian Law: Modern Development in the Limitation of Warfare* (2nd edn. Dartmouth Publisher 1998) 133. The Geneva Conventions do not include the definition of combatant; however, Rule 3 of the Customary International Law provides the meaning of combatant as follows: 'Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.' See *International Humanitarian Law Databases*. Some writers use the term 'belligerents' instead of 'combatants' to avoid the debate surrounding the former. The current research adopts the term 'combatants' since it is mentioned in the Rome Statute in Article 8.

¹³² Badar (n 44) 616.

¹³³ Hamidullah (n 43) 195.

and Allah is exalted in might and wisdom.’¹³⁴ In respect of this verse, Al-Dawoody explains that it precludes the execution and enslavement of prisoners of war.¹³⁵

Islamic international law prohibits killing prisoners of war. Ibin Rushd explains that there is a consensus of Muslim jurists who agree that it is not permissible to kill prisoners of war, except in cases where there is a necessity to protect a Muslim nation.¹³⁶ One scholar of Islamic international law explains that if a prisoner constitutes a danger to the Islamic community, and if there are clear public interests relating to a Muslim community, the leaders of Islamic states have the right to kill a dangerous prisoner.¹³⁷ Administering inhumane treatment or inflicting degradation on prisoners of war is prohibited under Islamic international law. This is based on a story in the Sunnah, when the Prophet ordered goodwill and good treatment for prisoners taken in the Battle of Badr, which was the first battle of Islam.¹³⁸ According to the Prophet, the dignity of prisoners of war must be respected when he says, ‘Pay respect to the dignity of a nation who is brought low.’¹³⁹ Moreover, prisoners of war should not serve against their government and are not to be questioned to provide security information about their government.¹⁴⁰ The latter is comparable to Article 7(2)(a)(v) of the Rome Statute, which stipulates that ‘[it is a war crime if the hostile power] compels a prisoner of war or other protected person to serve in the forces of a hostile power’.

There are other general international rules providing protection to prisoners of war that align with Islamic international law as stipulated below.

¹³⁴ The Quran 8:67.

¹³⁵ Al-Dawoody (n 26) 137.

¹³⁶ Hamidullah (n 43) 206. There were five instances when prisoners of war were killed. One prisoner was released based on a promise that he would not fight against a Muslim army again, when he was captured in the Battle of Badr, but then he was captured again in the Battle of Uhud. Another instance was because a prisoner had killed a Muslim national. For more information see Badar (n 46) 217-219.

¹³⁷ Wahbah al-Zuhaylī, *’athār al-Ḥarb fī al-’islām*, (Dār al-Fikr Beirut 1998) 431.

¹³⁸ Badar (n 44) 616.

¹³⁹ Hamidullah (n 43) 208. With regard to enslavement, it is evident that there is no Quranic verse that permits enslavement. However, in the early history of Islam, some instances of enslaved people, who were not prisoners of war, are reported. Slavery is mentioned in early Islam as a social phenomenon, and the Quran encourages Muslims to free slaves, saying, ‘Do good to the parents, the relatives, the orphans, the poor, the neighbours (who are) near, the neighbours (who are) far, the companion at your side, the traveller and what your right hands possess (slaves)’ The Quran 4:36; Rebaz R Khdir ‘The Fate of Prisoners of War Between the Quran, Traditions of the Prophet Muhammad and Practice of the Islamic State in Iraq and Syria’ (2017) 13 (34) European Scientific Journal 34.

¹⁴⁰ Hamidullah (n 43) 206.

5.3.2 Respecting the Dignity of Prisoners

Islamic international law obliges Muslim soldiers to respect the human dignity of prisoners of war, whether this is mental or physical.¹⁴¹ This is based on the following Quranic verse: 'We honoured the children of Adam.'¹⁴² This verse deems that dignity and the life of mankind must be respected; moreover, honour here has a broad meaning that covers all aspects of life and in all circumstances.¹⁴³ Under Islamic international law, prisoners of war must be classed as guests, and no man can be enslaved.¹⁴⁴ This is consistent with Article 12 of the Geneva Convention III, which recognises that prisoners of war shall not be enslaved by those who have captured them.¹⁴⁵ This principle can also be seen in Article 13 of the Geneva Conventions Protocol I, which provides that prisoners of war must be humanely treated; moreover, acts committed against them that cause serious mental or physical harm are prohibited.¹⁴⁶ Under Islamic international law, prisoners of war should not be compelled to convert to Islam or change their religion.

The Quran states the following: 'O Prophet! Say to those who are captives in your hands; if Allah finds any good in your heart, He will give you something better than what has been taken from you and He will forgive you. Allah is forgiving, most merciful.'¹⁴⁷ Islamic international law deems that if prisoners of war are captured with their families, they shall be kept together with their husbands and children.¹⁴⁸ This is based on the Hadith of the Prophet Mohammed when he says, 'Whoever separates a child from his mother, will be separated from his own loved ones on the Day of Judgement.'¹⁴⁹ Obtaining information from prisoners is prohibited under Article 17 of the Geneva Convention III, which provides that 'Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date

¹⁴¹ Murphy and El Zeidy (n 129) 640.

¹⁴² The Quran 17:70.

¹⁴³ Murphy and El Zeidy (n 129).

¹⁴⁴ Mohammed Abo Zahra, *The Concept of War* (translated by Muhammad Al-Hady and Taha Omar; revised by Shawki Sukkary, The Supreme Council for Islamic Affairs Cairo 1964).

¹⁴⁵ The Geneva Convention III Article 12 stipulates that 'Prisoners of war are in the hands of the enemy power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the detaining power is responsible for the treatment given them.'

¹⁴⁶ The Geneva Conventions Protocol 1 Article 13.

¹⁴⁷ The Quran 8:70.

¹⁴⁸ Reza Mousazadeh, 'The Islamic View on International Criminal Law' (2005) 71 *International Students Journal* 16.

¹⁴⁹ Cited in Daily Hadith Online website < <https://abuaminaelias.com/dailyhadithonline/> > accessed 17 October 2018.

of birth, and army, regimental, personal or serial number, or failing this, equivalent information.'

5.3.3 Rules Governing the Provision of Pressing Needs

Prisoners of war have the right to have their pressing needs met, such as receiving food, water, and shelter, and must be transferred to a location that is safe and far from warfare, according to Article 23(1) of the Geneva Convention III. The Convention also requires detaining powers to provide sufficient daily food, water, clothes, medical treatment, and camps, which must be the same standard as those lived in by the civilian population.¹⁵⁰ Thus, violation of these provisions constitutes serious violations of the Geneva Conventions.

Islamic international law recognises rules that govern the status of prisoners with regard to meeting their necessary needs. This includes accommodation for prisoners of war, including at mosques or in Muslim houses.¹⁵¹ Islamic international law obliges Muslims, whether soldiers of the Muslim army or private individuals, to provide prisoners of war with pressing needs such as food, water, medicines, clothes, and shelter.¹⁵² This is considered in the Quranic verse that says, 'and the righteous feed from the food that they most love, the needy, the orphan and the captive.'¹⁵³ According to Abu Yusef, who is a jurist of the Hanfi school, those who look after prisoners of war and meet their pressing needs will not be charged, because these expenses must be met by the detaining Muslim state.¹⁵⁴ These rules are derived from the following Quranic verse: 'Thereafter is the time for either generosity or ransom until the war lays down its burdens.'¹⁵⁵ During the Battle of Badr, in the time of the Prophet, a prisoner was brought before the Prophet without clothes. The Prophet asserted that prisoners must be fed and provided with clothes. The relevant Quranic verse says, 'Feed for the love of God, the indigent, the orphan and the captive.'¹⁵⁶

¹⁵⁰ The Geneva Convention III Articles 25 to 31.

¹⁵¹ Murphy and El Zeidy (n 129) 642.

¹⁵² Hamidullah (n 43) 208.

¹⁵³ The Quran 78:8.

¹⁵⁴ Hamidullah (n 43) 211.

¹⁵⁵ The Quran 47:4.

¹⁵⁶ The Quran 76:8.

5.3.4 The Treatment of Prisoners

The treatment of prisoners of war is mentioned in Articles 13 and 26 of the Geneva Convention III, which provides that all prisoners of war 'shall be humanely treated'. According to some writers, the meaning of 'humanely treated' could refer to treatment in the wider sense, namely, to save the life of prisoners, and that prisoners should not have to encounter dangerous situations that may affect their physical or mental health.¹⁵⁷

In Islamic international law, prisoners of war have the right to obtain medical care for treatment of their injuries, and should be granted a safe place for this to happen. This is comparable to an act of charity.¹⁵⁸ The Quran says, 'And they feed, for the love of Allah, the indigent, the orphan and the captive.'¹⁵⁹ The Prophet also says, 'Take heed of the recommendation to treat the prisoners fairly.'¹⁶⁰ Equal treatment is required for prisoners of war under Islamic international law, namely any type of discrimination against prisoners is prohibited, whether religious, ethnic, or national.¹⁶¹ The basis of this is the Hadith of the Prophet that says, 'O people your Lord is only one: your Father is only one, all of you emanated from Adam and Adam emanated from earth. It is only piety, which distinguishes Arab from non-Arab and a red complexion from a white complexion.'¹⁶²

Article 16 of the Geneva Convention III covers discrimination against prisoners of war. It can be stated that this Article requires that prisoners are treated equally to other prisoners, while Islamic international law requires the treatment of prisoners to be equal with other people among the population of the detaining power. The Article includes the term 'shall be equal with other prisoners', while the Quran talks about the treatment of prisoners of war, whether they are connected to the detaining power or not.¹⁶³

¹⁵⁷ Murphy and El Zeidy (n 129) 629.

¹⁵⁸ Mousazadeh (n 148) 15.

¹⁵⁹ The Quran 76:8.

¹⁶⁰ Hamidullah (n 43) 209.

¹⁶¹ Ibid.

¹⁶² Shaheen Sardar Ali, 'Women's Human Rights in Islam: Towards a Theoretical Framework' (1997) Yearbook of Islamic and Middle Eastern Law Vol. 4 (1)117.

¹⁶³ The Geneva Convention III Article 16 stipulates the following: 'Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the detaining power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.' It is also important to mention that the Geneva Convention III provides comprehensive rules for protecting prisoners; for instance, prisoners have the following rights. (a) To register their names and their positions to identify their identity in order to send it to the ICRC; then the ICRC must send the list of names to their

5.3.5 Releasing Prisoners of War

Releasing prisoners of war is covered under provision 21(3) of the Geneva Convention III, which states that prisoners can obtain release on parole. This article provides for the release of prisoners on three conditions. (a) If prisoners suffer illnesses or health conditions, they shall be released. (b) They may be released based on agreement between the parties of war. (c) Prisoners of war cannot be released if the domestic laws of the detaining power prevent the release of prisoners on parole.¹⁶⁴ Paragraph (2) of the same Article provides that it is not acceptable to promise release to prisoners of war if they comply with conditions to achieve liberty. Wounded and sick prisoners must be repatriated to their countries without waiting for the end of war.¹⁶⁵

Repatriated prisoners must not seek 'active military service' in the war again in accordance with Article 17 of the Geneva Convention III. This concept is similar to rules for releasing prisoners of war under Islamic international law. Islamic rules are based on the story of the Prophet releasing prisoners with a condition that they must not fight against the Muslim army in the same war again.¹⁶⁶ Article 82 of the Geneva Convention III provides that releasing prisoners of war can be undertaken during hostilities or at the end of the war.

In Islamic international law, the leader of a Muslim state has the right to choose between three scenarios when considering the release of prisoners of war, based on the interests of the Muslim nation.¹⁶⁷ These scenarios are as follows.

a) Releasing prisoners as a gratuity, without an exchange for Muslim prisoners and without accepting a ransom. This is based on the following Quranic verse: 'set them [i.e. prisoners of war] free either graciously or by ransom.'¹⁶⁸

b) Releasing prisoners of war by exchange with Muslim prisoners, based on the reciprocity principle.¹⁶⁹

c) Releasing prisoners of war by accepting a ransom, either from the prisoners or from their government. The ransom must be put in the treasury of the Muslim state. If the ransom is not paid, then prisoners who have knowledge

countries. (b) To be moved from the area of war to a safe place. (c) To not experience any kind of discrimination against them and be humanely treated.

¹⁶⁴ The Geneva Convention III Article 21.

¹⁶⁵ The Geneva Convention III Article 109; This article gives rights to state parties in a war to arrange the exchange of prisoners, whether via a third-party state, or via a neutral state.

¹⁶⁶ Badar (n 44).

¹⁶⁷ Hamidullah (n 43) 206.

¹⁶⁸ The Quran 47:4.

¹⁶⁹ Al-Dawoody (n 26) 137.

should teach Muslim children.¹⁷⁰ This principle was reported by the Prophet Mohammed, who confirmed that the released prisoner must not then fight again against a Muslim army. In this way the Prophet released four thousand prisoners taken during the Battle of Badr in 624.¹⁷¹

The Quran states that 'It is not for a prophet to have captives [of war] until he inflicts a massacre [upon the enemies of Allah] in the land. Some Muslims desire the commodities of this world, but Allah desires [for you] the hereafter, and Allah is exalted in might and is wise.'¹⁷² Al-Tabri confirms that Allah commends his messenger not to confine disbelievers who are captured for manna or ransom.¹⁷³ He adds that Allah knew what the Prophet had done in the Battle of Badr when he asked for ransom and released prisoners; thus, because of this, Allah deems it right to release prisoners without asking for a ransom.¹⁷⁴ Later on, the Prophet released six thousand prisoners after the Battle of Hunyin in 629.¹⁷⁵

5.4 The Destruction of Property

The destruction of property is classed as a war crime under the jurisdiction of the Rome Statute, according to Article 8. Thus, the Court's jurisdiction provides protection to property from destruction in international conflict as noted in the Geneva Conventions and their Additional Protocols.¹⁷⁶ Article 8 of the Rome Statute (2)(b)(ii) provides that deliberately directed attacks against civilian property constitute war crimes if there is no military

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² The Quran 8:67.

¹⁷³ Muḥammad al-Ṭabarī, *Tafsīr al-Ṭabarī Jāmi' al-Bayān 'an Ta'wīl al-Qur'ān* (Dār al-Hijrah al-Ṭayybah Egypt 2001). It is available online on The King Saud University website (Arabic source) <<http://quran.ksu.edu.sa/tafseer/tabary/sura8-aya67.html>> accessed 9 October 2018.

¹⁷⁴ Ibid.

¹⁷⁵ The Battles of the Prophet, the Jordanian Chechen Site <<http://www.sukhneh.com>> accessed 9 October 2018; Badar (n 44) 616.

¹⁷⁶ There are provisions governing the protection of property in the Rome Statute as follows. Article 8(2)(b)(v) prohibits 'attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended, and which are not military objectives'. Article 8(2)(b)(xvi) prohibits 'pillaging a town or place, even when taken by assault'. Article 8(2)(b)(xiii) prohibits 'destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war'.

necessity.¹⁷⁷ However, if there is military necessity,¹⁷⁸ the attack will be examined under the provisions of Article 8(2)(a)(iv)¹⁷⁹ or under Article 8(2)(b)(xii).¹⁸⁰ Civilian objects mean all objects that do not constitute military objectives, namely 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.'¹⁸¹

Article 8(2)(b)(iv) of the Statute provides that a disproportionate attack against protected property is a war crime within its jurisdiction, stipulating as follows.

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹⁸²

This Article provides that the rights of property must be protected from extensive attack; consequently, the destruction of property cannot be justified by military necessity. If there is a military necessity, the destruction of property must be examined according to whether it was taken in the course of urgent military action that aims to attain a known military purpose. The purpose should be consistent with the provisions of the Geneva Conventions and its Additional Protocols.¹⁸³

It has been argued that Article 8(2)(b)(iv) may limit the Court's jurisdiction in relation to the damage caused in a non-human environment that is enough to

¹⁷⁷ The Rome Statute Article 8(2)(b)(ii) prohibits the following: 'Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.' The meaning of the term 'military necessity' has not been explicitly explained by Islamic international law and the Rome Statute and its regulations. However, there are some conditions related to resorting to military necessity. These conditions are a) the military necessity must be urgent, and b) the military necessity must not be extensive and excessive. See, for example, Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, New York City: Oxford University Press 2008). See also Christopher G Weeramantry, *Islamic Jurisprudence: An International Perspective* (Macmillan Press 1988).

¹⁷⁸ Cryer (ed) (n 34) 245.

¹⁷⁹ The Rome Statute Article 8(2)(a)(iv). This Article stipulates the 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'.

¹⁸⁰ The Rome Statute (n 1) Article 8(2)(b)(xii). This Article provides 'that no quarter will be given [is a war crime]'. Namely, the declaration of no quarter could result in a massive destruction of civilians and their properties.

¹⁸¹ The Geneva Conventions Additional Protocol 1 Article 52(2).

¹⁸² The Rome Statute Article 8(2)(b)(iv).

¹⁸³ Christopher Greenwood, 'Historical Development and Legal Basis' in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (Oxford University Press 2008).

constitute a war crime.¹⁸⁴ Other writers have questioned whether the jurisdiction of the Rome Statute in Article 8(2)(b)(iv) covers a 'non-human environment' and whether this requires individual responsibility for damage; namely, the Court may allow acts that do not constitute a non-extensive attack but that result in damage to property.¹⁸⁵ Islamic international law provides protections for property during warfare.

According to Islamic international law and the Quran, all land is owned by Allah: 'Seek help through Allah and be patient. Indeed, the earth belongs to Allah. He causes to inherit whom He wills of his servants. And the [best] outcome is for the righteous.'¹⁸⁶ However, under the laws of Islam, property can be and is owned by private persons or by the state. Formal property is subject to the territorial jurisdiction of a state.¹⁸⁷ Thus, Islamic law deems that the ruler is responsible for the protection of property because the ruler is an agent of Allah. Hamidullah notes that 'the legal dictum is that all the parts of a Muslim territory lie under the authority of the Muslim ruler'.¹⁸⁸

Islamic international law prohibits the destruction of civilian property and the targeting of it as an objective of war in international conflict and in non-international conflict.¹⁸⁹ This is because Islamic international law places emphasis on the rights of people to own private property and the right to sanctify their property and protect it from destruction, even in peacetime.¹⁹⁰ This can be evidenced in the following Quranic verse: 'do not consume each other's wealth in vain, nor offer it to men in authority with the intent of usurping unlawfully and knowingly a part of the wealth of others.'¹⁹¹ The destruction of property in warfare can cause a significant amount of mischief.¹⁹² The Quran says, 'And do not act corruptly, making mischief in the earth.'¹⁹³ Moreover, the protection granted for property does not distinguish between properties that

¹⁸⁴ Mark Drumbl, 'Waging War against the World: The Need to Move from War Crimes to Environmental Crime' (1998) Volume 22, Issue 1 Fordham International Law Journal 122.

¹⁸⁵ Kevin Jon Heller and Jessica C Lawrence, 'The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime' (2007) vol 20 Georgetown University Law Centre 61.

¹⁸⁶ The Quran 7:128.

¹⁸⁷ Hamidullah (n 43) 224.

¹⁸⁸ Ibid.

¹⁸⁹ Muhammad Munir, 'Suicide Attacks and Islamic Law' (2008) 90 International Review of the Red Cross 88.

¹⁹⁰ Malekian (n 29) 129.

¹⁹¹ The Quran 2:188.

¹⁹² Mousazadeh (n 148).

¹⁹³ The Quran 2:60.

belong to the enemy state or those that belong to a private person.¹⁹⁴ This rule is derived from the Prophet's command to the Muslim army when they entered enemy territories. He commanded them not to destroy public buildings and facilities and not to pillage or plunder private property. The Prophet said, 'Do not destroy the villages and towns, do not spoil the cultivated fields and gardens, and do not slaughter the cattle.'¹⁹⁵ This is different from collecting the booty of war, which is acquired from materials captured on a battlefield.¹⁹⁶

The Cairo Declaration on Human Rights in Islam (1990) provides protection for the property of individuals, and reads as follows.

Everyone shall have the right to own property acquired in a legitimate way and shall be entitled to the rights of ownership, without prejudice to oneself, others or to society in general. Expropriation is not permissible except for the requirements of public interest and upon payment of immediate and fair compensation ... confiscation and seizure of property is prohibited except for a necessity dictated by law.¹⁹⁷

It can be noted that this Article emphasises the sanctity of property to be protected from confiscation, unless there is public interest in its destruction, with fair payment and adequate compensation. Thus, in general, property is protected from destruction during peacetime and war.

The jurists of Islamic international law hold divergent views on the protection of an enemy's property during warfare. Al-Awzai, Abo Thawr, Al-Layth Ibin Saad, and Al-Thawri argue that it is prohibited to destroy the property of an enemy. This view is based on the Hadith of the Prophet which says, 'Do not destroy the villages and towns, do not spoil the cultivated fields and gardens, and do not slaughter the cattle.'¹⁹⁸ Alternatively, Ahmad Ibin Malik, Abo Hanifah, and Al-Shaybani argue that destruction is sometimes permissible if there is a military necessity or in cases of reciprocity.¹⁹⁹

This view is based on an incident overseen by the Prophet during a siege for six nights in 625 upon the Banu Al-Nadir tribe when the Muslim army cut down some trees to encourage surrender. This act was classed as military

¹⁹⁴ Hamidullah (n 43) 237.

¹⁹⁵ Mousazadeh (n 148) 17.

¹⁹⁶ Ibid.

¹⁹⁷ Article 15, The Cairo Declaration on Human Rights in Islam, 5 August 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993).

¹⁹⁸ Saqr (n 86) 64.

¹⁹⁹ Ibid.

necessity²⁰⁰ because the property constituted a direct barrier to the Muslim army.²⁰¹ Such a view considers the principle of reciprocity, which is derived from the following Quranic verse: 'And for the prohibited things, there is the Law of Equality (*qişâş*). Then whoever transgresses the prohibition against you, you transgress likewise against him.'²⁰² However, the first group of jurists often respond to the second group by arguing that these circumstances are exceptional and abrogated by the Hadith of the Prophet in subsequent battles.²⁰³ Additionally, the second Caliph Abo Baker commanded his soldiers as follows.

Stop, O' people, that I may give you ten rules for guidance on the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies, do not kill a woman, a child, or an aged man, do not cut down fruitful trees, do not destroy inhabited areas, do not slaughter any of the enemies' sheep, cows or camel except for food, do not burn date palms, nor inundate them, do not embezzle (e.g. no misappropriation of booty or spoils of war) nor be guilty of cowardliness.²⁰⁴

Islamic international law provides for the protection of property from destruction committed in warfare or during times of peace.²⁰⁵ This is recognised by the Hadith of the Prophet Mohammed which reads, 'Do not destroy the village and town, do not spoil the cultivated fields and gardens, and do not slaughter the cattle.'²⁰⁶

5.5 The Protection of Humanitarian Assistance

The Rome Statute emphasises the protection of relief workers who work in international conflicts and non-international conflicts. The relevant provisions of the protection are Articles 8(2)(b)(iii) and 8(2)(e)(iii), which provide for the protection of humanitarian assistance and peacekeeping missions. The former covers protections in international conflict, while the latter covers

²⁰⁰ Matthias Vanhullebusch, 'General Principles of Islamic Law of War: A Reassessment' (2006) 13 *Islamic & Middle E. L.* 48.

²⁰¹ Badar (n 44) 613.

²⁰² The Quran 2:194.

²⁰³ Al-Dawoody (n 26) 128.

²⁰⁴ As quoted from Onder Bakircioglu 'Islam and Warfare: Context and Compatibility with International Law' (2017) *Journal of Islamic Studies*, Volume 28, Issue 1, 99.

²⁰⁵ The meaning of property covers private civilian buildings and facilities such as hospitals, schools, parks, transportation materials, and industrial areas.

²⁰⁶ 'The Hadith of the Prophet' as quoted from M Munir, 'Suicide Attacks and Islamic Law' (2008) 90 *International Review of the Red Cross* 71. Islamic international law provides protection for animals such as cows, horses, sheep, and camels, and states that they must not be slaughtered except for food.

protections during non-international conflict. These Articles, and their subparagraphs, provide the same protections for peacekeeping and humanitarian assistance. Articles 8(2)(b)(iii) and 8(2)(e)(iii) stipulate the following.

Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

The given protections are based on the United Nations Charter and the customary international laws of armed conflict.²⁰⁷ The United Nations Charter gives rights to the Security Council to establish relief work and give humanitarian assistance in conflicts that threaten international peace and security. Thus, intentional direct attacks against personnel nominated by the United Nations constitute war crimes. Other personnel who are members of the armed conflict and providing humanitarian assistance are not covered under the Rome Statute.²⁰⁸ For example, the Security Council established its Resolution 1744 in February 2007 in relation to Somalia. This Resolution ensures the protection of humanitarian assistance and peacekeeping missions by the United Nations as long as the people involved are entitled to undertake them to protect civilians. Humanitarian assistance should be used to provide necessary needs and facilities, and governments must 'ensure complete and unhindered humanitarian access, as well as providing guarantees for the safety and security of humanitarian aid workers [in Somalia]'.²⁰⁹ It was also ruled by the International Tribunal for Yugoslavia

²⁰⁷ The Charter of the United Nations (1945) Article 49 of Chapter VII provides that 'The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.' Rule 25 of Customary International Law provides protection for medical personnel, stipulating that 'Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy.' Rule 26 provides protection for persons who work in medical assistance, stipulating that 'Punishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited'.

²⁰⁸ The Geneva Conventions Article 71(2) of Additional Protocol I; see also Rule 31 of the Customary International Law available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule31#Fn_84AA347B_00003> accessed 1 May 2019.

²⁰⁹ UN Res 1744 (2007) adopted by the Security Council at its 5,633rd meeting on 20 February 2007 <<https://www.treasury.gov/resource-center/sanctions/Documents/1744.pdf/>> accessed 28 October 2018.

(ICTY) that humanitarian assistants shall be given protections from violence or breaches in the laws of war.²¹⁰

Additional Protocol I of the Geneva Conventions provides for the protection of aid to assist wounded and sick people caught up in armed international conflict. Articles 12 and 13 of Protocol I give protections to those providing humanitarian assistance in the same manner as protections offered to civilians 'unless they are used to committing, outside of their humanitarian function, acts that are harmful to the enemy. Protection may, however, cease only after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.'²¹¹ The abovementioned Articles of the Rome Statute offer a broad analytical context for the following reasons.

a) The meaning of 'humanitarian assistance' covers all those who work in assistance teams, whether or not these teams have been established by the United Nations and/or by citizens of the parties in conflict, and who work voluntarily, or are third-party teams such as the Committee of the Red Cross, the wider Red Cross, and the Red Crescent Movement, and who do not take part in the conflict.²¹²

b) The protections granted for humanitarian assistance cover properties and facilities, such as hospitals and medical camps.

c) Humanitarian assistants are not obliged to involve themselves in the armed conflict or in military actions.

d) The jurisdiction of the Rome Statute for protecting aid workers and the facilities they use is not limited to providing medical care, food or shelter to people who are in need, but extends to considering the idea that preventing access to aid or to aid workers is classed as a war crime.

The role of humanitarian assistance whether in international or non-international conflict must meet the following conditions.

a) Humanitarian assistance must be neutral, namely it must provide balanced assistance to both sides in the conflict, according to the duties of the Red

²¹⁰ *The Prosecutor v Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, Simo Zarić*, (ICTY Trial Chamber, 27 June 1999) (46).

²¹¹ The Geneva Conventions Protocol 1 Article 13.

²¹² The International Committee of the Red Cross Website <<https://www.icrc.org/en>> accessed 28 October 2018.

Cross as described in Article 3 of The Geneva Conventions as 'an independent'²¹³ and 'impartial humanitarian body'.²¹⁴

b) It must not be involved in the conflict.²¹⁵

The protection of humanitarian assistance is also recognised in Islamic international law. Granting protection to humanitarian assistance derives from the protection of civilians, since humanitarian assistants do not fight and do not take military action in the war.²¹⁶ The Quran states the following.

O' you who have believed, do not violate the rights of Allah or [the sanctity of] the sacred month or [neglect the marking of] the sacrificial animals and garlanding [them] or [violate the safety of] those coming to the Sacred House seeking bounty from their Lord and [His] approval. But when you come out of ihram, then [you may] hunt. And do not let the hatred of a people for having obstructed you from al-Masjid al-Haram, lead you to transgress. And cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty.²¹⁷

This verse was interpreted by Al-Mawardi to mean that righteousness and piety are favoured by Allah.²¹⁸ Humanitarian assistance was practised by the Prophet himself in the Battle of Uhud in 625 between Muslims in Madinah and the Quraysh (a tribe of the Prophet) in Mecca. When starvation affected the people in Mecca, the Prophet sent ripe dates and 500 dinars.²¹⁹ Thus, Islamic international law accepts humanitarian assistance as a neutral third party, and grants protections if they are not involved in the conflict.

There are two conditions under which relief workers are accepted under Islamic international law. The first condition is that relief workers must be neutral; the second is that they shall not take any action in the war.²²⁰ Thus,

²¹³ Statute of the International Committee of the Red Cross (3 October 2013) Article 1, available at <www.icrc.org/eng/resources/documents/misc/icrc-statutes-080503.htm> accessed 28 October 2018.

²¹⁴ The Geneva Convention IV, Article 3.

²¹⁵ Denise Plattner, 'ICRC Neutrality and Neutrality in Humanitarian Assistance' (1996) 311 International Review of the Red Cross <www.icrc.org/eng/resources/documents/misc/57jn2z.htm> accessed 28 October 2018.

²¹⁶ Hamidullah (n 43) 271.

²¹⁷ The Quran 5:2.

²¹⁸ Ali ibn Muhammad Māwardi, *al-Ahkām as-sultāniyyah* (al-watn Cairo 1980) 53 (Arabic source).

²¹⁹ Mohd Hisham Mohd Kamal, 'Is Neutral Humanitarian Action Permissible Under Islamic law?' (2015) 97 (897/898) International Review of the Red Cross 423.

²²⁰ Hamidullah (n 43) 277.

under Islamic international law, humanitarian assistants should a) be neutral; b) serve all people who are in need without any prejudice between the wounded and sick soldiers of the parties of the war and civilians who are in need on all sides; and c) not take action in the conflict.²²¹ These conditions are based on the objectives of *Sharī'ah* for protecting the five essential elements of life, which are: a) life itself; b) religion; c) honour; d) the mind; and e) property. These principles are also regulated by the Rome Statute, the Geneva Conventions, and the Red Cross Statute.

Both legal systems offer protections for humanitarian relief teams from violence and to protect their properties and facilities from destruction. However, both legal systems place conditions on workers to be independent and neutral, and to provide balanced assistance for all people. Moreover, both legal systems prohibit humanitarian workers from involving themselves in the conflict, but neither system discusses the use of aid workers as human shields, or what happens if humanitarian workers violate their commitments and involve themselves in the conflict. Are they then still granted protection or not?

5.6 Using Prohibited Weapons

Article 8 of the Rome Statute discusses types of prohibited weapons. However, this discussion does not distinguish between combatants and non-combatants, or when these weapons cause devastation to mankind after a war ends.²²² According to Article 8(2)(b), all weapons that cause severe injuries or wounds, whether mental or physical, or death to humans, including toxic gases that have the same effect, are forbidden. The following items are prohibited.

- a) Poison or poisoned weapons.
- b) Asphyxiating, poisonous or other gases, and all analogous liquids, materials, or devices.
- c) Bullets that expand or flatten easily in the human body, such as bullets with a hard envelope that does not entirely cover the core or is pierced with incisions.
- d) Weapons, projectiles, and material and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering, or which are

²²¹ Statute of the International Committee of the Red Cross (3 October 2013) Article 1 available at <www.icrc.org/eng/resources/documents/misc/icrc-statutes-080503.htm/> accessed 28 October 2018.

²²² Cryer (ed) (n 34) 254.

inherently indiscriminate in the violation of the international law of armed conflict, provided that such weapons, projectiles, and material and methods of warfare are the subject of comprehensive prohibition and are included in an annex to the Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123.²²³

e) Analogous liquids whether devices or materials.

f) Toxic weapons, and chemical and biological weapons.²²⁴

Although the jurisdiction of the ICC under Article 8 covers most war crimes included in the Geneva Conventions in its Additional Protocol II, the ICC also has jurisdiction over war crimes in armed conflict whether international or non-international. According to the Report of the Preparatory Committee on the Establishment of the ICC No. 22 A/51/22 (1996), there was discussion about listing nuclear weapons within the ICC's jurisdiction. Most Arab countries, and Pakistan, India, Latin America, and some African countries support the inclusion of nuclear weapons in the ICC's jurisdiction.²²⁵ This is based on the idea that customary law is the blanket umbrella for prohibiting such weapons.²²⁶ However, the Committee deemed that nuclear weapons are not prohibited under international law, but their use is prohibited. The Committee did not want to establish a substantial law in this respect, but rather include prevented crimes within international law.²²⁷ The advisory opinion, July 1996, of The International Court of Justice on the legality of the threat of use of nuclear weapons provides that ' A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful.'²²⁸

Even though the jurisdiction of the ICC does not explicitly prohibit chemical, biological, and nuclear weapons, it is understood that their use in international armed conflict should be prohibited under customary international law.²²⁹ This may mean that certain types of weapons are not prohibited per se, but their

²²³ The Rome Statute Article 8(2)(b) paragraphs (xvii), (xviii), (xix), and (xx).

²²⁴ Chemical and biological weapons are classed as prohibited weapons under The Rome Statute Article 8(2)(b)(iv), (xvii), (xviii), (xix), and (xx); see also Cryer (n 36) 254-255.

²²⁵ Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in Roy S Lee (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer 1999) 115.

²²⁶ Ibid.

²²⁷ UN Doc A/51/22 (1996) 4 (a) <<https://www.legal-tools.org/doc/e75432/pdf/>> accessed 11 October 2018.

²²⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996 (105) 226.

²²⁹ Von Hebel and Robinson (n 225).

use in international conflict can constitute war crimes under customary international law.²³⁰ The advisory opinion of The International Court of Justice ICJ 226 in 1996 explains that 'in most conceivable circumstances, the use of nuclear weapons would contravene rules of international humanitarian law ... but it does not rule out the possibility of legal use'.²³¹

In the battles undertaken by the Prophet and his successors in the early days of Islam, no modern weapons existed that would now constitute serious violations of the rules of war under modern Islamic international law.²³² Available weapons for use in the days of the Prophet were typically swords and arrows (except for poisoned ones), and these would not have constituted serious violations of The Hague 1907, The Geneva Convention, and The Rome Statute.²³³ Furthermore, not much discussion has taken place by Muslim scholars regarding the use of prohibited weapons against the enemy.²³⁴ However, Al-Shaybani, a member of the *Ḥanafī* School, and other jurists of the *Mālikī* School allow the use of 'poison-tipped arrows' against the enemy, as an effective way to achieve victory.²³⁵ However, Weeramantry talks about the prohibition of poisoned arrows as follows: '[there] seems to have been no restrictions on the degree of force that could be used and when the Emperor Babur used artillery for the first time ... it does not seem to have been the subject of juristic discussion.'²³⁶ However, under Islamic international law, the use of such weapons may be prohibited. This approach is based on the prohibition of fire stones and mangonel catapults in wars during the time of the Prophet because burning is prohibited. According to the Hadith of the Prophet: 'Do not punish the creature of God with the punishment of God.'²³⁷

²³⁰ Ibid.

²³¹ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) I ICJ Rep 226 (95-97) Von Hebel and Robinson (n 229).

²³² Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine*, (Brill, Martinus Nijhoff Publishers 1966).

²³³ The Hague Convention; the Geneva Conventions and Protocols; the Rome Statute.

²³⁴ Al-Dawoody (n 26) 122.

²³⁵ Muhammad ibn al-Hassan al-Shaybānī, *Kitāb al-Siyar al-Saghīr* (Tahqeq Muḥammad al-Sarkhashī, Dār al-Kutub al-ʿilmiyyah Beirut 1997).

²³⁶ Christopher G Weeramantry, *Islamic Jurisprudence: An International Perspective* (Macmillan Press 1988) 138. In this regard, it can be observed that the OIC (Organisation of Islamic Co-operation) should consider the evolution of weapons in the modern world; thus, they may re-evaluate some opinions of the ancient Muslim jurists so they are consistent with international law and modern times because one of the duties of Islam is to build connections between Muslim states and non-Muslim states. Moreover, most Muslim countries are parties to the Geneva Conventions and its protocols.

²³⁷ Sohail Hashmi, *Ethics and Weapons of Mass Destruction; Religious and Secular Perspective*, (1st edn, Cambridge 2004) 328. This Hadith is quoted from Daily Hadith Online < <https://abuaminaelias.com/dailyhadithonline/> > accessed 28 October 2018.

According to one writer, Islamic international law prohibits the use of mangonel catapults in battle and using fire to cause mass destruction. This is because Islamic international law must promote the principles of proportionality.²³⁸ Hamidullah claims that 'the deliberate burning of persons, either to overcome them in the midst of battle is forbidden'.²³⁹

Under Islamic international law, if the enemy uses weapons of mass destruction, it is permissible to attack the enemy using the same weapons they have employed. This is based on the following Quranic verse: 'Who so commits aggression against you then respond within the same degree of aggression waged against you.'²⁴⁰ Dayem and Ayub claim that this is deemed under the principle of reciprocity.²⁴¹

Another weapon that is prohibited under Islamic international law is flooding. This is because innocent people may be affected.²⁴² However, Al-Shaybani and Ibin Qudamah permit flooding if there is a 'military necessity'. Al-Shaybani explains that putting poison into the water supply of the enemy is prohibited, but preventing water supplies reaching the enemy is allowed to encourage them to surrender.²⁴³ However, these views are not consistent with the Rome Statute, according to Article 8(e)(i)²⁴⁴ and the Genocide Convention.²⁴⁵ Furthermore, if the Prophet prevents punishment by fire because only God can use this as punishment, it follows that only God can punish by withholding water. Also, using this kind of mass destruction may affect innocent civilians who receive immunity under the rules of Islamic international criminal law.

The meaning of the term 'military necessity' has not been explicitly explained by Islamic international law and the Rome Statute and its regulations, neither have the elements of related crimes thereto. However, Article 8(2)(a)(iv) of the ICC mentions the 'extensive destruction and appropriation of property, not

²³⁸ John Kelsay, 'Arguments Concerning Resistance in Contemporary Islam' in Richard Sorabji and David Rodin (eds) *The Ethics of War: Shared Problems in Different Traditions* (Ashgate, Aldershot 2007). 65.

²³⁹ Hamidullah (n 43) 328.

²⁴⁰ The Quran 2:194.

²⁴¹ Mohamed A Dayem and Fatima Ayub, 'In the Path of Allah: Evolving Interpretations of Jihad and its Challenges (2008) 7 UCLA Journal of Islamic & Near Eastern Law 67.

²⁴² Mohammed Bedouin, *The Gulf War of 1980-1988 and the Islamic Concept of International Law* (Nijhoff 1992) 290.

²⁴³ Al-Dawoody (n 26) 125.

²⁴⁴ This paragraph stipulates 'Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.'

²⁴⁵ The Genocide Convention Article II(c) stipulates that it is prohibited to 'deliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part'.

justified by military necessity and carried out unlawfully and wantonly'. Islamic international law prohibits discretionary attacks on enemy cities and towns, even when there is military necessity, and is based on the words of the Prophet when he said, 'Do not destroy the villages and towns, do not spoil the cultivated fields and gardens, and do not slaughter the cattle.'²⁴⁶ However, Islamic international law considers the principle of reciprocity when an enemy attacks. If a Muslim army or city is destroyed in military operations, a Muslim army is allowed to respond by enacting the same type of attack. This is based on the following verse: 'Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors.'²⁴⁷ At international level, military necessity may be identified as the urgent measures needed to achieve a specific military purpose, but these should be undertaken bearing in mind international humanitarian law.²⁴⁸

Some questions have also been raised in relation to the meaning of the term 'in particular' in Article 8(1), which provides the following: 'The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.' The terms 'in particular' and 'a plan or policy' may limit the ICC's jurisdiction over war crimes that have been committed without plan or policy, namely war crimes committed in ways that are not systematic. This situation sometimes relates to the use of poisonous weapons in war crimes; for example, in the Syrian crisis, when the Syrian regime allegedly released explosive drums and chemical weapons on civilians. Akande feels that 'analogical liquid materials' can be classed as prohibited weapons; thus, the crimes can be prosecuted before the ICC.²⁴⁹ Heller explains that 'the requirements of the principle of legality in international criminal law would warrant against the application of the broad and ultimately discretionary rules of interpretation of the Vienna Conventions of Treaties'.²⁵⁰ He adds that ignoring the intended meaning is simply a way for human rights activists to create the Rome Statute they want, and not the Rome Statute that was drafted and accepted by member states.²⁵¹

²⁴⁶ Khadduri (n 50) 107.

²⁴⁷ The Quran 2:190.

²⁴⁸ Christopher Greenwood, 'Historical Development and Legal Basis' in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008).

²⁴⁹ Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?* (Blog of the European Journal of International Law, EJIL Talk 2013), 1, 4
<<https://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>>
accessed 30 December 2017.

²⁵⁰ Kevin Heller, responding to the analysis of Dapo Akande above.

²⁵¹ Ibid.

However, some writers argue that using the term 'in particular' is classed as guidance for the Court and does not limit the Court's jurisdiction.²⁵²

5.7 Human Shields

Using innocent people, whether civilians or non-combatants, as 'human shields' is classed as a war crime in the Rome Statute. This is based on Article 8(2)(b)(xxiii), which defines the crime as 'utilising the presence of a civilian or other protected persons to render certain points, areas or military forces immune from military operations'.²⁵³ Such an idea is compatible with the notion of the 'adversary's respect' in International Humanitarian Law and consistent with the principle of proportionality.²⁵⁴ The jurisdiction of the ICC recognises the use of human shields as a war crime in international and non-international conflict, according to Article 8(2)(c) as follows.

In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause.²⁵⁵

In addition, sub-paragraph (i) of Article 8(2)(c) states the following circumstances: 'Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.'²⁵⁶

Islamic international law also deals with using human shields in a war context or during hostilities in relation to people who are non-combatants and those protected from attack under its rules of war.²⁵⁷ In this respect, Muslim jurists take the following into account.

a) If the human shield comprises women or children.

²⁵² Cryer (ed) (n 34) 244.

²⁵³ The Rome Statute Article 8(2)(b)(xxiii).

²⁵⁴ The Geneva Conventions Article 51(7) of the Additional Protocol stipulates that 'The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.'

²⁵⁵ The Rome Statute.

²⁵⁶ Ibid.

²⁵⁷ Al-Dawoody (n 26) 117.

- b) If it is used in cases of war with another Muslim army.
- c) Whether or not the human shield comprises people of a state that has a peace agreement with a Muslim state.
- d) If the human shield is made up of Muslim prisoners.

The first group of jurists²⁵⁸ argue that it is permissible to attack an enemy if the human shield consists of Muslim prisoners or *dhimmi* (those people who are tolerated within Islam) or if it comprises citizens of a state that have a peace agreement with the Muslim state.²⁵⁹ However, the jurists restrict this conduct by two conditions: a) if there is military necessity, including preventing the defeat of the Muslim army and destruction of the Muslim community; and b) if attacking the shield can be avoided. In this respect, they rely on the following Quranic verse: 'Had they [any believing Muslim men and women] been separated, we would have inflicted a sever chastisement on those who disbelieved from among them [the Meccans].'²⁶⁰

The second group of jurists deem it permissible to attack the enemy when they are using a human shield of non-combatants if there is a military necessity, as long as they avoid deliberately targeting the human shield.²⁶¹ They assess military necessity based on whether the human shield has been used to prevent a Muslim army from fighting or to stop a war that results in the defeat of the Muslim army.

Al-Dawoody discusses relevant issues in respect of the revaluation of the views of some Muslim jurists working in this area. He considers the development of rules covering war and the materials and mechanisms of war, and the idea that Muslim countries are not separate from other non-Muslim countries in the world. He notes the following.

The best approach in the discussion of these Islamic legal issues is to relate such rulings to the jurists who advocated them. Concerning the application of these rulings, it would be left to the Muslims in question to decide which rulings to endorse. The main point to be concluded from the discussion of this issue is that most of the jurists override the Quranic injunction on the basis of the principle of Muslim public interest, judging that it would be in the interest of the Muslims to attack the enemy even

²⁵⁸ This group of jurists comprises Ahmad *ibn Hanbal* (the Head of *Ḥanbalī*) *Abu Thawr*, *Al-Layth*, and *Al-Shaybani* of the *Ḥanafī* school.

²⁵⁹ Muḥammad al-Ṭabarī, *Ikhtilāf al-Fuqahā'*, (Maktabat ūaqfiyāh 1999) 9.

²⁶⁰ The Quran 48:25.

²⁶¹ This group of jurists are the *al-ūwzāi* and *Mālikī* schools.

though this might lead to casualties among innocent non-combatants, Muslim captives, *dhimmi*, or any individuals who belong to a country with which Muslims have a peace accord, despite the fact that the Qurān gives a different ruling in a similar situation.²⁶²

In addition, Islamic international law provides protection for non-combatants. However, some reasons are offered by jurists to explain why an attack on a human shield may be allowed. If the enemy constitutes a danger to a Muslim nation, some jurists use public interest and/or the potential defeat of the Muslim army as a reason to allow an attack. Thus, it seems that Muslim jurists tend to focus on the subjective status of the human shield, for example the people that constitute the shield, rather than the effects of attacking the shield. Thus, the focus is on victory rather than applying the rules of war. This is because a war in Islamic international law can be considered self-defence. Consequently, this stance raises the following question: do the means justify the ends?

5.8 The Declaration of 'No Quarter' in War

In war, 'no quarter' (or taking no prisoners) can be defined as when the victor declares no clemency or mercy and refuses to spare the life of the losing opponent, unless the opposition offers complete unconditional surrender.²⁶³ The Rome Statute states that the declaration of 'no quarter' is a war crime, according to Articles 8(2)(b)(xii) and (e)(x).²⁶⁴ The declaration of 'no quarter' violates the rights of people who are non-combatants.²⁶⁵ The elements of this crime are stipulated in The Elements of the Crimes of the Rome Statute, which states the following.

- a) The perpetrator has declared or ordered that there shall be no survivors.
- b) Such a declaration or order was given to threaten an adversary or to conduct continued hostilities on the basis that there shall be no survivors.
- c) The perpetrator was in a position of effective command or control over the subordinate armies to which the declaration or order was directed.

²⁶² Al-Dawoody (n 26) 118.

²⁶³ For a detailed definition of 'no quarter', see Rule 46 of Humanitarian Law, which deems that 'no quarter' is prohibited, as is threatening an adversary therewith or conducting hostilities on this basis; see the International Humanitarian Law Database.

²⁶⁴ The Rome Statute Article 8(2)(b)(9)(xii) stipulates that 'declaring that no quarter will be given' is a war crime; the Rome Statute Article 8(92)(e)(x) also stipulates the same prohibition in non-international conflict.

²⁶⁵ Cryer (ed) (n 34) 257.

d) The conduct took place in the context of and was associated with an international armed conflict.

e) The perpetrator was aware of factual circumstances that established the existence of the armed conflict.²⁶⁶

Thus, the declaration of 'no quarter' must be given publicly or in private to be classed as a war crime.²⁶⁷ The former can be done via speeches or statements that threaten an enemy, while the latter can be undertaken by committing hostilities during warfare 'on the basis that there be no survivors'.²⁶⁸ The declaration of 'no quarter' is also dealt with in Article 41 of Additional Protocol I of the Geneva Conventions. This Article defines the status of *hors de combat* and stipulates that individuals who do not take part in warfare are protected from violations and hostilities.²⁶⁹

Islamic international law recognises the declaration of 'no quarter' and prohibits this because it constitutes hostilities in warfare against protected persons. This can be deduced from the following Quranic verse: 'And if they incline to peace, then incline to it [also] and rely upon Allah. Indeed, it is He who is the Hearing, the Knowing.'²⁷⁰ This verse was interpreted by Al-Tabri, who said that if the enemy wants to stop or surrender, convert to Islam, or pay *jizyah* (tax), Muslims should incline towards peace and stop fighting.²⁷¹ Islamic international law also uses the concept of Aman, which literally means 'safety and protection' for protected persons in warfare. In order to prevent bloodshed in warfare situations, it also applies to persons who are *dhimmi* (not Muslims) and who live in a Muslim state, and to non-Muslims who live in a non-Muslim state, as long as they do not take action in warfare against other Muslims.²⁷²

Aman can be defined as 'a contract for the protection of persons and property of the enemy belligerents, or any other citizens of an enemy state'.²⁷³ Aman is compatible with the idea of *hors de combat*, as mentioned in Article 41 of the Geneva Conventions.²⁷⁴ Peters argues that 'safe conduct' is encapsulated

²⁶⁶ The Elements of the Crimes of the Rome Statute Article 8(2)(b)(xii).

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ The Geneva Conventions, Additional Protocols relating to the Protection of Victims of International Armed Conflicts (Protocol I, 8 June 1977).

²⁷⁰ The Quran 8:61.

²⁷¹ Muḥammad al-Ṭabarī, *Tafsīr al-Ṭabarī Jāmi' al-Bayān 'an Ta'wīl al-Qur'ān* (Dār al-Hijrah al-Ṭayybah, Volume 4 2001).

²⁷² Badar (n 44) 616.

²⁷³ Al-Dawoody (n 26) 133.

²⁷⁴ Hamidullah (n 43) 206.

in the meaning of Aman in Islamic international law.²⁷⁵ He also adds that Aman is a contract of protection for non-Muslims, whether they live in a Muslim state or a non-Muslim state.²⁷⁶ Wansbrough explains that, in Islamic international law, Aman covers people who want to live in or enter a Muslim state for trade, business, or education.²⁷⁷ Thus, these people are protected under the meaning of Aman.²⁷⁸

5.9 Protection of the Environment

In an international legal context, Rule 43 of Customary International Humanitarian Law details the meaning of the protection of the natural environment in armed conflict, whether of an international or non-international character, as follows.

- a) No part of the natural environment may be attacked, unless it is a military objective.
- b) Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
- c) Launching an attack against a military objective that may be expected to cause incidental damage to the environment and would be excessive in relation to anticipated concrete and direct military advantage is prohibited.²⁷⁹

In addition, Jensen and Halle offer a definition of the protection of the environment as follows.

The sum of all external conditions affecting life, development, and the survival of an organism; in the context of this report, environment refers to the physical conditions that affect natural resources (climate, geology, hazards) and the ecosystem services that sustain them (e.g. carbons, nutrients and hydrological cycles).²⁸⁰

The environment is given protection under international humanitarian law, according to Additional Protocol I of the Geneva Conventions. Article 35(3)

²⁷⁵ Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (Mouton, The Hague 1979) 29.

²⁷⁶ Ibid.

²⁷⁷ John Wansbrough, 'Safe Conduct in Muslim Chancery Practice' (1977) 20 *Bulletin of the School of Oriental and African Studies* 34.

²⁷⁸ Al-Dawoody (n 26)137.

²⁷⁹ The Database of International Humanitarian Law, Rule 43.

²⁸⁰ David Jensen and Silja Halle (eds) *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (United Nations Environment Programme, Iraq, March 2004) <http://www.un.org/zh/events/environmentconflictday/pdfs/int_law.pdf> accessed 31 October 2018.

prohibits the destruction of the environment by any method or means by parties engaging in conflict. It prohibits parties from employing 'methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'.²⁸¹ However, the natural environment per se does not appear on the list of 'grave breaches'; thus, it is not subject to individual criminal liability in the Geneva Conventions.²⁸²

According to Article 47 of the Geneva Conventions IV, the extensive destruction of the environment cannot be justified by military necessity. Article 85(3)(b) prohibits the launch of attacks that cause excessive loss of life to a population and excessive loss of property or objects owned by civilians.²⁸³ During the International Criminal Tribunal for the former Yugoslavia, the judge in the *Tadić* ruled that violations of international humanitarian law committed in non-international conflict must be prosecuted.²⁸⁴ The protection of the environment is also affirmed in the Rome Statute, which imposes punishments for the destruction of the environment because such destruction constitutes a war crime in international conflict. Article 8(2)(b)(iv) of the Rome Statute states the following.

[It is a war crime] to (iv) intentionally launch an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Furthermore, Article 8(1) of the Rome Statute outlines a test of military necessity when violations are committed as 'widespread, long-term and severe'.²⁸⁵ Thus, damage to the environment is a war crime under the jurisdiction of the Rome Statute. However, this carries a requirement of intent and physical conduct that relates to the intent and knowledge of the doer. The context is an attack constituting environmental damage that results in a physical element of criminal conduct.²⁸⁶ Thus, the Rome Statute considers damage to the environment to be criminal conduct, which is subject to

²⁸¹ Protocol Additional to the Geneva Conventions (1949) and relating to the Protection of Victims of International Armed Conflicts (Protocol I, 8 June 1977).

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ *Prosecutor v Duko Tadi* in the Appeal Chamber (ICTY IT-94-1-A) (15 July 1999) Paragraph 96 <<http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>> accessed 11 May 2019.

²⁸⁵ The Rome Statute Article 8(1).

²⁸⁶ Ibid Article 25.

individual responsibility. The protection of the environment in the Rome Statute also goes further in providing protection 'for cultural goods and enemy property'.

Islamic international law provides for the protection of the environment. Nonetheless, there are divergent views among Muslim jurists about the circumstances in which protecting the environment in warfare situations is valid. The first group of jurists, Al-Awzai, Al-Thwari, and Abo Thawr, argue that the environment (such as trees and crops) must be protected from destruction and damage.²⁸⁷ This view is based on the ten rules given by the first caliph Abo Baker, who said that, during warfare, it was wrong to destroy trees or farms, and to kill animals, except for food. A second group of Muslim jurists, Abo Hanifa, the *Sháfi'í* school, Ibin Hazm, and Al-Shaybani, argue that it is permissible to destroy the environment of the enemy in warfare if there is military necessity, such as attacking the soldiers of the enemy who are in fortresses.²⁸⁸

Kamili and Munir argue that the destruction of the environment constitutes 'mischief and corruption' on earth according to the following Quranic verse.

And to [the people of] Madyan [we sent] their brother Shu'ayb. He said, 'O my people, worship Allah; you have no deity other than Him. There has come to you clear evidence from your Lord. So fulfil the measure and weight and do not deprive people of their dues and cause not corruption upon the earth after its reformation. That is better for you, if you should be believers.'²⁸⁹

The protection of the environment in Islamic international law is conditional on military necessity, which is assessed by the leader of the Muslim army. In the Rome Statute, the destruction of the environment is not justified by military necessity if this is done on a large scale or is widespread. Thus, the Rome Statute prohibits the destruction of the environment as part of any objectives to achieve victory. In Islamic international law, environmental destruction may be permissible to achieve victory, but the Muslim army must not exploit the concept of military necessity in order to destroy or damage the environment because this is classed as causing 'mischief' on earth. The Muslim leader must consider the principle of proportionality in warfare in order to protect the environment.

²⁸⁷ Karima Bennoune, 'As Salamu Alaykum: Humanitarian Law in Islamic Jurisprudence' (1994) vol 15 issue 2 University of Michigan Law School 506.

²⁸⁸ Ibid.

²⁸⁹ The Quran 7:85.

5.10 Conclusion

The protection of civilians is affirmed in both of the analysed legal systems. According to the Rome Statute, military necessity does not justify the killing of civilians. However, killing protected civilians does not constitute a war crime unless the actions are committed using a plan or targeted policy, or undertaken on a large scale.²⁹⁰ In the main sources of Islamic international law, there is no divine text that allows the killing of non-combatants in a war context. It must also be noted that in Islamic international law, there is no focus on the means leading to the killing of civilians, although emphasis is placed on the prohibition of criminal conduct and the crime per se. According to the Rome Statute, targeting civilians during war is prohibited. However, if this happens, the incident must be assessed using the principle of proportionality, which requires the following.

- a) There was no request made to target civilians.
- b) The damage was not excessive.

In Islamic international law, there is no agreement between Muslim jurists in this respect. Some prohibit the targeting of civilians because civilians are not combatants in a war context, but others allow the targeting of civilians if there is a public interest and in the interests of protecting a Muslim community from destruction.

With regard to the rights of civilians to receive a fair trial, the Rome Statute provides for this right in the detaining state, but Islamic international law provides for this right under its own laws. Islamic international law may not allow a Muslim person to be tried in a non-Muslim court if there is no agreement or contract to allow this between the parties of conflict. The United Nations Charter has been ratified by most Muslim and Arab countries, thereby underlining the concept of sovereignty. Muslim countries must abide by this Charter in accordance with the following Quranic verse: 'O you who have believed, fulfil [all] contracts.'²⁹¹

In relation to prisoners of war, the Rome Statute states that the killing of prisoners of war amounts to criminal conduct and is punishable. Islamic

²⁹⁰ Questions have been raised about what the writers of the Rome Statute mean by the term 'large scale'. Does this term mean 'a large number of persons' or does it mean 'the ways or means used' in the war crime?

²⁹¹ The Quran 5:1.

international law uses a comparable concept to prevent the killing of prisoners of war. This can be found within its main sources. However, Islamic international law is administered in accordance with the choices of the leader of an Islamic state based on certain criteria, such as releasing prisoners in exchange for a ransom, an exchange with Muslim prisoners, or as a gratuity. In some cases, Muslim jurists permit the killing of prisoners of war if they constitute a danger to a Muslim community; for example, if they are working as spies against their own country or pose a risk to a Muslim community. However, in these circumstances, questions are usually raised about whether actions have been taken in the public interest or because of criminal conduct per se. However, these permissions may enable political leaders to control the rules governing war rather than controlling military leadership. With regard to the treatment of prisoners of war, the jurisdiction of the Geneva Conventions and the Rome Statute provide that prisoners of war must receive the same treatment as imprisoned counterparts. Islamic international law provides that prisoners of war must receive the same treatment as civilians, namely other Muslim people.

The Rome Statute criminalises the destruction of property unless there is a military necessity not to protect a property. In Islamic international law, Muslim jurists hold divergent views in respect of the destruction of property in a war context. Some Muslim jurists prohibit the destruction of property during war, while others allow destruction if there is a 'military necessity'. 'Military necessity' is now defined under Islamic international law in the context of modern warfare because most Muslim countries, including Saudi Arabia, have ratified the Geneva Conventions. In terms of the protection of humanitarian assistance, both legal systems assert the protection of humanitarian workers and their facilities as long as the workers are not combatants, do not take action in a war context, and are neutral. However, both legal systems fail to outline provisions for when aid workers violate their status of neutrality and become involved in a conflict.

The use of certain kinds of weapons is prohibited and is punishable under the Rome Statute, whether this use takes place during international or non-international conflict. However, nuclear weapons are not explicitly prohibited in the Rome Statute. In Islamic international law, there is no agreement between Muslim jurists in relation to the use of certain kinds of weapons. Some Muslim jurists prohibit the use of certain weapons, but other jurists allow the use of these weapons if the enemy uses them and when there is a 'military necessity' to protect a Muslim community from destruction.

Using civilians as a human shield is prohibited under the jurisdiction of the Rome Statute because it constitutes a war crime against protected persons. In Islamic international law, Muslim jurists agree that attacking the enemy when they are using a human shield is only permitted if there is a 'military necessity'; however, generally, attacks on protected people should be avoided. This means that Muslim jurists may allow an attack, but will not allow the killing of protected people because Islamic international law seeks to avoid the targeting of such people.

Chapter Six

Crimes Against Humanity

6.1 Introduction

In the field of international criminal law, the concept of crimes against humanity was formulated many years ago. In 1915, Great Britain, France, and Russia established a declaration that defined crimes against humanity in relation to the mass killing of Armenians by the Turkish Empire.¹ Furthermore, a Special Commission of the Versailles Conference decided to create an international military criminal tribunal in order to deal with crimes against humanity committed during World War I.²

In 1945, the international community, especially the Allied Powers, namely America, Great Britain, and Russia, established the London Agreement in order to bring Nazi perpetrators of crimes against humanity during World War II to justice.³ In later years, the United Nations Assembly adopted a resolution for establishing ad hoc tribunals for crimes committed in Yugoslavia and Rwanda. Then, over time, crimes against humanity 'became part of customary international law'.⁴ Other international laws have also been passed that deal with crimes against humanity, namely the Control Council Law No. 10 (1948),⁵ the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968),⁶ the Apartheid Convention (1973),⁷ and

¹ Dispatch of the United States Ambassador in France to Secretary of State Bryan on 28 May 1915 (Washington, US Government Printing Office 1928) 881, quoted from Antonio Cassese and Paola Gaeta, *International Criminal Law* (3rd edn, Oxford 2013) 84.

² Report presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of War and on the Enforcement of Penalties (1919) 14(1) *The American Journal of International Law* <[https://www.jstor.org/stable/2187841?origin=crossref&seq=1#metadata_info_tab_contents/](https://www.jstor.org/stable/2187841?origin=crossref&seq=1#metadata_info_tab_contents)> accessed 16 November 2018.

³ The Allied Powers (the United States, Great Britain, and the Soviet Union) met in London on 8 August 1945 to establish the International Military Tribunal of Nuremberg (1945). This Tribunal was set up on 15 March 1951 and sought to prosecute offenders who had committed war crimes during WWII. Following this, the Allied Powers established another international military tribunal for the Far East, Tokyo (1946) that dealt with Japanese war crimes.

⁴ William A Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 255.

⁵ The Nuremberg Trials Final Report Appendix D: Control Council Law Number 10, 'Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity' (1948).

⁶ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, GA Res 2391 (XXIII), 26 November 1968 entered into force on 11 November 1970.

⁷ The International Convention on the Suppression and Punishment of the Crime of Apartheid, GA Res 3068 (XXVIII), 28 UN GAOR Supp (Number 30) at 75, UN Doc A/9030 (1974) 1015 UNTS 243, entered into force on 18 July 1976 (the Apartheid Convention).

the Rome Statute (1998). All this legislation has been designed to prohibit crimes against humanity in times of war and peace. The definition of 'crimes against humanity' evolved because the international community realised the seriousness of such crimes against international peace and security. This led to the establishment of international conventions and international tribunals by judges and scholars in order to prevent crimes against humanity.

Article 7 of The Rome Statute covers crimes against humanity that are committed against any civilian population.⁸ It covers crimes against humanity that are committed against 'any' civilians and includes crimes committed against civilians by their own state or by an organised policy of persecution.⁹ Article 7(1) of the Rome Statute outlines the reasons for prosecuting crimes against humanity in order to prevent inhumane acts that may happen in peacetime or during armed conflict. This Article stipulates that 'crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. It is important to examine the terms of the Article to discover the legal definition of crimes against humanity so as to reach an interpretation of the Article. Terms used include the following: attack, policy, widespread, and systematic attack. An examination of inhumane acts as they are covered in this Article will be compared here with Islamic international law. According to Article 7 of the Rome Statute, crimes against humanity are covered as follows.

- a) All inhumane acts that result in death or that cause harm against the integrity or the body of persons.
- b) These acts should not be isolated, namely they should not be committed at intervals.
- c) Crimes against humanity must be committed systematically or on a widespread scale.
- d) Crimes must be committed by a state or organisation pursuant to or in furtherance of state or organisational policy.
- e) Crimes must be committed against the civilian population with intent and knowledge of the prohibited attack.

⁸ The Rome Statute, Article 7(2).

⁹ Antonio Cassese and Paola Gaeta, *International Criminal Law*, (3rd edn, Oxford University Press 2013) 185-189.

f) These crimes are criminalised and punishable during times of war and peace.¹⁰

Islamic international law also prohibits and criminalises certain acts that are against an individual's rights and aims to protect these rights. The rights of individuals are mentioned in the main sources of Islamic criminal law as rudimentary rights; thus, these rights must be protected.¹¹ The rights are discussed later in this chapter.¹²

The main sources of Islamic criminal law provide equal protection for the rights of individuals. Islamic criminal law goes further by prohibiting any act that goes against these rights.¹³ In order to maintain protection and prevent criminal acts against the rights of individuals, Muslim jurists have developed Islamic jurisprudence to explore and explain these rights. With regard to this endeavour, they have set up four Muslim Sunni schools.¹⁴ Furthermore, the main criterion of the prohibition of crimes against the rights of individuals in Islamic international law is permanent.¹⁵ This is because the legitimacy of the law is derived from divine law and is not based on time, place, and interests.¹⁶ However, currently, crimes against humanity are being committed against people in some Muslim countries, such as in Sudan, Syria, and Iraq, where Islamic law is the main or part source of law and/or where Islamic law is a source of domestic legislation.¹⁷ These crimes constitute a danger to humanity. Thus, studying crimes against humanity from an Islamic perspective and an international criminal law perspective can be valuable for undertaking a process of compatibility development.

¹⁰ The Rome Statute, Article 7: The Elements of Crimes of the Rome Statute.

¹¹ Farhad Malekian, *The Concepts of Islamic International Criminal Law: A Comparative Study* (Springer 1994) 117.

¹² The rudimentary rights of individuals in Islamic law are protected by its sources; thus, protection of these rights can be applied to crimes against humanity and genocide.

¹³ M Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text: Volume I* (Ardsey, NY Transnational Publishers 2005) 129.

¹⁴ See, for example, Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford Monographs in International Law 2005); Abdullahi An-Naim, *Islamic Family Law in a Changing World: A Global Resource Book* (Zed Books 2002).

¹⁵ Abdullah Alturky, 'Huquq al-Insan bayna a Sharī'ah wa-Lqānūn al-Wadi' (2001) Naif Arab University for Security Sciences (Arabic source) 13.

¹⁶ Ibid.

¹⁷ Bassiouni (n 13) 151.

6.2 The Conditions for Crimes against Humanity as Stipulated in the Rome Statute

Crimes against humanity have not, historically, been codified in international conventions in the same way as war crimes and genocide.¹⁸ Thus, a gap has evolved in legislation that does not cover systematic and widespread inhumane acts of murder, rape, torture, sexual slavery, and persecution.¹⁹ The Rome Statute goes some way to address this gap, but according to Article 7 these crimes must be committed in 'a widespread or systematic' way against civilian populations in order to be classed as crimes against humanity.²⁰ Subsequently, criminal acts may constitute a breach of human rights as mentioned in the Universal Declaration of Human Rights of 1948,²¹ as well as in other international conventions relating to human rights.

The insistence of the international community for prohibiting crimes against humanity has led to attempts to distinguish these crimes from war crimes, but there is some overlap. The overlap in defining crimes against humanity and war crimes, such as mass killing and torture during armed conflict, needs to be explained. In this regard, scholars argue that there are differences as follows.

- a) It is not required that crimes against humanity are committed in armed conflict, whether international or internal.
- b) Crimes against humanity need to be committed in a widespread or systematic way.
- c) Crimes against humanity are prohibited and criminalised, whether there is armed conflict or not.²²

6.2.1 The Terms 'Attack' and 'Policy'

The term 'attack' as it is used in Article 7(2) of the Rome Statute requires multiple victims and multiple inhumane acts to be considered in relation to crimes against humanity.²³ 'Attack' is identified as '[an] attack directed against any civilian population ... a course of conduct involving the multiple

¹⁸ Robert Cryer (ed.) *An Introduction to International Criminal Law and Procedure* (Cambridge 2007) 187.

¹⁹ Ibid.

²⁰ The Rome Statute, Article 7(1).

²¹ United Nations General Assembly in Paris held on 10 December (1948), GA Res 217 A.

²² Cryer (ed) (n 18) 190.

²³ Ibid 195.

commission of acts referred to in Paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.' This term suggests that, under the Court's jurisdiction, inhumane acts can in some situations be committed by non-state actors.²⁴ The reason is that, historically, crimes against humanity require the 'implementation of a state policy'. This requirement has produced legal evolution that has 'paralleled the expansion of war crimes into the area of non-international armed conflict'.²⁵ However, Bassiouni raises important questions about the definition of crimes against humanity to cover non-state actors, and presents the examples of the Mafia and Al-Qaeda as two groups that do not qualify for inclusion under the terms of the Rome Statute Article 7. Article 7(2) explicitly refers to the 'policy of state' and the 'organisation' of policy.²⁶ It has been argued that the inclusion of the word 'policy' places additional burden on the Court to prove that the policy has been sanctioned by a state or an organisation.²⁷ Thus, political anarchy, natural disaster, and random criminal acts committed by individuals may not always constitute crimes against humanity, as stipulated under the terms of the Rome Statute.²⁸

Cassese argues that 'if a state or an organisation tolerated or conducted inhumane acts within the Rome Statute, jurisdiction may constitute crimes against humanity, this is because the Elements of Crimes in the ICC requires encouragement or promoting, practised by a state or an organisation actively.²⁹ Therefore, proof is required that crimes against humanity have been committed by individuals who are/were officials of a state or who officially represent a state, so that crimes against humanity can be considered by the Prosecutor of the Court.'³⁰ Cupido argues that it is not necessary for 'the theoretical characterisation of the policy requirement' to be 'either an element of crime or an evidentiary relevant circumstance for crimes against humanity

²⁴ The Elements of Crimes of the Rome Statute Introduction (3).

²⁵ Ibid.

²⁶ Bassiouni (n 13) 151.

²⁷ Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in Roy S Lee (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer 1999) 95-97; Margaret McAuliffe de Guzman, *The Developing Law of Crimes against Humanity* (John Hopkins University Press 2000).

²⁸ Cryer (ed) (n 18) 197.

²⁹ Cassese and Gaeta (n 9) 107; The Elements of Crimes, Article 7(1) Introduction 3, Footnote 6. This Article stipulates that 'a policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action'.

³⁰ Cassese and Gaeta (n 9) 100.

[since it] is deficient'. This affects the underlying meaning of crimes against humanity.³¹

One may notice that the term 'any' may refer to any inhumane act that constitutes a crime against humanity, even though the act may not be specifically codified in the Rome Statute. This is because the authors of the Rome Statute use the term 'any of the following acts' and not 'the following acts' because the latter may work to restrict the Court's jurisdiction. In addition, the term 'attack' may refer to a widespread and systematic attack, but not refer to an 'act' because the latter would also restrict the scope of the Rome Statute. On the other hand, the term 'attack' aims to cover the attempt to commit crimes against humanity. Thus, the Rome Statute covers general conduct encapsulated in the term 'attack'. For instance, if a state wanted to carry out a non-systematic or non-widespread attack against civilians without any discrimination, but the person in charge of the attack undertakes a widespread attack and is a representative of a state, then the Rome Statute offers provision to prosecute the perpetrator. Hence, this means that the state did not commit a systematic or widespread attack; instead, its official personnel committed it. The Pre-Trial Chamber II in the Situation of the Central African Republic in The Case of the *Prosecutor v. Pierre Gombo* ruled the following.

The requirement of 'a State or organisational policy' implies that the attack follows a regular pattern. Such a policy may be made by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised.³²

One reason for using the word 'policy' is as follows: if crimes against humanity are committed that are not codified in the Rome Statute, the Court will have jurisdiction for those crimes against humanity.³³ In addition, Schabas states that crimes against humanity could be committed through or by groups that exercise 'de facto control' upon some areas without international acknowledgement or without acknowledgement from the state where the crimes are committed.³⁴

³¹ Marjolein Cupido, 'The Policy Underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate' (2011) *Criminal Law Forum* 275.

³² The Pre-Trial Chamber, Situation in the Central African Republic in the Case of the *Prosecutor v Jean-Pierre Bemba Gombo*, (ICC-01/05-01/08 15 June 2009) (81); Pre-Trial Chamber I, Katanga decision, (ICC-01/04-01/07-717) (396); *The Prosecutor v Jean-Pierre Bemba Gombo*, International Criminal Court Number (ICC-01/05-01/08 A 8 June 2018) footnote at 9 <https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF>.

³³ Von Hebel and Robinson (n 27) 97.

³⁴ Schabas (n 3) 111.

6.2.2 The Term ‘Widespread or Systematic’

The term ‘widespread’ is defined in the ICTR *Akayesu* case as ‘[a] massive, frequent, large scale action carried out collectively with considerable seriousness and directed against multiple victims’.³⁵ The term ‘systematic’ is defined as a ‘completely planned action within a common policy and involving substantial public or private resources’.³⁶ Ambos and Wirth argue that the terms used in the Rome Statute may indicate a threshold, but that non-widespread and non-systematic crimes do not constitute crimes against humanity.³⁷ However, one may suggest that the term ‘whether or not’ be added before the term ‘widespread or systematic’. This addition would serve to include inhumane acts committed without systematic or widespread attack. In addition, if crimes against humanity are committed without systematic or widespread attack, the Court will exercise its jurisdiction. Furthermore, to avoid the embarrassment of the Court not punishing criminals who have committed crimes against humanity, a reform is suggested to the Article that reads, ‘crimes against humanity means any of the following acts committed ‘whether or not’ as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.³⁸

Islamic international law does not require that crimes against humanity be committed in a widespread or systematic way since its provisions provide a broad deterrent for prohibiting crimes against humanity with the general protection of individuals’ rights.³⁹

6.3 Inhumane Acts that Fall within the Jurisdiction of the Rome Statute and Islamic International Law

Article 7 of the Rome Statute refers to prohibited acts recognised under previous international tribunals. Inhumane acts as defined within the scope of the Rome Statute are murder, discrimination, torture, enslavement and imprisonment, the severe deprivation of physical liberty in violation of the

³⁵ *Prosecutor v Akayesu* (ICTR-96-4-T) (Judgment, 25 September 1998) (580).

³⁶ *Ibid.*

³⁷ Kai Ambos and Steffen Wirth, ‘The Current Law of Crimes against Humanity: An Analysis of UNTAET Regulation’ (2000) *Criminal Law Forum* 1, 90, *Kluwer Law International* 1.

³⁸ The terms ‘systematic’ and ‘widespread’ refer to the element of intent for crimes against humanity. However, this study suggests the inclusion of the term ‘whether or not’ before these terms in the Article as previously discussed.

³⁹ Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Brill 2011) 621.

fundamental rules of international law, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity, persecution, the enforced disappearance of persons, and apartheid. These crimes, as well as other inhumane acts of a similar character that are intentionally enacted to cause great suffering or serious injury to the body or to mental or physical health, are examined below within the scope of Islamic international law and the Rome Statute.

6.3.1 Murder and Extermination

Murder sits at the top of the pyramid of prohibited crimes against humanity under the Rome Statute. It refers to unlawful killing with the intention of causing the death of an innocent person.⁴⁰ According to the judgment made in the *Kupreskic* case, the prohibition of murder as a crime against humanity is classed as '*lex specialis* in relation to the prohibition of murder as a war crime'.⁴¹ Cassese explains that 'it is sufficient for a perpetrator to cause the victim serious injury with reckless disregard for human life'.⁴²

The second prohibited crime on the pyramid of the Rome Statute is extermination. In the Rome Statute, the crime of extermination connects to the crime of murder but may not involve killing on a large scale.⁴³ The Rome Statute provides that 'extermination includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'.⁴⁴ The differences between murder and extermination can be outlined as follows.

a) Extermination requires the knowledge of the perpetrator about the circumstances that have caused the mass killing of innocent people.

b) Extermination can include the use of indirect mechanisms that cause the death of innocent people.⁴⁵

Article 7(2)(b) stipulates that 'extermination includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine [or pressing needs], calculated to bring about the destruction of part of a population'. However, in this respect, it is valid to ask that if the state denies

⁴⁰ Cryer (ed) (n 18) 196.

⁴¹ *Prosecutor v Kupreskic* (IT-95-16-T) (Judgment 24 January 2000), (701).

⁴² *Prosecutor v Akayesu* (ICTR-96-4-T) (Judgment, 25 September 1998) (580).

⁴³ Cryer (ed.) (n 18) 198.

⁴⁴ The Rome Statute, Article 7(2)(b).

⁴⁵ *Ibid.*

access to food or water to part of its civilian population and if this does not cause death, would this still be classed as 'extermination' in the context of crimes against humanity? The conceivable answer would be 'yes', because the term 'includes' is used rather than 'means', and the latter would restrict the scope of the Statute. Furthermore, the term 'inter alia' could include any conduct that causes or inflicts the life conditions stated as crimes against humanity, such as the restriction of oxygen. Thus, actual proof of extermination is not required when assessing crimes against humanity.⁴⁶

In Islamic international law, the crime of murder is prohibited and punishable because it constitutes a criminal act against an innocent person or a group of innocent persons. Thus, legal attention here is paid to prohibiting this crime because committing the crime of murder goes against the right to life.⁴⁷ Furthermore, committing the crime of murder also goes against principles of the equality of life.⁴⁸ In Islamic criminal law, the punishment for murder falls under the terms of *qiṣāṣ*.⁴⁹ In addition, punishment in the thereafter is undertaken in hell. Murder is criminalised and punished in Islamic international law, whether or not the crime is committed against a Muslim or a non-Muslim *dhimmi*, or whether in a Muslim or non-Muslim state.

The prohibition of the murder of a Muslim is outlined in the Quran: 'But whoever kills a believer intentionally, his recompense is Hell, wherein he will abide eternally, and Allah has become angry with him and has cursed him and has prepared for him a great punishment.'⁵⁰ This verse encapsulates two ideas as follows: first, that a Muslim person is prohibited from, and will be punished for, murdering another Muslim person or more than one Muslim person; and second, that the official authorities of a Muslim state are responsible for protecting the state's people from this criminal act without any discrimination, whether this is based on ethnicity, religion, nationality, colour, language, or gender.⁵¹ This is because it is the function of Islamic criminal law to protect all people from being killed or destroyed on earth.

Murder is prohibited in the main sources of Islamic criminal law, whether or not this is committed against Muslims or non-Muslims. This is stated in the

⁴⁶ Herman von Hebel (ed) *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (TMC Asser Press 1999) 49.

⁴⁷ Malekian (n 39) 112.

⁴⁸ The Arab Charter of Human Rights (2004), date enacted 22 May 2004, entered into force 15 March 2008. Article 5 provides that 'Every individual has the right to life, liberty and security of person'.

⁴⁹ See chapter four of this study.

⁵⁰ The Quran 4:93.

⁵¹ Malekian (n 39) 112.

Quran as follows: 'Whoever kills a soul unless for a soul or for corruption in the land, it is as if he had slain mankind entirely. And whoever saves one, it is as if he has saved mankind entirely. And our messengers have certainly come to them with clear proof. Then indeed many of them, after that, throughout the land, were transgressors.'⁵² The criminalisation of the crime of extermination has been codified in international conventions. Such codification has resulted from the international community facing the crime of extermination in many areas in the world, thereby leading to the enactment of the term. Thus, although Islamic criminal law may not use the term 'extermination', it considers that, in accordance with the main sources of Islamic law, killing a person or a group of people constitutes a crime against the whole of mankind. However, killing is lawful under Islamic criminal law when it is based on a verdict issued by an impartial court at a public hearing. In other words, if there is no judicial justification, killing is unlawful.⁵³ This is based on the following Quranic verse: 'Do not take a soul which Allah has forbidden, except through the due process of law.'⁵⁴

The prohibition of murder and extermination under the Rome Statute is the same in Islamic international law. However, Islamic criminal law goes further by criminalising murder if it is undertaken by official individuals of state and/or private individuals, while the Rome Statute requires that crimes against humanity must be committed by a state or an organisation and that these crimes should be undertaken by systematic and widespread attack.⁵⁵

6.3.2 Enslavement

The crime of enslavement is defined in the International Convention on Slavery (1926) and in the Supplementary Slavery Convention (1956) as 'exercising the powers attaching to the right of ownership over a person, or more than one person'.⁵⁶ This definition has been adopted in Article 7(2)(c) of the Rome Statute. However, the Rome Statute goes further by including the trafficking of human beings. Article 7(2)(c) of the Rome Statute defines enslavement as 'the exercise of any or all of the powers attaching to the right

⁵² The Quran 5:32.

⁵³ See chapter four of this study.

⁵⁴ The Quran 6:151.

⁵⁵ Malekian (n 39) 621.

⁵⁶ The Slavery Convention 25 September 1926 entered into force on 9 March 1927 in accordance with Article 12 (the Slavery Convention); Supplementary Convention on the Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery, the Conference of Plenipotentiaries, convened by Economic and Social Council Res 608 (XXI) on 30 April 1956, and in Geneva on 7 September 1956, entered into force on 30 April 1957 in accordance with the Article.

of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'. The Elements of Crimes in the Rome Statute gives examples of enslavement, including the sale, disposal, exchange, capture, purchase, lending, bartering, and exploitation of children.⁵⁷ The criminalisation of slavery has been a norm of customary international law since Article 8 of the International Covenant on Civil and Political Rights asserted the rights of individuals not to be exploited in degrading acts of slavery.⁵⁸

Islamic international law, as part of Islamic law, insists on the principle of equality between people. This can be understood from the following Quranic verse: 'O you mankind, surely we created you of a male and a female, and we have made you races and tribes that you may get mutually acquainted. Surely the most honourable among you in the Providence of Allah are the most pious; surely Allah is ever-knowing, ever-cognizant.'⁵⁹ According to Malekian, this verse indicates the following: a) that there is no discrimination between female and male; and b) that there is no discrimination on the basis of race, ethnicity, nationality, religion, or colour, meaning that all mankind are equal in dignity.⁶⁰ Thus, the equality principle is not limited to Muslim people but covers all mankind. This Quranic verse does not place any weight on specific places or locations, and does not place specific weight on certain nationalities.⁶¹

In the beginnings of Islam, enslavement was not prohibited and was fairly commonplace in the Peninsula.⁶² At this time, Islamic law did not prohibit enslavement but neither did any other region in the world because, during

⁵⁷ The Elements of Crimes of the Rome Statute, Article 7(1)(b).

⁵⁸ International Covenant on Civil and Political Rights, GA Res 2200A (XXI) 16 December 1966 entered into force on 23 March 1976 in accordance with Article 49. Article 8 provides the following: '1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited; 2. No one shall be held in servitude; 3(a). No one shall be required to perform forced or compulsory labour; 3(b). Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court; 3(c). For the purpose of this paragraph the term "forced or compulsory labour" shall not include: (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations.'

⁵⁹ The Quran 49:13.

⁶⁰ Malekian (n 39) 115.

⁶¹ Ibid 117.

⁶² Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 85.

these times, slavery was an economic tool widely used by many different cultures and religions.⁶³ However, as time went by, Islamic jurists began to promote the teachings of the Prophet in the context of the principles of equality and freedom for enslaved people.⁶⁴ An enslaved man or woman was treated as equal to non-slaves in terms of their rights to receive food, shelter, and clothes, and was equal to non-slaves under early Islamic law.⁶⁵ In early Islamic law and in early international law, no agreements or treaties existed that prevented enslavement. Indeed, the first international convention to do this was the Convention on Slavery in 1926.⁶⁶

The Quran and Sunnah do not give any direct teachings that permit slavery, but there is also no specific advice about abolishing it. However, the sources of Islamic law encourage manumission. This approach is outlined in the Quranic verse that includes 'It is the freeing of a slave.'⁶⁷ Furthermore, freeing slaves has been recommended by successive jurists of Islamic law.⁶⁸ Current Muslim scholars such as Malekian and An-Nam have discussed Quranic verses that relate to slavery and the recommended practices of the companions of the Prophet. It is the view of some jurists of Islamic law that abolishing slavery is indeed alluded to in Islamic law.⁶⁹ However, scholars also explain that attitudes to slavery cannot be 'solved radically in isolation of the prevailing social circumstances of that period'.⁷⁰ The ratification of the Slavery Convention by some Muslim countries could also be classed as a consensus, *ijmá'*, to prevent slavery. Some Muslim countries also prohibit slavery in their domestic laws and in their commitment to international law.⁷¹

Enslavement is recognised in the Declaration of Human Rights (1948) in Article 4, which reads, 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.'⁷² When Islam was

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Christopher G Weeramantry, *Islamic Jurisprudence: An International Perspective* (Macmillan Press 1988) 139.

⁶⁶ The Slavery Convention (n 58).

⁶⁷ The Quran 90:13.

⁶⁸ Abul A'la Maududi, *Human Rights in Islam* (Islamic Publications Ltd, Lahore Pakistan 1993) 20.

⁶⁹ Abdullahi An-Naim, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (1st edn, Syracuse University Press 1996).

⁷⁰ Baderin (n 62) 87.

⁷¹ These Muslim countries are Afghanistan, Azerbaijan, Bangladesh, Bahrain, Egypt, Bosnia, Iraq, Kazakhstan, Morocco, Syrian Arab Republic, Tunisia, Turkey, Saudi Arabia, Sudan, and Yemen.

⁷² The Universal Declaration of Human Rights (1948).

first established, some Muslims decided to release enslaved people.⁷³ Moreover, The Prophet said, 'There are three categories of people against whom I shall myself be a Plaintiff on the Day of Judgement ... a man who sold a free person as a slave and appropriated his price, and a man who employed a worker and had him do the assigned work then failed to pay him his wages.'⁷⁴ The Prophet also commended Muslim soldiers who fought in the battle of Badr for releasing those who had been captured during the battle without taking any ransom. In the context of Islamic law, these actions are generally read as grounds for abolishing slavery.⁷⁵

Fifteen Muslim states have ratified the Convention on Slavery. Thus, they must comply with the provisions of the Convention according to the principle of *pacta sunt servanda*, which is an inherent principle in Islamic international law and is implied in the Quran as follows: 'O you who have believed, fulfil [all] contracts.'⁷⁶

6.3.3 Deportation or Forcible Transfer of Individuals and a Population

Deportation is described by the Rome Statute as the 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'.⁷⁷ This happened in 1995 when more than 20,000 Muslim civilians in Bosnia were transferred from their home.⁷⁸ The criminal conduct of deportation must be practised forcibly in order to be within the Court's jurisdiction of crimes against humanity. According to Article 7(1)(d) of the Elements of Crimes, this criminal conduct may include threats, coercion, oppression, and physical force against persons. If those who are subjugated to violence in their own country decide to leave their own country voluntary, this may not constitute enforced displacement.⁷⁹ The transfer of persons forcibly or by coercion, without any grounds laid out in international law, to

⁷³ Mohammad T Al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff, The Hague 1968) 191.

⁷⁴ Malekian (n 39) 230.

⁷⁵ Muhammed Hamidullah, *Muslim Conduct of State* (Kashmiri Bazar Lahore 1954)195.

⁷⁶ The Quran 5:1.

⁷⁷ The Rome Statute, Article 7(2)(d).

⁷⁸ International Centre for Transitional Justice , Prosecutions Case Studies, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008) 5 <<https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>> accessed 13 November 2018.

⁷⁹ Jean S Pictet 'Commentary on Geneva Convention IV' (International Committee of The Red Cross 1960) <https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf> accessed 13 November 2018.

another area, whether this is to another state or to another location, constitutes a crime against humanity.⁸⁰ Thus, international law is designed to prevent states from transferring persons by force or by expulsion.

There are some exceptional circumstances mentioned in Article 49 of the Fourth Geneva Convention in this regard. This Article provides that it is permissible to evacuate persons in whole or in part for 'the security of the civilians involved or [if] imperative military reasons so demand.'⁸¹ Ambos and Wirth talk about these circumstances in relation to crimes against humanity and enforced transfer or deportation.⁸² The main aim of using the terms 'deportation' and 'forcible transfer' is to prevent the enforced displacement of persons from their land, or from an area in which a population are lawfully present, on the grounds of ethnic cleansing.⁸³

In Islamic international law, one of the most significant rights of an individual is the right to live in the place where that person was born, or where they prefer to live, and this right is connected to the right to freedom of movement.⁸⁴ Thus, placing restrictions upon a person or enforcing them to leave the place they lawfully live in, or belong to, goes against the right to freedom of movement. Islamic international law places these rights in a global context. Moreover, they must be applied at all times, whether in times of war or peace, and apply to Muslims and non-Muslims.⁸⁵

Islamic schools of thought deem that 'the non-Muslim citizen of the State shall have, according to the law, complete freedom of religion and worship, mode of life, culture and religious education ... [and] they shall be entitled to have all their matters concerning personal law administered in accordance with their own religious codes, usages and customs'.⁸⁶ The main aim behind this rule is to maintain security and peace in communities, which affects international peace and security. In Islamic international law, this rule is based on the prohibition of deportation and/or enforced transfer. This is because the inhumane act of deportation or the transfer of individuals violates the rights of

⁸⁰ The Elements of Crimes of the Rome Statute, Article 7(1)(d) stipulates, 'The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.'

⁸¹ The Additional Protocol II to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts 8 June 1977, 1125 UNTS 609.

⁸² Kai Ambos and Steffen Wirth, (37) 60.

⁸³ Cryer (ed) (n 18) 204.

⁸⁴ The Arab Charter of Human Rights, Articles 20, 21, and 22.

⁸⁵ Malekian (n 39) 117.

⁸⁶ Sayyid Abul A'la Maududi, *The Islamic Law and Constitution* (Islamic Publications Pvt Lahore 1960) 333.

persons to live and their freedom of movement according to the following Quranic verse: 'It is He who made the earth tame for you - so walk among its slopes and eat of His provision - and to Him is the resurrection.'⁸⁷ This rule is also in place because practising these inhumane acts specifically violates the duty of a Muslim state to protect its population, and since the state is responsible for the security and peace of individuals, this cannot be achieved by means of deportation and enforced transfer. According to Al-Maududi: 'the citizen [within a state] shall be assured within the limits of the law, of full security of life, property and honour, freedom of religion ... freedom of movement, freedom of association, freedom of occupation, equality of opportunity and the right to benefit from public services.'⁸⁸

Although the terms of deportation or the enforced transfer of individuals are not explicitly mentioned in Islamic international law, they can be implicitly understood as constituting inhumane acts that violate the rights of life and the freedom of movement. However, Islamic international law outlines exceptional circumstances where deportation or enforced transfer can be applied. If the right of an individual or individuals to live or their freedom of movement in a certain manner is threatened, a state is allowed to deport or transfer an individual or individuals to a safe place to protect its population.⁸⁹ These exceptional circumstances in Islamic international law are similar to the provisions of the Geneva Convention (IV) Article 49, which reads, 'The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.'

6.3.4 Enforced Disappearance, Unlawful Imprisonment, and Persecution

Enforced disappearance is classed as a crime against humanity in the Rome Statute. It is also prohibited and criminalised in the Convention on the Protection of All Persons from Enforced Disappearance (1992).⁹⁰ Article 6 of this convention outlines the situations under which enforced disappearance can happen as follows.

⁸⁷ The Quran 67:15.

⁸⁸ Abul A'la Maududi (n 86).

⁸⁹ Malekian (n 39) 113.

⁹⁰ Declaration on the Protection of All Persons from Enforced Disappearance (1992) Proclaimed by the General Assembly, Resolution 47/133, A/RES/47/133, 18 December 1992.

- a) No order or instruction of any public authority, civilian, military, or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it.
- b) Each state shall ensure that orders or instructions directing, authorising, or encouraging any enforced disappearance are prohibited.
- c) The training of law enforcement officials shall emphasise the provisions in Paragraphs 1 and 2 of the Article.

Enforced disappearance refers to 'arresting, abducting, detaining a person with knowledge that a refusal to knowledge or give information would be likely to follow in the ordinary course of events'.⁹¹

Article 7(2)(i) of the Rome Statute prohibits and punishes the enforced disappearance of individuals and includes the following.

The detention or arrest or abduction of individuals by, or with the authorisation, support or acquiescence of a state or public organisation, followed by a refusal to acknowledge that deprivation of freedom, or to give information on the fate or whereabouts of those individuals, with the intention of removing them from the protection of the law for a prolonged period of time.⁹²

According to Article 7(1)(e) of the Rome Statute, unlawful imprisonment or other severe deprivation of physical liberty is in violation of the fundamental rules of international law and so constitutes a crime against humanity. Article 9 of the International Covenant on Civil and Political Rights provides that every person must enjoy his liberty and security and that 'no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'⁹³ This may provide that states shall take into account this right and enact domestic laws to be compatible with the mentioned Article. Moreover, it may provide the meaning of deprived liberty, which includes confinement, detention, or other severe deprivation. Article 5 of the European Convention on Human Rights provides an explanation of the meaning of lawful detention as follows.

- (a) The lawful detention of a person after conviction by a competent court.

⁹¹ The Convention on the Protection of All Persons from Enforced Disappearance (1992).

⁹² The Rome Statute Article 7(2).

⁹³ The Rome Statute Article 7(2)(i).

(b) The lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.

(c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

(d) The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.

(e) The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants.

(f) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Thus, the lawful arrest, or lawful confinement or extradition, of a person does not constitute a crime against humanity.⁹⁴ Consequently, according to scholars, 'it is clear that only the liberty of physical movement is covered' as follows.⁹⁵

a) Committed intentionally with the knowledge of the perpetrator.

b) Committed together with another crime against humanity that 'serves the sole purpose of limiting the Court's jurisdiction to forms of persecution which are of an elevated objective dangerousness'.⁹⁶

c) To constitute a breach of fundamental rights as stipulated in international law.

d) To cause severe deprivation.

e) Involve the discrimination of identifiable people collectively.⁹⁷

f) Discrimination must be based on politics, religion, culture, ethnicity, nationality, or gender.⁹⁸

⁹⁴ Cassese and Gaeta (n 9) 95.

⁹⁵ Ambos and Wirth (n 37) 62.

⁹⁶ Cassese and Gaeta (n 9) 73.

⁹⁷ Ibid.

⁹⁸ The Rome Statute Article 7.

g) Conduct must be committed 'as part of a widespread or systematic attack directed against a civilian population'.⁹⁹

Persecution is defined under the Rome Statute in Article 7(2)(g) as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively'. However, some scholars argue that it is wrong to imply that persecution can only be committed against a civilian population because military personnel can also be persecuted during internal and external conflict, especially combatants who lay down their arms.¹⁰⁰

In Islamic international law, unlawful imprisonment and enforced disappearance of individuals are classed as crimes against mankind because these crimes work against the rights of individuals as outlined in Islamic law. Islamic criminal law outlines the principle of freedom for individuals, and unlawful imprisonment and the enforced disappearance of individuals goes against such rights of freedom.¹⁰¹ This principle is not limited to Muslim persons but is applied to all people, without discrimination, whatever their ethnicity, religion, race, nationality, or colour.¹⁰² The Quran states, 'There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So whoever disbelieves in Taghut and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing.'¹⁰³ This principle is also emphasised by the Prophet in his Farewell Sermon, when he asserts that all mankind are equal and no wrongful acts against people's rights can be acceptable.¹⁰⁴

Another important principle in Islamic international law relating to the unlawful imprisonment and disappearance of individuals is the principle of integrity. The principle of integrity must be applied and respected by people in society and the authorities of a state in all aspects of law, whether civil or criminal.¹⁰⁵ The violation of this principle from any perspective, namely social or state, constitutes a crime against the right of integrity. Furthermore, unlawful imprisonment and the enforced disappearance of individuals work against the

⁹⁹ The Rome Statute Article 7(2)(g).

¹⁰⁰ Cryer (ed) (n 18).

¹⁰¹ Malekian (n 39) 116.

¹⁰² Ibid.

¹⁰³ The Quran 2:256.

¹⁰⁴ The Farewell Sermon in W Montgomery Watt, *Muhammed: Prophet and Statesman* (1961); Mohammad Omar Farooq, 'The Last Sermon of Prophet Muhammad: An Analytical Review' (2017) *Islam and Civilizational Renewal* (2018) available at <<https://ssrn.com/abstract=3068417>> accessed 21 November 2018.

¹⁰⁵ Malekian (n 39).

principles of the legal process to protect lives and the freedom of individuals. This principle prohibits unlawful imprisonment carried out without a legal presence, which can result in an unfair trial. This is understood from the Quranic verse which reads, 'And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right. This has He instructed you that you may use reason.'¹⁰⁶

In addition, based on the principle of equality before the law, Islamic criminal jurisdiction aims for everyone to enjoy similar protections from abuse and arbitrary confinement. This confirms the principles of the rule of law, which states that any act that works against the law, such as placing an individual into, or removing him from, society for a long period of time, or keeping him in a place that prevents him from practising his freedoms, is a prohibited and criminalised act.¹⁰⁷ The Prophet speaks about the matter of placing an innocent person in prison without legal process when he says, 'no obedience [shall be done] to any creature in disobedience to the Creator.'¹⁰⁸ This principle deems that an official person who works in state authority can refuse the demands of its authority if such demands contradict the sources of Islamic law. Thus, in Islamic criminal law, individuals enjoy protections in connection with justice and a public trial.¹⁰⁹ Islamic jurisdiction goes further to administer a judicial procedures approach by a competent court because 'a legal order [is] imposed on individuals and courts to take accurate decisions concerning legal remedies and not to violate the principle of justice'.¹¹⁰ Thus, no one can be deprived, be made to disappear, or can be punished by any charge except by the law, which gives him or her full opportunity for a defence.¹¹¹ Islamic jurisprudence recognises persecution, whether this is religious, social, moral, gendered, cultural, economic, or political, as a crime against the rights of a person to life in a safe environment without any discrimination. Such jurisprudence offers the right of freedom, the right of integrity, the right of equality, and the right to justice. These rights are mentioned in the Arab Charter of Human Rights, Part II, which reads as follows.

¹⁰⁶ The Quran 6:151.

¹⁰⁷ Hossein Esmaeili, Irmgard Marboe and Javid Rehman, *The Rule of Law, Freedom of Expression and Islamic Law* (Hart Publishing 2017).

¹⁰⁸ Quoted from Daily Hadith Online <<https://abuaminaelias.com/dailyhadithonline/>> accessed 19 November 2018.

¹⁰⁹ Mohamed Y. Mattar, 'Human Rights in Islamic Law, Specifically the Guarantee of Procedural Justice' (2014) *European Journal of Law Reform* 274.

¹¹⁰ Malekian (n 39) 127.

¹¹¹ Abul A'la Maududi (n 86) 333.

Each State Party to the present Charter undertakes to ensure to all individuals within its territory and subject to its Jurisdiction the right to enjoy all the rights and freedoms recognised herein, without any distinction on grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status and without any discrimination between men and women.

The Charter emphasises that 'each state party' and 'all individuals' and 'all rights' are inherent in Islamic law, which shall be applied for all individuals without any discrimination. The term 'each state' indicates that any Muslim or Arab country that is a party to the Charter must comply with the rights mentioned in the Charter, including all rights inherent in Islamic law. This also indicates that a state party must provide protection for these rights, and if the state violates these rights, it will be responsible for the breach. The term 'all rights' could mean that all rights mentioned in the preamble/provisions of the Charter are obligatory and must be protected by state parties. The term 'all individuals' indicates that all individuals should enjoy their rights without any discrimination on the grounds of ethnicity, religion, race, nationality, language, colour, or gender. This may confirm that the persecution could be committed by a competent person representing the state or by state authorities.

Article 20 of the Cairo Declaration on Human Rights in Islam (1990) prohibits any physical or psychological humiliation of individuals. The Article reads as follows.

It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experiments without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such action.

Bassiouni notes that prohibition of the persecution of human beings is mentioned in the main sources of Islamic law and in 299 Quranic verses.¹¹² However, some practices conducted by some Muslim states violate this principle of Islamic law, and so constitute crimes against individuals, because these actions violate human rights. These practices should not reflect and should not create a general antithesis to the main principles of Islamic law that maintain the rights of individuals. This is affirmed by The International

¹¹² M Cherif Bassiouni, 'Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System' (1982) Oceana Publications, Inc 3.

Commission of Jurists when it states that 'It is unfair to judge Islamic law (*Shari'ah*) by the political systems which prevailed in various periods of Islamic history. It ought to be judged by the general principles which are derived from its sources.'¹¹³

6.3.5 Torture

Torture, whether mental or physical, is prohibited under many international conventions.¹¹⁴ These conventions include The Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishment (1984).¹¹⁵ This Convention states that torture must be committed by 'a person acting in an official capacity to extract information or confession'.¹¹⁶ Furthermore, Article 16 of this Convention prohibits states from committing torture or any type of inhumane act. This could mean that states must establish domestic laws to prevent torture or make sure that its domestic criminal legal system prohibits torture by using other effective measures.¹¹⁷

Bassiouni and Daniel maintain that 'no political system in any part of the globe is necessarily immune from the practice of torture, because overall circumstances may change, and the adoption of torture is based on perceived expedience'.¹¹⁸ However, Article 7(2)(d) of the Rome Statute states that official capacity in torture is not required in order for torture to qualify as a crime against humanity.¹¹⁹ Broadly, it requires the victim to be under the control of the perpetrator and in custody, which is not synonymous with

¹¹³ International Commission of Jurists, 'Human Rights in Islam' (Kuwait 1982) 7 <<https://www.icj.org/wp-content/uploads/1982/01/human-rights-in-Islam-seminar-report-1980-eng.pdf>> accessed 17 December 2018.

¹¹⁴ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, 10 December 1984 entered into force on 26 June 1987 in accordance with Article 27(1) (the Convention against Torture).

¹¹⁵ Torture is also prohibited in the International Covenant on Civil and Political Rights, Article 7. This Article provides that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'

¹¹⁶ The Convention against Torture, Article 1. This convention provides the meaning of torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

¹¹⁷ The Convention against Torture, Article 16. The last public record of crimes of torture is for crimes committed in Abu Garib prison against Iraqi prisoners by American soldiers.

¹¹⁸ Bassiouni M and Derby D, 'The Crime of Torture' in Bassiouni (ed) *International Criminal Law*: Volume 3 (1986).

¹¹⁹ Von Hebel and Robinson (n 27) 99.

imprisonment.¹²⁰ Thus, no specific state circumstances are required for the crime against humanity that is torture, and no specific purpose is required.¹²¹ However, if the purpose to inflict harm is legal, namely within the scope of jurisprudence and a fair trial, then the purpose does not count as a crime against humanity.¹²² This is mentioned in Article 7 of the International Covenant on Civil and Political Rights, which states this in the following terms.

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹²³

Furthermore, the words of the Rome Statute are explicit in its description of torture as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.'¹²⁴ This definition may hint that the crime of torture must be committed by a state or by its authorities.¹²⁵

Torture is also prohibited under the following treaties and conventions: the Universal Declaration of Human Rights,¹²⁶ the International Covenant on Civil and Political Rights,¹²⁷ the American Convention against Torture,¹²⁸ and the Cairo Declaration on Human Rights in Islam.¹²⁹ These international conventions aim to protect mankind from outrageous crimes and to protect the integrity of individuals not to be violated. However, these international

¹²⁰ Christopher K Hall, 'Article 7 Crimes Against Humanity' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing 2008). Observers' Notes, Article by Article.

¹²¹ Elements of Crimes of the Rome Statute Article 7(1).

¹²² Ambos and Wirth (n 37) 68.

¹²³ The International Covenant on Civil and Political Rights, Article 7.

¹²⁴ The Rome Statute Article 7(2)(e).

¹²⁵ The Convention against Torture Article 1.

¹²⁶ The Universal Declaration of Human Rights (1948).

¹²⁷ The International Covenant on Civil and Political Rights.

¹²⁸ The Inter-American Convention to Prevent and Punish Torture (12th September 1985).

¹²⁹ The Cairo Declaration on Human Rights in Islam, 5 August 1990, UN GAOR, World Conference on Human Rights, 4th Session, Agenda Item 5, UN Doc A/CONF.157/PC/62/Add.18 (1993), Articles 12 and 19.

conventions mainly focus on preventing states from committing crimes and on respecting human rights. In slight contrast, the Rome Statute focuses on the perpetrators who have committed these crimes and on criminal responsibility, whether or not the perpetrators officially represent state authority.¹³⁰ Thus, one feature of the Rome Statute is that the Court does not require the specific purpose element that distinguishes between inhumane treatment and torture.¹³¹

Islamic international law does not provide a list of prohibited acts that constitute torture. However, Islamic criminal law prohibits torture, since torture can result in death or serious injury to a person.¹³² Because the aim of torture is to obtain a confession or information, in Islamic jurisprudence any information extracted in this way is not thought of as reliable, because the mind of the victim may not be functioning properly, and the victim may offer any information just to receive a break from torture.¹³³ In Islamic criminal law, torture is defined 'as the enforcement of unlawful and immoral measures by force which are not acceptable in Islamic theory and are against the spiritual dignity of the victim or accused as they are imposed by physical or psychological force'.¹³⁴

Islamic criminal law places emphasis on respect and dignity for the individual, and so any act that violates the dignity of an individual is prohibited, whether this is carried out by individuals or states. Article 8 of the Arab Charter of Human Rights stipulates that 'no one shall be subjected to physical or psychological torture to cruel, degrading, humiliating, or inhuman treatment'.¹³⁵ Islamic jurisprudence can make use of the facility of an oath. An oath can be taken from the accused or witnesses when acquiring information. An oath can be used as a final resort if there is a lack of evidence. However,

¹³⁰ Cryer (ed) (n 18) 207.

¹³¹ Elements of Crimes of the Rome Statute Article 7(1)(f). This Article outlines the five elements of the crime of torture as follows: 1. The perpetrator must have inflicted severe physical or mental pain or suffering upon one or more persons; 2. Such person or persons were in the custody or under the control of the perpetrator; 3. Such pain or suffering did not arise only from, and was not inherent in or incidental to lawful sanctions; 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

¹³² Sadiq Reza, 'Torture and Islamic Law' (2007) 8(1) Chicago Journal of International Law, 21-42.

¹³³ Malekian (n 39) 257.

¹³⁴ Ibid.

¹³⁵ The League of Arab States, Arab Charter on Human Rights, 22 May 2004 entered into force on 15 March 2008.

if there is evidence, an oath cannot be applied.¹³⁶ The prohibition of torture in Islamic criminal law is applied at all levels, namely it is not allowed at the arrest stage, at the pre-trial stage, at the trial stage, in prison, in custody, or after a court verdict is issued, even if the accused is found guilty.

6.3.6 Sexual Violence, Rape, Sexual Slavery, Enforced Prostitution, Enforced Sterilisation, and Forced Pregnancy

In the Rome Statute, forced pregnancy, rape, sexual slavery, enforced prostitution, and enforced sterilisation constitute crimes against humanity. These crimes have also been noted in previous international tribunals at the ICTY and at the ICTR.¹³⁷ The Elements of Crimes in ICC Article 7(1)(g)-1 defines sexual violence as a crime if 'the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim, or by the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body'. This explanation covers the following: a) all ages of persons; b) it requires the absence of the invaded person's approval; and c) the sexual violence must be committed physically.

The Elements of Crimes in the ICC Statute Article 7(1)(g) gives the meaning of sexual slavery as when 'the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons'. The perpetrator's acts must also have been carried out in the following circumstances.

a) The sexual acts must have been committed by the perpetrator against a person or more than one person, or by imposing on a person or more than one person to engage in sexual acts that involve inhumane behaviour such as 'bartering, or the deprivation of liberty'.

b) The act of sexual slavery must be committed 'as part of a widespread or systematic attack directed against a civilian population'.

c) The perpetrator must know that his or her conduct constitutes 'part of a widespread or systematic attack directed against a civilian population'.¹³⁸

The Rome Statute does not only hold to account the doer of the criminal act, but also the person who imposes or commands sexual violence by any

¹³⁶ M Cherif Bassiouni, 'Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System' (1982) Oceana Publications, Inc 3.

¹³⁷ Cassese and Gaeta (n 9) 97.

¹³⁸ The Elements of Crimes of the Rome Statute Article 7(1)(g)-2.

means, whether by abduction or imposing constraints that facilitate the criminal act.¹³⁹

Article 7(1)(g) of the Rome Statute affirms that enforced prostitution constitutes a crime against humanity. The Rome Statute classes this as a crime against humanity if it is committed in non-international or international conflict. Furthermore, enforced prostitution must be committed in 'a widespread or systematic attack directed against a civilian population'.¹⁴⁰

The Elements of Crimes in the Rome Statute Article 7(1)(g)-3 deems that enforced prostitution is classed as a crime against humanity in the following circumstances.

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.¹⁴¹

Forced pregnancy is also classed as a crime against humanity according to Article 7(2)(f) of the Rome Statute. For enforced pregnancy to constitute a crime against humanity, it must encompass: a) the illegal confinement of a woman; b) being made pregnant by force; and c) must affect the ethnic composition of any population and be carried out with other grave violations of international law. This applies to one woman or more than one woman, if the acts are carried out because of widespread or systematic conduct with intent and knowledge.¹⁴² Furthermore, the Article states that these provisions 'shall not in any way be interpreted as affecting national laws relating to

¹³⁹ Ibid footnote 16-17.

¹⁴⁰ The Elements of Crimes of the Rome Statute Article 7(1) (g) -3.

¹⁴¹ Ibid.

¹⁴² Ibid.

pregnancy'.¹⁴³ The latter may explain why legal abortion is accepted in some domestic jurisdictions and is not classed as a crime against humanity.¹⁴⁴

To be recognised as enforced sterilisation the actions of the perpetrator 'must deprive one person or more than one person of biologically reproductive capacity' with the knowledge and intent of the perpetrator. Furthermore, the acts of the perpetrator must be 'part of a widespread or systematic attack directed against a civilian population'.¹⁴⁵ In addition, the consent of the person is not recognised even if it was genuine consent, and acts include the medical treatment of the person that is carried out in hospital or 'birth-control measures which have a non-permanent effect in practice'.¹⁴⁶

Sexual crimes such as enforced prostitution, sexual slavery, rape, enforced sterilisation, and forced pregnancy, attack an individual's integrity, honour, and freedom.¹⁴⁷ Thus, under Islamic criminal law they are crimes against Allah and the rights of individuals regardless of whether they are committed in war or peacetime.¹⁴⁸ The crime of adultery (*ziná*) is prohibited and punishable by divine law without any discrimination between whether this is committed during war or peacetime.¹⁴⁹ Thus, the basic difference between the two legal systems is that these crimes do not only constitute crimes against humanity in Islamic law, but also crimes against Allah and the rights of individuals. Islamic criminal law prohibits adultery, defamation, and sodomy. These are dealt with by the punishments of *hudúd* (divine law). This means that Muslim countries or jurists should criminalise all mechanisms that assist the spread of sexual crimes, including enforced prostitution or forced pregnancy.

Jurists of Islamic criminal law deem that acts that go against the rights of individuals in its jurisdiction constitute crimes against the rights of those people.¹⁵⁰ Thus, sexual violence, adultery, and fornication are forbidden under Islamic criminal law, and punishments in respect of these issues are set out in divine law.¹⁵¹ However, Islamic international law does not distinguish between committing adultery and fornication against women who are captive

¹⁴³ The Rome Statute Article 7(2).

¹⁴⁴ Roy S Lee (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer 1999).

¹⁴⁵ The Elements of Crimes of the Rome Statute Article 7(1).

¹⁴⁶ The Elements of Crimes of the Rome Statute Article 7(1)(g)-5 footnote 19.

¹⁴⁷ Matthew Lippman, 'Islamic Criminal Law and Procedure Religious Fundamentalism v. Modern Law', (1989) 12 Boston College International & Comparative Law Review 29.

¹⁴⁸ See chapter four of this study.

¹⁴⁹ Lippman (n 147) 40.

¹⁵⁰ Abul A'la Maududi (n 86) 8.

¹⁵¹ Malekian (n 39) 257.

or who are civilians of a state in conflict, or citizens of a Muslim state.¹⁵² The prescribed punishment is death for the married person and whipping for a non-married person.¹⁵³ The female victim shall also receive 'bride-money' that is similar in amount to any received by her nearest female relatives upon marriage.¹⁵⁴ However, Islamic criminal law deems that rape, sexual slavery, enforced prostitution, and enforced sterilisation are separate types of criminal conduct.¹⁵⁵ This is because rape is a crime that is linked to adultery. The rape offender is punished under the terms of *ta'zír* if he does not commit adultery, while an adultery offender is subject to the divine law punishment as explained above.¹⁵⁶

Enforced prostitution and forced sterilisation are crimes that are subject to *ta'zír* punishments. However, the question of forced pregnancy was debated at the Rome Conference because some Muslim countries reject the inclusion of the term 'forced pregnancy' as it is written in the provisions of the Statute, based on the Islamic rejection of the criminalisation of the denial of abortion services.¹⁵⁷

6.3.7 Apartheid

Since being practised by the South African authorities against its population, the international community has defined the crime of apartheid as a crime against humanity.¹⁵⁸ Apartheid was criminalised in previous international conventions before the establishment of the Rome Statute, including in The Convention on the Non-applicability of Statutory Limitations to War Crimes (1968)¹⁵⁹ and the Apartheid Convention (1973).¹⁶⁰ The Apartheid Convention provides a definition of apartheid and of acts constituting apartheid crimes as 'similar policies and practices of racial segregation and discrimination as

¹⁵² Abul A'la Maududi (n 86) 8.

¹⁵³ See chapter three of this study.

¹⁵⁴ M E Badar 'Islamic law (Shari'a) and the Jurisdiction of the International Criminal Court' (2011) 24(2) *Leiden Journal of International Law* 411.

¹⁵⁵ Sadiq Reza, 'Torture and Islamic Law' (2007) 8(1) *Chicago Journal of International Law* 21.

¹⁵⁶ *Ibid.*

¹⁵⁷ Von Hebel and Robinson (n 27). Abortion is a contentious issue in Islamic jurisprudence. For more information, see the official website of the Majmi' al-fih al-Islami, Organisation of Islamic Co-operation <<http://www.iifa-aifi.org/>> accessed 17 December 2018.

¹⁵⁸ John Dugard and John Reynolds, 'Apartheid, International Law and the Occupied Palestinian Territory' (2013) 24(3) *The European Journal of International Law* 867.

¹⁵⁹ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, New York, 26 November 1968 entered into force on 11 November 1970 in accordance with Article VIII.

¹⁶⁰ The International Convention on the Suppression and Punishment of the Crime of Apartheid (1974), entered into force on July 18, 1976 (The Apartheid Convention).

practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'.¹⁶¹

Apartheid is classed as a crime against humanity under the Rome Statute, and is classed as an inhumane act of a character similar to other acts referred to in Paragraph 1 of Article 7. The paragraph provides that 'for the purpose of this Statute, crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. The crime of apartheid must be committed in the context of systematic oppression and domination by one racial group over another racial group with intent.¹⁶² Acts of apartheid comprise inhumane acts of a character similar to those referred to in Paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups, and committed with the intention of maintaining that regime.'¹⁶³

Islamic international law does not include the term 'apartheid' in its sources. However, Islamic criminal law provides a broad scope for prohibiting the crime of apartheid. This is because Islamic criminal law prevents and prohibits every type of discrimination whether is practised against one person or a group of persons. This highlights a point of difference between international criminal law and Islamic international law. International criminal law requires that the crime of apartheid is practised against 'a group of individuals'.¹⁶⁴ The basis for prohibiting apartheid in Islamic criminal law is the principle of equality between mankind according to the following Quranic verse: 'Surely we have accorded dignity to the sons of Adam.'¹⁶⁵ In addition, Islamic criminal law has the general aim of promoting the rights of mankind in all communities and in all locations so that everyone can enjoy an equal standard of life.¹⁶⁶ In order to achieve this aim, it is necessary to prohibit and criminalise acts that lead to breaching the rights of mankind. Thus, acts committed by one or more than one perpetrator against one person or a group of people are prohibited under Islamic criminal law, since those acts constitute the crimes of apartheid, which

¹⁶¹ Ibid Article II. This also details the acts that constitute apartheid crimes.

¹⁶² Ibid.

¹⁶³ The Rome Statute Article 7(2)(h).

¹⁶⁴ The Apartheid Convention Article II.

¹⁶⁵ The Quran 2:213.

¹⁶⁶ Malekian (n 39) 247.

violates the principles of equality. This means that acts such as discriminating on religious, racial, national, ethical, language, and colour grounds are prohibited.

6.3.8 Other Inhumane Acts of Similar Gravity

The Rome Statute goes further in prohibiting inhumane acts in the form of crimes against humanity in Article 7 (1)(k). This Article talks about 'other inhumane acts of a similar character, intentionally causing great suffering, or serious injury to body or to mental or physical health'. This brings us to how the Statute defines 'crimes against humanity' and its use of the words 'any' and 'when' in defining its terms. 'Any' could refer to the type of prohibited act and the location of the crime. The word 'when' could refer to the time the prohibited act happened. This leads to an extension of the jurisdiction of the Rome Statute to prosecute other inhumane acts that are not mentioned in Article 7. Article 7(1)(k) has been interpreted by Cassese as follows: 'In spite of its relatively loose character, which has been rightly narrowed down by case law, the rule is important, for it may function as a residual clause covering and criminalising instances of inhumane behaviour that do not neatly fall into any of the other existing categories of crimes against humanity, [therefore] it can cover acts of terrorism not falling under the sub-category of murder [or] torture.'¹⁶⁷ He explains that the positive point of adding the phrase 'other inhumane acts of a similar gravity' is that 'the more specific and complete a list tries to be, the more restrictive it becomes'. Moreover, negative points include an exhaustive enumeration of individual criminal acts that 'would merely create opportunities for evasion of the letter of the prohibition'.¹⁶⁸ Thus, there are some features of Article 7 of the Rome Statute that provide no connection to armed conflict. This can be covered with other international conventions such as the Control Council Law No. 10 and the Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity.¹⁶⁹ Article 7 also provides no discriminatory element. This is because including this element may place an unnecessary burden on the Prosecutor of the Court; thus, the discriminatory element is required for the prosecution of a crime.¹⁷⁰

¹⁶⁷ Cassese and Gaeta (n 9) 98.

¹⁶⁸ Ambos and Wirth (n 37) 83.

¹⁶⁹ Von Hebel and Robinson (n 27) 93.

¹⁷⁰ Ibid.

6.4 Conclusion

The Rome Statute and Islamic international law/Islamic criminal law prohibit inhumane acts in times of conflict and peace. The Rome Statute explains that crimes against humanity must be committed in the following circumstances: a) they must be part of an attack; b) they must be widespread; and c) they must be systematic. Under these terms, crimes against humanity do not include imprisonment because this is mostly undertaken by the arrest and detention of individuals with or without due process. Inclusion of the term 'widespread' and 'systematic' is the main difference between both legal systems. According to the Statute, these terms are used in order to prevent states or state officials committing inhumane acts. Crimes that fit the terms 'systematic' and 'widespread' were committed by officials who had power in the governments of Rwanda, Yugoslavia, Sierra Leone, and Timor. The authors of the Statute emphasise these terms. The terms are used as guidance for the Court, namely the jurisdiction of the Court will examine alleged crimes in its jurisdiction if the crimes are committed with widespread or systematic attack. Thus, it may be appropriate to add the phrase 'whether or not' before 'widespread' or 'systematic'. However, the prosecution may fail if crimes were not widespread or systematic. It seems to be that the provisions of the Rome Statute are result-orientated in favour of states, while Islamic law considers both the individual and the state.

Although Islamic international law may not rely on modern criminal terms that exist in the Rome Statute, it covers the rights of individuals, which must be respected and not violated. In addition, if these rights are violated, and when the crimes cannot be categorised under *ḥudūd* and *qiṣāṣ*, Islamic criminal law looks to the decisions of Muslim jurists and Muslim states, and considers the public interest of Muslim nations at an international and/or national level. However, there could be compatibility between international criminal law and Islamic international law in terms of criminalising and punishing crimes against humanity because both legal systems look to prohibit acts that violate fundamental human rights. However, although the Rome Statute includes a definition of crimes and describes elements of the crimes, Islamic criminal law prohibits crimes that violate inherent human rights, and leaves some punishments that are not mentioned in the main sources of Islamic law (*ḥudūd* or *qiṣāṣ*)¹⁷¹ to the discretion of jurists and/or to a Muslim state to set up definitions, elements, and punishments. In future, it may be necessary to codify crimes against humanity in Islamic international law. For instance, the

¹⁷¹ See chapter four of this study.

international community has taken a proactive step to prohibit slavery, which is now a crime against humanity. In Islamic jurisprudence, there are still divergent views among jurists despite the ratification and signature by many Muslim countries of the International Convention on Slavery. This goal may be achieved using consensus, which is one of the sources of Islamic law.

Chapter Seven

The Crime of Genocide

7.1 Introduction

Genocide is the most heinous international crime because the perpetrators aim to confiscate the right to life of a group of people.¹ It is prohibited under international law by the Convention on the Prevention and Punishment of the Crime of Genocide 1948.² The Genocide Convention was introduced by the international community not just for member states but for all states because prevention is an integral part of customary international law.³ Genocide was described at the International Criminal Tribunal for Rwanda (ICTR) as the 'crime of crimes'.⁴ However, there is a debate among academics about the precise definition of the term genocide. Going forward, this study will use the definition of genocide as it is used in the International Convention of Genocide (1948) and reiterated in the Statutes of the ICTY and the ICTR and in the Rome Statute of the ICC.⁵

On 11th December 1946, the international community unanimously voted to pass The Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).⁶ This Convention defines genocide as

¹ Kai Ambos, 'What Does "Intent to Destroy" in Genocide Mean?' (2009) 91 International Review of the Red Cross Volume 91 Number 876, 833. Ambos states that 'genocide is a crime with a double mental element'.

² The Polish jurist Raphael Lemkin coined the word 'genocide' in his work *Axis Rule in Occupied Europe* (1944). He derived the word by combining the Greek word 'genos' which means 'race' with the Latin word 'cide' which means 'killing', as quoted from Lawrence Leblanc, *The United States and the Genocide Convention* (Duke University Press 1991) 17; The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December (1948) came into force (1951) (the Genocide Convention) Article I ; Robert Cryer (ed), *An Introduction to International Criminal Law and Procedure* (Cambridge 2007) 165; Florian Jessberger, 'The Definition and The Elements of The Crimes of Genocide' in Paola Gaeta, *The UN Genocide Convention: A Commentary* (Oxford University Press 2009) 88.

³ The International Court of Justice (ICJ), Advisory Opinion Reservations to the Convention on Genocide (28 May 1951) as cited in Yuval Shany (ed) 'The Road to The Genocide Convention and Beyond' in Paola Gaeta (ed) *The UN Genocide Convention: A Commentary* (Oxford University Press 2009) 15.

⁴ *Prosecutor v Kambanda*, (ICTR 97-23-S) (Judgment 4 September 1998), (16). Winston Churchill, who was the Prime Minister of the UK from 1940 to 1945, describes genocide as the 'crime of crimes'. See William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press 2009).

⁵ The Rome Statute of the International Criminal Court (1998) entered into force in July (2002) UNTS 2187 (the Rome Statute) Article 21; International Criminal Tribunal for Rwanda (ICTR); The International Criminal Tribunal for the former Yugoslavia (ICTY); Adam Jones, *Genocide: A Comprehensive Introduction* (2nd edn, London, Routledge 2011); May Larry, *Genocide: A Normative Account* (Cambridge University Press 2010).

⁶ General Assembly Res. 96 (1) (11 December 1946)
<<http://www.un.org/documents/ga/res/1/ares1.htm>> accessed 10 February 2019.

'a denial of the right to existence of an entire human group'.⁷ Article II of the Convention defines the mental element (*mens rea*) and physical element (*actus rea*) of the crime of genocide. It stipulates that 'genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. The categories are a) killing members of a group of people; b) causing serious bodily or mental harm to a group of people; c) deliberately inflicting on a group of people conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within a group of people; and e) forcibly transferring children of a group of people.

Islamic international law does not explicitly refer to the term 'genocide', but prohibits killing one person or a group of people. This is because it focuses on the rights to life and existence.⁸ This is based on the following Quranic verse: '... whoever kills a soul unless for a soul or corruption [done] in the land – it is as if he had slain mankind entirely.'⁹ Bassiouni notes that Islamic law 'contains both general prohibitions against killing and harming others, and protection for specific persons and places'.¹⁰ The main point here is that people must be allowed to enjoy their rights to life and existence regardless of their ethnic, religious, racial, and national identity. Thus, difficulties can arise when trying to compare the definition of the crime of genocide as it is used in international criminal law, and how genocide is dealt with in Islamic international law. This is because the former uses specific legal terms to define crimes committed with specific intention, while Islamic international law provides more general prohibitions relating to the killing of innocent people and causing harm whether mental or physical. However, carrying out a comparative approach here can be undertaken by looking at the prohibition of the entire prohibited physical acts in Islamic international law as mentioned in the Genocide Convention as well as the underlying reasons of committing such a crime, namely discrimination against a group of people in whole or in part.

This chapter aims to examine compatibilities and incompatibilities between international criminal law and Islamic international law in terms of the following: how genocidal acts are criminalised; the mass killing of a group of

⁷ Ibid.

⁸ This refers to the term 'killing' as it is used in the Genocide Convention and as proposed by Saudi Arabia; UN Doc. A/C.6/86, as cited in William Schabas, *An Introduction to International Criminal Law* (4th edn. Cambridge 2014) 157.

⁹ The Quran 5:32

¹⁰ M Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, (Cambridge University Press 2014) 175.

people; the underlying reasons behind committing these crimes; and the criminalisation of acts mentioned in international criminal law against a group of people, whether in whole or in a part.

From this point of view, the prohibition in Islamic international law is primarily based on Quranic verses and the words of the Prophet Mohammed as recalled in the Hadiths. These sources are interpreted according to Islamic jurisprudence and the views of Islamic jurists. Islamic international law provides rights for people to life and existence, whatever the group they belong to, using the equality principle.

7.2 The Element of Intent (*Mens Rea*)¹¹

7.2.1 International Criminal Law

Intent to commit genocide is expressly dealt with in the preamble of Article II of the Genocide Convention, which reads, 'Genocide means any acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.' This statement reveals that intent to commit genocide requires 'special intent' to destroy a group of people 'in whole or in part' and knowledge of the act of doing so.¹² Committing violent acts without specific intent to destroy a group of people does not constitute genocide.¹³ An example of this is when the United Nations appointed a panel led by Antonio Cassese to discuss the Darfur crisis. Cassese found that 'Sudanese government forces and militias were responsible for mass killings, torture, rapes, and forced displacement of civilians, but not genocide due to a lack of intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such'.¹⁴

¹¹ This part of the study explores the debate between scholars regarding intent. However, the views presented are a guide, and the context of the study does not explore the actual debates because the scope of the study is about the compatibility and incompatibility between international criminal law and Islamic international law; thus, it is not appropriate to extend the scope of the study.

¹² Schabas (n 4). There has been significant discussion among scholars working in the field of international criminal law about the meaning of 'as such' and the meanings of 'in whole' and 'in part' as worded in the Genocide Convention. See Antonio Cassese and Paola Gaeta *International Criminal Law* (3rd edn, Oxford 2013).

¹³ Schabas (n 4) 102.

¹⁴ The UN Report says that the element of intent could have been missing. It is stated that although the Sudanese forces committed indiscriminate attacks against groups of black African tribes, it refrained from killing or attacking groups that did not flee. Thus, the Commission ruled that for the crimes committed in Darfur to be classed as genocide, the circumstances must include 'beyond a reasonable doubt' within the intent to commit genocide. Thus, in this case, it was shown that the element of intent could have been missing. See also Samuel Totten, 'The UN International Commission of Inquiry on Darfur: New and Disturbing Findings' (2009) *International Association of Genocide Scholars* 354; see also Michael J Kelly, 'The Debate Over Genocide in Darfur, Sudan' (2011) 18 *U.C. Davis Journal of International Law & Policy* 205.

Another recent example can be found in the Report of the Independent International Fact-finding Mission on Myanmar in its Thirty-ninth Session September 2018, which states that 'The Rohingya is a protected group under [the definition of genocide convention]'. The Rohingya's treatment by the Myanmar security forces, acting in concert with certain civilians, includes conduct that amounts to four of the five defined prohibited acts as follows: a) killing; b) causing serious bodily or mental harm; c) inflicting conditions of life calculated to bring about the physical destruction of the group in whole or in part; and, d) imposing measures intending to prevent births.¹⁵ This is because the Myanmar forces intended to change the 'demographic composition of Rakhine State. The intent included an oppressive context to destroy those minorities on religious and ethnical grounds.'¹⁶

In respect of the element of intent, there are two sides of the debate. The first deems that if there is destruction of a group of people in whole or in part, and the perpetrator did not intend to destroy, then he or she could be liable to be prosecuted for genocide in terms of aiding or abetting.¹⁷ This view considers that the intent to commit genocide is based on a 'purpose-based approach'.¹⁸ The second view is based on the meaning of intent for genocide as 'a knowledge-based approach', which identifies intent when the perpetrator has knowledge, or has reason to know, that the special intent of the genocide crime has arisen.¹⁹ Thus, the 'knowledge-based approach' deems that the actual offender is liable for complicity even if the accomplice did not intend a genocidal act.²⁰

The element of intent for committing the crime of genocide must encompass both a) special intent and b) knowledge.²¹ Special intent means that the accused must have understood the surrounding circumstances of the situation, and have been aware of the consequences of his or her act and what would have occurred in an ordinary situation.²² 'Knowledge' is classed as a main element of the principle of 'intent'. It means that the perpetrator must have knowledge of the 'scope of committing genocide crimes mostly planned

¹⁵ Report of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/64, 12 September 2018 <https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf> accessed 10 February 2019, 16.

¹⁶ Ibid.

¹⁷ *Prosecutor v Krstic* (Appeal Chamber Judgment 134) (19 April 2004).

¹⁸ Jessberger (n 2) 105.

¹⁹ Ibid.

²⁰ For more information, see Elies van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2007) 5 *Journal of International Criminal Justice* 184.

²¹ *Prosecutor v Akayesu*, (ICTR-96-4-T) (Judgment 25 September 1998) (524).

²² The Genocide Convention Article 2; The Rome Statute Article 30.

or organised by the state or by individuals who are associated with the state'.²³ This is based on the ruling issued by the International Criminal Tribunal for Rwanda in the *Kayishema and Ruzindana* cases when the Tribunal wrote that 'the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide'.²⁴

The intent, as it is referred to in the Genocide Convention, means 'a specific intent' or 'a precise description of the intent'.²⁵ This means that the prosecutor shall seek reasons beyond the intent of the accused that he or she, with awareness, engaged in the criminal conduct of a genocidal act to cause the consequences of the criminal act.²⁶ Based on the comments of the Trial Chamber of the International Criminal Tribunal for Rwanda in the *Akayesu* case, special intent means when 'the intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'.²⁷ Another factor associated with specific intent as it relates to genocide is 'to destroy, in whole or in part, a national, ethnical, racial or religious group'. The Elements of the Crimes of the Rome Statute explains that the meaning of 'destroy' is when 'the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'.²⁸ The International Law Commission also describes the meaning of 'destroy' as 'the material destruction of a group either by physical or by biological means'.²⁹

Genocide mostly occurs 'with the specific intent to destroy a number of a relevant group'.³⁰ Hence, genocide in this sense could mean that killing a few people on the basis of their national, ethnic, racial or religious status may not constitute a crime of genocide unless there is evidence that the act 'was the first of a series of acts amid the destruction of an entire group'.³¹ Schabas argues that the size of the group or the number of victims is not relevant in respect of the crime of genocide.³² Thus, the principle of 'intent' is a specific

²³ Schabas (n 4) 207.

²⁴ *Prosecutor v Kayishema and Ruzindana*, (ICTR-95-1-T) (Judgment, 21 May 1999) (94).

²⁵ Schabas (n 4) 214.

²⁶ *Ibid.*

²⁷ *Prosecutor v Akayesu* (n 21) (497).

²⁸ The Elements of the Genocide Crime in the Rome Statute Article 6(a).

²⁹ Report of the Commission to the General Assembly on the work of its forty-first session UN Doc.A/CN.4 SER.A/1989/Add.1 (2-4).

³⁰ Leila Sadat and Wexler and Jordan Paust, 'Model Draft Statute Preamble' in *Yearbook of International Humanitarian Law* (Volume 5 Cambridge University Press 2002).

³¹ The Elements of the Crimes of the ICC Statute Article 6.

³² *Ibid.* One may observe that the term 'genocide' used in the Genocide Convention and the term 'group of people' indicate that the victim is more than one person, since the Convention

factor that distinguishes between crimes of genocide and crimes against humanity.³³ Thus, intent must be established whether the victims are many or just one individual.³⁴

The international community has declared that all states must refrain from committing genocide during times of war and peace.³⁵ This is articulated in The United Nations Resolution 180 (II) passed in 1947, which reads as follows.

It should be clarified that not only those States party to the Genocide Convention are compelled to abide by its rules, but also non-party states, since the rules thereof protect the collective interest of the international community, i.e. the rules of *jus cogens*, which are mandatory to all nations, including those not party to the international convention.³⁶

7.2.2 Islamic International Law

Islamic international law, which is part of Islamic law, deals with the element of 'intent' in its jurisprudence, in that intent must include elements of both 'knowledge' and 'will'.³⁷ The meaning of 'knowledge' is that an offender must have known that his or her act was criminalised and is punishable.³⁸ The meaning of 'will' is that an offender must have been conscious of the consequences of the criminal act, and that the perpetrator had the capacity to commit the criminal act in order to accomplish the result.³⁹ In essence, these two required elements are similar to those specified for 'specific intent' under international criminal law. Moreover, the same elements can be observed in Islamic criminal law when considering that the burden is mostly placed on the prosecution authority.⁴⁰ Intent in Islamic criminal law refers to 'the offender's intent to carry out the criminal act in aiming to achieve the result'.⁴¹

Under Islamic criminal law, one Quranic verse indicates the importance of the principle of intent when a person carries out a criminal action. The verse states

does not speak of a 'group of individuals', which may mean that one or more than one can be victimised with specific intent.

³³ Cryer (n 2) 166.

³⁴ Ibid.

³⁵ The Genocide Convention Article 1.

³⁶ The UN, Resolution 180 II (1947), <<https://documents-dds-ny.un.org/doc/Resolution/Gen/NR0/038/87/img/NR003887.pdf?OpenElement>> accessed 2 October 2018.

³⁷ Abdul qader Awda, *a- tashri al-Jiyn'ai fi al-Islam muqarānh bi al-qanon al-wadāi* (al-Risālah Beirut 2000) (Arabic source) 403, 409.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

that 'man can have nothing but what he strives for'.⁴² Jurists also adopt the Islamic maxim of intent *al-Umūr bi Maqāsidihā*, which states that 'an act should be judged in accordance with the intention of the offender'.⁴³ According to Bahnassi, intent means 'the inclination of one's will toward the performance of a punishable act or toward a punishable omission'.⁴⁴ Islamic criminal law classes intent as when an offender intends to carry out a physical element that brings about the result of the act.⁴⁵ This means that 'it is sufficient to prove that the act was carried out with the purpose of assault and not for the purpose of amusement or discipline'.⁴⁶ Jurists of Islamic criminal law also require proof of the results of a criminal act, namely there need to be clear results of a criminal act for an applicable punishment to be imposed.⁴⁷ In conclusion, in Islamic criminal law, 'specific intent' can be seen within the Islamic maxim of *al-Umūr bi Maqāsidihā*.

7.3 The Material Elements of Genocide (*Actus Rea*) and Categories of Genocide

The crime of genocide is defined in the 1948 General Assembly of the United Nations Resolution 96 (I) as 'a denial of the right to existence of entire human groups, as homicide is the denial of the right to live of individual human beings'.⁴⁸ Furthermore, Article II of the Genocide Convention and Article 6 of the Rome Statute cover the crime of genocide. Provisions of the Genocide Convention stipulate that the following actions constitute genocide.

- a) Killing a group of people in whole or in part.
- b) Causing serious harm whether mental or bodily to a group of people, in whole or in part.
- c) Deliberately inflicting on the group conditions of life that cause physical destruction, in whole or in part.

⁴² The Quran 53:39.

⁴³ L Zakariyah, 'Applications of Legal Maxims in Islamic Criminal Law with Special Reference to Sharia Law in Northern Nigeria (1999–2007)' (D. Phil Thesis, University of Wales 2009) 64.

⁴⁴ Aahmad Bahansi, *al-Mas'ūliyyah al-Jinā'iyyah fī al-Fiqh al-'islāmī* (Dār al-Shurūq Egypt 1998) (Arabic source) 177.

⁴⁵ Sanad Nagaty, *The Theory of Crime and Criminal Responsibility in Islamic Law, Sharia* (Chicago: Office of International Criminal Justice, University of Illinois 1991) 87.

⁴⁶ Mohamed Elewa Badar and Iryna Marchuk, 'A Comparative Study of the Principles Governing Criminal Responsibility in the Major Legal Systems of the World: England, the United States, Germany, France, Denmark, Russia, China, and in the Islamic Legal Tradition' (2013) 1:48 Criminal Law Forum 1.

⁴⁷ The perspective of criminal responsibility in Islamic law is discussed in chapter three of this study.

⁴⁸ The Genocide Convention Article II and Article 6 of the Rome Statute.

- d) Imposing anti-birth measures against a group of people, in whole or in part.
- e) Transferring children forcibly from their group, in whole or in part, to another place, or to another group of people, and preventing them from being with their parents or culture.⁴⁹

These acts constitute the physical element (*actus rea*) of the Genocide Convention. In order to examine compatibility and incompatibility between Islamic international law and international criminal law in respect of these acts, it is important to highlight the perspective of international criminal law in relation to genocide, and then present an analysis of each element.

The Genocide Convention is part of the field of public international law, which encompasses international human rights law, international humanitarian law, and international criminal law.⁵⁰ Schabas outlines the basic principles recognised under this law as follows.

- a) Improving international criminal law in defining the elements of the crimes of genocide (*actus rea* and *mens rea*).
- b) The protection of individuals from being victimised by their own state.
- c) Prosecuting perpetrators who have committed crimes that violate fundamental human rights and humanitarian law.
- d) Imposing international obligations upon states to criminalise the crime of genocide as it is prohibited and punishable on a domestic level.

These principles are designed to 'pierce the hitherto impenetrable wall of state sovereignty'.⁵¹ Thus, if international crimes such as genocide are committed at a domestic level, perpetrators will be punished, whether in domestic or international courts.⁵² This is because the crime of genocide is a prime concern at international level.⁵³

Article II of the Genocide Convention and its preamble describes the physical elements of genocide in the following terms: 'In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'

⁴⁹ The Genocide Convention Article 1.

⁵⁰ Schabas (n 4) 7.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Leo Kuper, 'Genocide and Mass Killing, Illusion and Reality' in Bertrand Ramcharan (ed) *The Right to Life in International Law* (Martinus Nijhoff Publisher Dordrecht 1985) 144.

7.3.1 Killing

Article II of the Genocide Convention notes that killing members of a group in whole or in part constitutes genocide. Moreover, this kind of genocide is positioned at the top of the hierarchy of the crime of genocide.⁵⁴ Killing a group of people (whether in whole or in part) is classed as a crime against innocent people because these people did not take part directly in a situation of international war or in a domestic conflict situation.⁵⁵ Killing must contain two material factors as follows: a) the death of the victim, and b) death must result from an unlawful act according to the International Criminal Court for Rwanda as ruled in the *Akayesu* case.⁵⁶ In the *Akayesu* case, the Court interpreted the provisions of the Genocide Convention, stating that genocide can be committed whether or not the victim was a member of the group of people who were victimised, since killing within the context of genocide constitutes the crime of genocide.⁵⁷

In Islamic international law, killing one person or a group of persons falls under the crime of murder.⁵⁸ This is because Islamic international law considers that unlawful killing constitutes the crime of murder.⁵⁹ Hence, it prohibits the killing of a person whatever the reasons behind the crime. It does not distinguish between killing one person or a group of people on the basis of ethnicity, religion, colour, or nationality.⁶⁰ This is confirmed in the following Quranic verse: 'If anyone slays a person - unless it be for murder or for spreading mischief in the land - it would be as if he slew the whole people: and if anyone saves a life, it is as if he has saved the life of the whole people.'⁶¹ However, this Quranic verse has been interpreted by Muslim scholars in different ways.

⁵⁴ The Genocide Convention Article 1.

⁵⁵ *Prosecutor v Akayesu* (n 21) (577); see also Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford 1991) 51.

⁵⁶ *Prosecutor v Akayesu* (n 21) (90).

⁵⁷ *Ibid.*

⁵⁸ Here it can be difficult to compare the crime of genocide between international criminal law and Islamic international criminal law because the crime of genocide in international criminal law carries provisions of specific intent. However, it can be argued that since Islamic international criminal law prohibits killing one person and/or killing a group of people (as the criminal act), and it prohibits discrimination between peoples (as the basis of committing such a crime), then Islamic international criminal law is consonant with the prohibition of the mass killing of people, whether in whole or in part, based on discrimination. This is because Islamic international criminal law criminalises the criminal act of mass killing and prohibits the intent of the mass killing of people that is undertaken on the basis of discrimination.

⁵⁹ See chapter four of this study.

⁶⁰ Mohammad Shokry a-Daqaq, 'Genocide from the Perspectives of International and Islamic Law' in Muhammad Abdul Haleem, Adel Omar Sherif and Kate Daniels, *Criminal Justice in Islam and Judicial Procedures in the Sharia* (I B Tauris 2003) 139.

⁶¹ The Quran 5:32.

For example, Mansur argues that Allah commits to judge murder by punishing the offending person under the category of *qiṣāṣ* crimes⁶² and by punishing them in the hereafter.⁶³ However, a-Daqaq argues that this verse connects with the idea of mental intent (*mens rea*), which infers that killing one person is like murdering a whole group of people since everyone has an equal right to life and existence. Consequently, the offender is responsible under the concept of intent if he intended to commit a crime.⁶⁴

Thus, Islamic international law prohibits and punishes the mass killing of people and of causing mental or physical injury or harm to the life of a person or to a group of people.⁶⁵ This is because the main sources of Islamic international law consider that people are equal in terms of human rights and there is no discrimination between individuals on the basis of their dignity.⁶⁶ The following Quranic verse encapsulates this principle.

Mankind we created you from a single (pair) male and female, and made you into nations and tribes, that you may know each other. Verily the most honoured of you in the sight of God is (he who is) the most righteous of you. And God has full knowledge and is well acquainted (with all things).⁶⁷

Ibn Kathir argues that Allah speaks to mankind so that people can make communication with each other, and there is no kind of people better than the other except on the basis of piety.⁶⁸ In this verse, Allah talks about all people, whatever their religion, ethnicity, or colour. Allah prevents discrimination between peoples on the basis of their ethnicity, indicating that all mankind originates from one male and one female. Allah also promotes good communication, and prevents murder or doing harm to each other.

The Prophet Mohammed says, 'O men, verily your God is one, and your father is one. No Arab is superior to a non-Arab except in righteousness, nor black to red or red to black, except in righteousness.'⁶⁹ This Quranic verse and the Hadiths of the Prophet constitute a strong statement of deterrence for any discrimination against any group of people in all aspects, whether in whole or

⁶² See chapter four of this study under the heading of *qiṣāṣ* crimes.

⁶³ Ansar Mansour, *a-Sharia al-Islamiyah* (Volume 1 The Supreme Council for Islamic Affairs Egypt 1971) 299 (Arabic source).

⁶⁴ a-Daqaq (n 60) 139.

⁶⁵ Wahba al-Zuhili, 'Islam and International Law' (2005) 87 *International Review of the Red Cross* Volume 87, Issue 858 (Religion) 269.

⁶⁶ *Ibid.*

⁶⁷ The Quran 49:13.

⁶⁸ Ibn Kathir, *Tafsīr al-Quran* (Vol. 7 Dar Ṭayybah 1997) (Arabic source) 385.

⁶⁹ Muḥammad ibn Ismā'īl al-Bukhārī, *Sahih al-Bukhari* (Maktabat Al-Rushid Riyadh 1427 H) (Arabic source).

in part, on the grounds of religion, ethnicity, colour, or even language. Islamic international law focuses on preventing discrimination that leads to killing or causing harm to peoples in whole or in part.⁷⁰

In Islamic international law, crimes of genocide would fall under *qişáş* laws and punishments.⁷¹ This is because when proving these crimes, both the mental element and physical element must be considered to make sure that 'genocide' has been committed (if the latter results in the death of a group of people and the former results in the intention of the offenders to undertake mass killing).⁷² Furthermore, in Islamic international law, the prohibition of the mass killing of people involves looking at the reasons behind committing this crime, and whether this was because of religion, ethnicity, or nationality.⁷³ This applies to whenever a crime is committed, and if the victim is a Muslim, a foreigner living in a Muslim state, a Muslim living in a non-Muslim state, or a non-Muslim living in non-Muslim state, and whether this occurs during domestic conflict or in times of war or peace.⁷⁴

7.3.2 Causing Serious Bodily or Mental Harm

Article II of the Genocide Convention refers to, 'causing serious bodily or mental harm to members of the group in whole or in part'. International criminal law prohibits causing serious harm to a group of people, whether this is bodily or mental; inflicting injuries or torture that affect the group's health; and/or deliberately inflicting on the group life conditions that result in permanent or non-permanent illness or disability, or that cause death.⁷⁵ The Elements of Crimes of the Rome Statute Article 6(b)(1) stipulates that the acts which constitute serious harm to the group, whether bodily or mental, 'may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment'.⁷⁶ For example, this may include depriving a group of people of food, water, medicine, and housing that results in the decimation of the group of people in whole or in part.⁷⁷

Another example is subjugating a group of people in whole or in part to difficult living conditions, such as leaving them without food or water; leaving them in

⁷⁰ Farhad Malekian, 'The Homogeneity of International Criminal Court with Islamic Jurisprudence' (2009) 9 International Criminal Law Review 595.

⁷¹ For more information see chapter four of this study.

⁷² a-Daqaq (n 60)1140.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ The Genocide Convention Article 2.

⁷⁶ The Elements of Crimes of the Rome Statute Article 6(b)(1) Footnote 3.

⁷⁷ Schabas (n 4) 139.

severe weather conditions, whether cold or hot; and leaving sick people without treatment and medicine.⁷⁸ This may include instances where responsible individuals, a state, or an organisation refrains from carrying out its legal duty of providing people with what they need.⁷⁹ The Elements of Crimes of the Rome Statute also rules that sexual violence and rape is an integral part of the Genocide Convention, which was previously ruled by the ICTR *Akayesu* case.⁸⁰ Sub-paragraph 4 of The Elements of Crimes states that this is the case if 'the conduct took place in the context of a manifest pattern of similar directed conduct'.⁸¹

The terms 'serious bodily or mental harm' have been interpreted by the Rwanda Tribunal in the *Akayesu* case to include acts that are not limited to torture, persecution, sexual violence, inhuman, or degrading treatment, whether the serious harm is permanent or not.⁸² Writers have argued that the sexual violence that occurred in Bosnia when Muslim women were raped and were separated from Muslim men would have created 'a condition of life calculated to bring about the group's destruction'.⁸³

In Islamic international law, Muslim societies are like any other societies around the world in that they include, play host to, and represent a diversity of peoples who contribute to their communities, including other religions, nationalities, and ethnicities. This position of Muslim society was considered at the time of the revelations of the Prophet Mohammed, and when Muslim communities included a minority of Jews and Christians.⁸⁴ These minority communities are protected by the provisions of *Sharí'ah*, the Quran, and the Sunnah from any discrimination or ill treatment. This protection was realised in the *Sahifaht al-Madinah* (the first constitutional law in Islam).⁸⁵ These minority peoples, namely Jews and Christians, were known as *ahl al-kiātb* (the People of the Book) and others were known as *ahl a-Dimāh* (idolaters who are tolerant of Islam).⁸⁶ In this regard, the Prophet says, 'Whoever killed a *mu'ahid* (a person who is granted the pledge of protection by the Muslims)

⁷⁸ *Prosecutor v Rutaganda*, (ICTR 96-3-T 6) (Judgment December 1999) (73), see <http://www.worldcourts.com/ictf/eng/decisions/1999.12.06_Prosecutor_v_Rutaganda.pdf/> accessed 2 October 2018.

⁷⁹ Schabas (n 4) 159.

⁸⁰ *Prosecutor v Akayesu* (n 21) (731).

⁸¹ The Elements of Crimes of the Rome Statute.

⁸² *Prosecutor v Akayesu* (n 21) (447) and (501).

⁸³ M Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers 1996) .

⁸⁴ Muhammad Tahir-ul-Qadr, *The Constitution of Medina* (Forest Gate, London, E7 9HD United Kingdom 2012) 10.

⁸⁵ *Ibid.*

⁸⁶ Majid Khadduri, *Law of War and Peace in Islam: A Study in Muslim International Law* (London 1940) 177.

shall not smell the fragrance of Paradise though its fragrance can be smelt at a distance of forty years (of travelling).'⁸⁷ The Prophet prevents any discrimination that leads to killing or causing harm against any human being, as he or she is protected by the law of Islam.

Islamic international law prohibits mental or bodily harm whether this is serious or not, based on the following Hadith of the Prophet: 'There should be neither harming nor reciprocating harm.'⁸⁸ This covers mental or physical harm.⁸⁹ It can be noted that the Prophet does not distinguish between peoples whether they are Muslim or not, but prevents any harm whether physical or mental against people on the basis of their identity, ethnicity, or religion. In his last sermon, the Prophet says, 'Hurt no one so that no one may hurt you. Remember that you will indeed meet your Lord, and that He will indeed reckon your deeds.'⁹⁰ Thus, Islamic international law prevents discrimination that causes death or serious harm to people, whether mental or physical.⁹¹ Furthermore, it prohibits annihilation, whether systematic or non-systematic, against the whole or part of a group of people, and prohibits causing serious harm or inflicting destructive conditions on the lives of a group of people.⁹² The protection of people from an Islamic perspective is derived from the right of people to life, religion, property, and from any destruction against them. This can be comparable to the International Convention of Genocide 1948 Article (II) and the Rome Statute Article 6.

In Islamic international law, protecting people's lives, religion, and property covers times of war and peace.⁹³ This is because Islamic law guarantees the rights of people to live peacefully and prohibits fighting with non-combatants (whether these civilians are women or children).⁹⁴ Similar views exist in the provisions of the International Convention of Genocide Article I, which stipulates that 'the contracting Parties confirm that genocide, whether

⁸⁷ Muḥammad ibn Ismā'īl al-Bukhārī, *Sahih al-Bukhari* Hadith No 49 Book 83, (Maktabat Al-Rushid Riyadh 1427 H) (Arabic source).

⁸⁸ Quoted from Hadith Commentary Website, <<https://hadithcommentary.com/nawawi/hadith32/>> accessed 2 October 2018.

⁸⁹ Ibid.

⁹⁰ Prophet Mohammed's Last Sermon cited on the Islamic Religion website <https://d1.islamhouse.com/data/en/ih_articles/single2/en_Prophet_Muhammad_Last_Sermon.pdf> accessed 8 December 2018.

⁹¹ a-Daqaq (n 60) 157.

⁹² Ibid.

⁹³ Sayyid Abul A'la Maududi, *The Islamic Law and Constitution*, (Islamic Publications Pvt Lahore 1960) 4, 5.

⁹⁴ Mohammed Al-Naisaburi, *Sahih Muslim*, Hadith 2577, as quoted from Daily Hadith online <<https://abuaminaelias.com/dailyhadithonline/2011/02/05/allah-has-forbidden-oppression/>> accessed 30 September 2018.

committed in times of peace or in times of war, is a crime under international law which they undertake to prevent and to punish'.⁹⁵

7.3.3 Deliberately Inflicting Conditions of Life that Cause Physical Destruction, in Whole or in Part

The Genocide Convention criminalises causing mental or physical harm to people intentionally that affects their conditions of life. It prohibits 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.⁹⁶ The meaning of this clause was interpreted by the Trial Chamber of the Rwanda Tribunal as 'the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seeks their physical destruction'.⁹⁷ It adds that physical destruction can include the whole or part of the group. Moreover, physical destruction can include the expulsion of the group systematically from their homes, or preventing essential medications, even in a minimum services capacity, that leads to the destruction of the group of people. The ICC jurisdiction and the Elements of the Crimes refer to the essential resources of human beings 'as including' but 'not necessarily restricted to' items such as food, housing, medicine, and water.⁹⁸

Islamic international law prohibits causing harm to people through the deprivation of food, water, and essential medical treatment. This is because it guarantees essential medical treatment, food, and water to prisoners and captives during war, even if these people are fighting against a Muslim army.⁹⁹ Preventing necessary resources and medical treatment is prohibited in peacetime as well as during war.¹⁰⁰ Islamic international law prevents the killing of non-combatants and does not allow the mass killing of innocent people on the basis of ethnicity or religion during warfare. Thus, it undoubtedly prevents the mass killing of any people whatsoever. This is because the values of Islamic law promote the rights of people. These values are outlined as follows.

⁹⁵ The Genocide Convention Article 1.

⁹⁶ Ibid.

⁹⁷ *Prosecutor v Akayesu* (n 21) (505).

⁹⁸ The Rome Statute, The Elements of Crimes of the Rome Statute, General Introduction and Article 6(c); see also Alexander Greenwalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review* 2259; see also Claus Kress, 'The Crime of Genocide under International Law' (2006) 6 *International Law Review* 461.

⁹⁹ Shaheen Whyte, 'The Foundations of International Humanitarian Law in Islamic Tradition' (2014) 10 (7) *Journal of Islamic State Practices in International Law* 7.

¹⁰⁰ Muhammed Hamidullah, *Muslim Conduct of State* (Kashmiri Bazar Lahore 1954) 360.

a) The administration of justice promotes justice and prohibits injustice, as reported in the Hadith al-Qudsi: 'Allah Almighty said: O my servants, I have forbidden injustice for myself and I have forbidden it among you, so do not oppress one another.'¹⁰¹ Another example is when the Prophet suggests to his companions that they migrate to the Kingdom of Abyssinia because it is ruled by a just governor.¹⁰²

b) Compliance for the benefit of the entire people without any discrimination. This can be seen in the five imperative conditions for people (life, mental health, religion, the body, honour, and property). These values of Islamic law can contribute to the welfare of mankind. The protection of people in Islamic law covers imperative aspects of their life. Islamic international law prohibits and punishes the killing of individuals whatever race or religion they belong to, for whatever reasons, unless a person was convicted under the *ḥudūd* and *qīṣāṣ* punishments after judges have reached a final verdict.¹⁰³ Furthermore, Islamic international law prohibits causing harm whether bodily or mentally on the grounds of racial conflict.

The provisions of Islamic international law classify genocide as punishable whether committed in war or peacetime, whether relating to the mass killing of people or causing serious harm, and whether physical or mental.¹⁰⁴ Leaving a person or a group of people without food or water or in severe weather (cold or hot) on the basis of discrimination (whichever mechanism is used) is criminalised in Islamic international law. This is deemed in the Hadith of the Prophet when he said the following.

Every one of you is a shepherd and is responsible for his flock. The leader of people is a guardian and is responsible for his subjects. A man is the guardian of his family and he is responsible for them. A woman is the guardian of her husband's home and his children and she is responsible for them. The servant of a man is a guardian of the property of his master

¹⁰¹ Mohammed Al-Naisaburi, *Sahih Muslim, Hadith 2577*, quoted from Daily Hadith online <<https://abuaminaelias.com/dailyhadithonline/2011/02/05/allah-has-forbidden-oppression/>> accessed 30 September 2018.

¹⁰² Shahnaze Safieddine, 'Migration to Abyssinia' (2011) 12 Message of Thaḳalayn 88 <https://www.al-islam.org/message-thaqalayn/vol-12-no-2-summer-2011/migration-abyssinia-shahnaze-safieddine/migration>> accessed 30 September 2018.

¹⁰³ For more information about *ḥudūd* and *qīṣāṣ* crimes, see chapter four of this thesis.

¹⁰⁴ Majid Khadduri, *Law of War and Peace in Islam: A Study in Muslim International Law* (London 1940).

and he is responsible for it. No doubt, every one of you is a shepherd and is responsible for his flock.¹⁰⁵

7.3.4 Imposing Measures Intended to Prevent Births

The Genocide Convention also prohibits using anti-birth measures or transferring children to another place from where they live.¹⁰⁶ In relation to imposing severe measures against a group of people by using anti-birth measures, the physical act of imposing these measures against a group of people in whole or in part constitutes biological genocide and includes a) compulsory abortion, b) restricting births, c) segregation between women and men, and d) placing obstacles in the path of marriage.¹⁰⁷ The Genocide Convention confirms that the act of separating children forcibly from their parents or families constitutes a crime of genocide.¹⁰⁸ In relation to the intent to impose measures on and restrict the births of a group of people in whole or in part, the Genocide Convention talks about acts aimed at abolishing the proliferation of a group of people on the basis of their ethnicity or national and religious identity, and about acts that aim to prevent a group from bearing new generations. Examples of this can be through forced abortion, sterilisation, compulsory drugs, the separation of women from men, and by preventing marriage.¹⁰⁹

In Islamic international law, imposing measures intended to prevent births within a group may also include the subjugation of women into undergoing hysterectomy and injecting women with anti-pregnancy drugs, or injecting men with drugs that cause infertility, for the purpose of preventing the proliferation of a group of people, whether in whole or in part.¹¹⁰ These actions are prohibited in Islamic international law in accordance with the following Quranic verse: 'And to Thamud [we sent] their brother Salih. He said, "O my people, worship Allah; you have no deity other than Him. He has produced you from the earth and settled you in it so ask forgiveness of Him and then

¹⁰⁵ Quoted from Daily Hadith online <<https://abuaminaelias.com/dailyhadithonline>> accessed 26 October 2018.

¹⁰⁶ Cryer (n 2) 177.

¹⁰⁷ The Report of the Commission to the General Assembly on the work of its forty-first session, paragraph 102.

¹⁰⁸ The Genocide Convention Article 2, paragraph (e).

¹⁰⁹ M Cherif Bassiouni, *Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Dordrecht 1987) 73.

¹¹⁰ Majmi' al-Figh al-Islami qrar 39 (5/1) [1] (1409), the Organisation of Islamic Co-operation (Arabic source) <<http://www.iifa-aifi.org/1746.html>> accessed 6 February 2019.

repent to Him. Indeed, my Lord is near and responsive".¹¹¹ Tantawi's interpretation of this verse is as follows: 'The reason for the creation of Allah for mankind is worship and also the reconstruction of the land through reproduction and proliferation of the land and its construction.'¹¹² It can be noted that worship for Allah cannot be practised without people who populate the earth. Thus, existence and proliferation are needed to ensure continuous worship of Him. Consequently, trying to remove human beings from the earth by birth regulation is against the principles of existence, whatever the reason.

7.3.5 The Forcible Transfer of Children

The forcible transfer of children is criminalised and punishable in international criminal law. This criminalisation also covers the threat of committing this kind of transfer. In the International Tribunal for Rwanda in the *Akayesu* case, the Tribunal stated that 'the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threat or shock which would lead to the forcible transfer of children from one group to another'.¹¹³ Under ICC jurisdiction, the Elements of Crimes identifies the meaning of 'forcibly' as to threaten, coerce, oppress, or physically separate in terms of the methods used for separation.¹¹⁴ It should be noted that the Genocide Convention does not specifically identify criminal acts against children, but considers genocide in the context of child kidnapping and/or the separation of children from their parents or relatives.¹¹⁵

According to the Genocide Convention, the taking and gathering of a group of children can cause serious mental harm to the children and their parents. These actions are forbidden in Islamic international law. As the following Quranic verse says, 'Do no mischief on the earth, after it hath been set in order, but call on Him with fear and longing [in your hearts] for the Mercy of Allah is [always] near to those who do good.'¹¹⁶ Ibn Kathir's interpretation of this Quranic verse is that any act that causes harm or death is forbidden in

¹¹¹ The Quran 11:61.

¹¹² Mohammad Tantawi, *al-Waseet Tafsiṛ Qur'ān* (Dar a-Nhdah 1998) available online at <<http://quran.ksu.edu.sa/tafseer/waseet/sura11-aya61.html>> accessed 26 September 2018 (Arabic source).

¹¹³ *Prosecutor v Akayesu* (n 21) (505).

¹¹⁴ The Elements of Crimes of the Rome Statute Footnote 5 provides that 'The term "forcibly" is not restricted to physical force, but may include the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment'.

¹¹⁵ Nina Jorgensen, 'The Definition of Genocide: Joining the Dots in the Light of Recent Practice' (2001) *International Criminal Law Review* 285.

¹¹⁶ The Quran 7:56.

Islam, and this principle extends to the mischief of acting against the environment.¹¹⁷ In respect of forcibly transferring children belonging to one group to another group, Sulaiman argues that, from an Islamic international law perspective, this may lead to the enslavement or recruitment of children into rough labour that is not suited to their age.¹¹⁸

Islamic international law per se guarantees the rights of children to life and an education, and to prevent abortion.¹¹⁹ In relation to the rights of a mother to breastfeed, the Quran says the following.

Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period]. Upon the father is the mother's provision and their clothing according to what is acceptable. No person is charged with more than his capacity. No mother should be harmed through her child and no father through his child.¹²⁰

With regard to the rights of children to an education, Ibin 'Umar reports that the Prophet said the following.

All of you are shepherds and each of you is responsible for his flock. A man is the shepherd of the people of his house and he is responsible. A woman is the shepherd of the house of her husband and she is responsible. Each of you is a shepherd and each is responsible for his flock.¹²¹

Moreover, Islamic international law provides protection for captives in times of war. Such protection includes keeping children with their parents in times of war and peace. This is because the Prophet says, 'Do not take a child from his mother neither separate siblings from each other.'¹²²

¹¹⁷ Ibn Kathir, *Tafsīr al-Qur'ān al-Kareem*, available online at The King Saud University Website <<http://quran.ksu.edu.sa/tafseer/tabary/sura8-aya67.html>> accessed 9 October 2018 (Arabic source).

¹¹⁸ A Sulieman, *al-Mogdimāt fi a-Lqānūn a-dāuli al-Jinā'i*, (Diwan al-Maṭbw'āt Algeria 2003) (Arabic Source).

¹¹⁹ Muslim scholars have conducted long-standing discussions about the right of abortion.

¹²⁰ The Quran 2:233.

¹²¹ Quoted from Muhammad al-Bukhari, *sahih al-Adab Al-Mufrad* (212, Book 10, Hadith 1, daleel 1994) available online at <<https://sunnah.com/adab/10/1>> accessed 6 September 2018 (Arabic source).

¹²² Mahmood Youssef (ed), *al-harb wa qiyadha al-a'khlakih; Moqāranh fi al-figh al-Islami wa-Lqānūn a-dauli al-Insani* (Markz al-Hādarh, Beirut 2018) 259 (Arabic source).

7.4 Conclusion

The Genocide Convention prevents certain categories of crimes mentioned in Article II.¹²³ Islamic international law offers a broader and general criminalisation of the prevention of killing and causing mental or physical harm to a group of people. The former refers to the principle of no crime and no punishment without law when defining crimes, while the latter refers to the principle that all people have the right to life. This principle is derived from the main sources, the Quran and Sunnah, which have been interpreted by jurists in cases of ambiguity. Consequently, interpretation is often undertaken by Muslim jurists/judges on the basis of estimations made about the case in question, whether or not the crimes they are judging are crimes of genocide or not.

International criminal law and Islamic international law prohibit the mass killing of a group of people in whole or in part, even if the killing is committed by perpetrators who belong to the same group of people who have been victimised. This principle was illustrated in the International Tribunal for Rwanda in the *Bagilishema* case, which held that 'a group may not have precisely defined boundaries ... the perpetrators of genocide may characterise the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society.'¹²⁴

International criminal law and Islamic international law deal with the prevention of genocide in times of war and peace. In Islamic international law, killing just one person, for whatever reason, is prohibited. Arguably, the Genocide Convention deals with genocide as being specifically applicable only when a group of people or part of a group of people is targeted.¹²⁵ In Islamic international law, crimes of genocide are not classed as 'genocide' unless the crimes have actually been committed, since Islamic law deems that human intention should not be punished, except in the hereafter, and because the terms of Islamic criminal law require a criminal result. The Genocide Convention and the Rome Statute both deal with attempts to commit the crime of genocide, as well as its actual realisation even if the result did not occur.¹²⁶

¹²³ There has been significant discussion on this topic; see Cryer (n 2) 172.

¹²⁴ *Prosecutor v Bagilishema*, (ICTR-95-IA-T) (Judgment 7 June 2001) (65).

¹²⁵ The Kingdom of Saudi Arabia ratified the Convention on 13 July 1950.

¹²⁶ The Genocide Convention; The Rome Statute Article 25; with regard to Islamic Criminal Law see chapter four of this thesis.

Islamic international law can be compared with international criminal law under broad provisions prohibiting murder and discrimination because it deems that genocide is prohibited under its provisions, whether or not these provisions have been recognised, or if certain acts have been criminalised at an international level. This means that Islamic law prohibits crimes at all levels, since its focus is on the prohibition of crimes per se, whether these are committed by authorities, states, a group of people, individuals, or militias (and whatever the basis for committing a crime). International criminal law recognises and defines that the crime of genocide must be committed systematically and be organised with intent against a group of people in whole or in part, and that these actions threaten the existence of mankind at all levels and result in serious threats to international peace and security.

Part Four

Saudi Domestic Issues and the Reconciliatory Approach

Chapter Eight

The Quest for Compatibility between Saudi Domestic Laws and the Rome Statute

8.1 Introduction

The domestic laws of the Kingdom of Saudi Arabia comprise both *Sharī'ah* /Islamic law and secular laws (codified laws).¹ The Basic Law of Governance allows for some laws to be codified if they do not contradict *Sharī'ah*.² This can be understood from an analysis of Article 48 of the Basic Law of Governance, which reads, 'The Courts shall apply rules of the Islamic *Sharī'ah* in cases that are brought before them, according to the Holy Quran and the Sunnah, and according to laws which are decreed by the ruler in agreement with the Holy Quran and the Sunnah.' This chapter looks at the quest for compatibility between Saudi Basic Law/Criminal Procedural Law and the Rome Statute. This study has used Saudi Arabia in special reference to Islamic law. The reasons for choosing these domestic laws are as follows. a) Because the Basic Law of the Saudi Government contains general principles, and the rights and duties of individuals, and outlines the form of the state, as well as regulating the relationship between the State and its citizens/residents. It also explains the internal and external policy of the state. b) With regard to the Criminal Procedural Law, this covers general criminal principles, trial procedures, and the rights of the accused, as well as appeal proceedings.

Although Saudi Arabia has not yet ratified the Rome Statute, it has agreed to maintain international peace and security under the Charter of the United Nations, and has become a state party to the Genocide Convention.³ Furthermore, Saudi Arabia has ratified the Geneva Conventions.⁴ The

¹ The Basic Law of Governance (The Basic Law) Article 1 provides that 'The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH). Its language shall be Arabic, and its capital shall be the city of Riyadh.' Article 48 stipulates that 'The courts shall apply to cases before them the provisions of Islamic Shari'ah, as indicated by the Quran and the Sunnah, and whatever laws not in conflict with the Quran and the Sunnah which the authorities may promulgate.' The Basic Law of Governance of Saudi Arabia, issued by Royal Order No (A/91) 27 Sha'ban 1412H – 1 March 1992, published in Umm al-Qura Gazette No 3397 2 Ramadan 1412 H - 5 March 1992. The first Saudi State ran between 1744 and 1818. The second Saudi state ran between 1824 and 1891. The current state of Saudi Arabia was established in 1932; see Joseph Kostiner, *The Making of Saudi Arabia 1916-1936* (Oxford University Press 1993); Alexei Vassiliev, *The History of Saudi Arabia* (1st edn, Saqi Books London 1998).

² Bryant Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Sharia to Regulate Development' (1979) 18 Columbia Journal of Transnational Law 413.

³ Saudi Arabia ratified the Genocide Convention on 13 July 1950.

⁴ Saudi Arabia ratified the Geneva Conventions on 18 May 1963.

provisions of these international conventions are stipulated in the Rome Statute in Articles 6 and 8. Thus, Saudi Arabia is committed to the international community with regard to the prevention and criminalisation of the crime of genocide and war crimes for both internal and/or international armed conflict situations.

Saudi Arabia has been described as a conservative state and one that sometimes hesitates to ratify some international treaties on the grounds that Islamic law supersedes secular international treaties and secular laws.⁵ However, Saudi Arabia is a member of the United Nations, a member of the Arab League, and a member of the Organisation of Islamic Co-operation. These memberships reflect an awareness of the importance of co-operation between states to maintain international peace and security, as well as a regional commitment to enhance security and political stability. In addition, in the Islamic world, Saudi Arabia is classed as a central location of religious focus because it is home to two Holy Mosques, in Mecca and Medinah. In this light, international co-operation for the prevention of international crimes is important to Saudi Arabia, as is the desire to ratify international conventions that maintain international peace and security. However, legal harmony cannot be achieved by dismissing some international conventions and accepting others. International law pursues its objectives via international legal instruments that are applied by means of international law practised by states and international organisations.

The legal system of government in Saudi Arabia is a monarchy in accordance with Article 5 of the Basic Law of Governance. The Government in the Kingdom of Saudi Arabia comprises three branches: the Judiciary, the Legislative Authority, and the Executive Branch, in accordance with Article 44 of the Basic Law of Governance. Saudi Arabia applies Islamic law, and according to some international reports, certain aspects of law in Saudi Arabia have been deemed inadequate by some international organisations. For example, the Report of the Commission on Human Rights Number A/HRC/WG.6/4/SAU/3 of 14 November 2008 says that 'the Basic Law of Governance in Saudi Arabia lacks guarantees to enjoy: freedom of religion or belief, freedom of expression and opinion, equality and equal enjoyment of the protection of the law, freedom from torture and other cruel, inhumane or degrading treatment or punishment, freedom of association and assembly, the

⁵ Abdulhamid A Al-Hargan, 'Saudi Arabia and the International Covenant on Civil and Political Rights 1966: A Stalemate Situation' (2005) 9 (4) International Journal of Human Rights 491.

right to a fair trial, and freedom of thought'.⁶ The Report calls on the Saudi Government to introduce a system of penal procedures that are in line with international human rights standards, in particular giving detainees the right to challenge the lawfulness of their detention in a competent and independent court, and to protect their right to be presumed innocent.⁷ In the goal of seeking legal compatibility, it is valuable to highlight an overview of the legal system of the Government of Saudi Arabia before analysing its domestic provisions.

8.2 An Overview of the Legal System of Saudi Arabia

The Basic Law of the Kingdom is the most significant constitutional document of the State. It outlines the basic legal system of Saudi Arabia, its authorities, the duties and rights of people, and the general policies of the state, both internal and international.⁸ The significance of this law for this study relates to how its provisions compare with those of the Rome Statute. It is important to give an overview of the authorities of the Kingdom before analysing the provisions of the Basic Law and Criminal Procedural Law, in seeking to find equivalent provisions to the Rome Statute.

8.2.1 Judicial Authority

The judicial system in Saudi Arabia is based on the rules and principles of Islamic law, namely the applicable law in the Kingdom is *Sharí'ah* for all matters.⁹ The source of the Saudi judicial system is *Sharí'ah*, and legislations issued by the regulatory authority must not conflict with Islamic law. Thus, judges in the Saudi Courts are obliged to apply *Sharí'ah* rulings in all cases.¹⁰ Judges in Saudi Arabia subscribe to the *Ḥanbalí* school of thought in cases brought before the domestic courts. However, if there is no ruling that deals with the case in question, views are sought from another school of Islamic thought namely *Ḥanafí*, *Sháfi'í*, and *Málikí*.¹¹ Saudi Arabia's judicial system

⁶ Human Rights Working Group on the Universal Periodic Review, Fourth Session February (2009), discussing the summary prepared by the Office of the High Commissioner for Human Rights Number A/HRC/WG.6/4/SAU/3 on 14 November 2008.

⁷ Ibid.

⁸ The Basic Law Parts Two, Five, Six and Nine.

⁹ The Basic Law Article 48 provides that 'The courts shall apply to cases before them the provisions of Islamic Sharia, as indicated by the Quran and the Sunnah, and whatever laws not in conflict with the Quran and the Sunnah which the authorities may promulgate'; see also Frank E Vogel, *Islamic Law and Legal Systems: Studies of Saudi Arabia* (Brill 2000).

¹⁰ The Basic Law Article 48.

¹¹ Ahamed A Al-Ghadyan, 'The Judiciary in Saudi Arabia' (1998) *Arab Law Quarterly* 235.

derives its independence from the Basic Law of Governance.¹² The sources of the judicial system and its independence are derived from Basic Law because this is the constitutional document of Saudi Arabia. The Saudi judicial system is based on a dual judicial system and comprises the *Sharí'ah* Courts and the Board of Grievances (the Administrative Court).¹³ However, for the purposes of this thesis, it is important to focus on the general Saudi judicial system because, in this respect, Criminal Procedural Law is applied and this relates more closely to the research question and the main objectives of the thesis. The general Saudi judicial system has undergone various stages of development since the establishment of the Kingdom of Saudi Arabia. These stages are as follows.

a) The First Stage. In 1927, the formation of the *Sharí'ah* Courts was set up by Royal Decree No. 140 18-2-1346 H (14-8-1927), which regulates the procedures and different levels of *Sharí'ah* Courts in the Kingdom.¹⁴

b) The Second Stage. In 1938, new judicial laws were set up by Royal Decree No. 3/1/32 1357 H and referred to as the Concentration of *Sharí'ah* Responsibilities Law.¹⁵ This law defines different types of *Sharí'ah* Courts in Saudi Arabia, such as the criminal court, family courts, and the choosing of judges.

c) The Third Stage. In 1970, King Faisal established the Ministry of Justice by Royal Decree No. A/126 in 13-8-1390 (14 October 1970). He also replaced previous judicial laws with a new law called The Judicial Law, issued by Royal Decree No. 64/M 14-7-1395 H (21 July 1975).¹⁶ This judicial law confirmed the rules of previous laws, but affirmed the importance of the independence and impartiality of the judicial system.

d) The Fourth Stage. In 2007, King Abdullah set up new judicial laws by Royal Decree No. 87/M 19-9-1428 H (30-9-2007).¹⁷ This new judicial law outlines

¹² The Basic Law, Article 46 provides that 'The Judiciary shall be an independent authority. There shall be no power over judges in their judicial function other than the power of the Islamic Sharia.' The independence of judges is reflected in Articles 2, 3, and 4, which state that judges are not empowered, except in the provisions of Islamic law, which cannot be isolated and removed from their work.

¹³ The Basic Law Article 53, provides that 'The Law shall set forth the structure and jurisdiction of the Board of Grievances.' The Board of Grievances was created by Royal Decree No 2/13/8759 17-9-1374 H. It was later replaced by a new law issued by Royal Decree No 78 19-9-1428 H.

¹⁴ Um Al-Qura Gazette Number 140 21-2-1346 H (The National Centre for Archives and Documents in Riyadh).

¹⁵ Ibid No 1436 in 4-1-1357 H.

¹⁶ Ibid No 2592 in 29-8-1395 H.

¹⁷ Preamble to the Judicial Law of Saudi Arabia.

the roles and the duties of the Supreme Judicial Council, and establishes levels of courts in the Saudi judiciary system as well as the jurisdiction of the courts.¹⁸ According to Article 6 of the Saudi Judicial Law, the Supreme Judicial Council is responsible for the administrative aspects of the judiciary system. For instance, it sets conditions for appointing judges, outlines the duties and rights of judges, provides for their dismissal, sets out rules for trial, and outlines their administrative work and the role of the Ministry of Justice in administrative and financial supervision.¹⁹

Courts in the Saudi judicial system are divided into three levels; namely, First Instance Courts, Appeal Courts, and the Supreme Court. Thus, it is appropriate to describe different court levels, and the terms for reference of each level of court in the Saudi judicial system, as follows.

8.2.1.1 Supreme Court

The Supreme Court is based in the capital city of the Kingdom of Saudi Arabia, Riyadh. It comprises judges working in different chambers. Each chamber is allocated three judges, with the exception of the Criminal Chamber, which employs five judges. The Criminal Chamber deals with judgments relating to death, cutting, and stoning.²⁰ According to Article 11 of the Judicial Law of Saudi Arabia, the Supreme Court shall oversee the proper application of the provisions of *Sharí'ah*, and laws issued by the King that are not inconsistent with *Sharí'ah*, in cases within the jurisdiction of the general courts and in relation to the following.

- a) The review of judgments and decisions issued or supported by courts of appeal relating to sentences of death, amputation, stoning, or *qişás* (retribution) in cases of criminal homicide or lesser injuries.
- b) The review of judgments and decisions issued or supported by courts of appeal relating to cases not mentioned in the previous paragraph, or relating to *ex parte* cases or the like, without dealing with the facts of the cases whenever the objection to the decision is based upon the following: i) the violation of the provisions of *Sharí'ah* or laws issued by the King which are not inconsistent with *Sharí'ah*; ii) the rendering of a judgment by a court that was improperly constituted, as provided for in the provisions of this and other laws; iii) the rendering of a judgment by an incompetent court or panel; and iv) if an error is made in characterising the incident or improperly describing it.

¹⁸ Ibid Article 6.

¹⁹ Ibid Articles 30 to 47.

²⁰ Ibid Article 10(4).

8.2.1.2 Appellate Courts

The appellate courts hear appealable judgments referred by the first instance courts, after hearing the statements of the litigants, in accordance with the procedures prescribed in *Sharí'ah* Procedures and Regulations Criminal Proceedings.²¹ These chambers comprise financial chambers, criminal chambers, personal status chambers, commercial chambers, and labour chambers.²²

8.2.1.3 First Instance Courts

Courts of the First Instance must be competent in all cases and disputes in each province.²³ Each court has its own chambers within its jurisdictional departments: the criminal cases chamber is concerned with *hudúd*, *qişáş*, and *ta'zír* crimes.²⁴ The Chamber of Personal Status specialises in all issues of inheritance, marriage, and divorce.²⁵ The Commercial Chamber deals with all commercial disputes.²⁶ The Labour Chamber deals with labour issues.²⁷ The Financial Chamber specialises in property, contracts, and money disputes.²⁸

8.2.2 The Regulatory Authority

In the Saudi legal system, the *Majlis a-Shura* (Council of Consult or *Shūra*) is derived from the *Sharí'ah* in accordance with the following Quranic verse: 'And those who have responded to their Lord and established prayer and whose affairs are [determined by] consultation among themselves, and from what we have provided them, they spend.'²⁹ *Shura* was practised by the Prophet when he consulted his caliphs in matters that concerned the Muslim community.³⁰ *Shūra* means consultation or discussion on any issues concerning a nation. In other words, *shūra* refers to obtaining opinions from knowledgeable and

²¹ Ibid Article 17.

²² Ibid Article 26; also according to Article 15(1), each district must have an Appeals Court. There are thirteen districts in the Kingdom set up by Royal Decree No A/92 on 27 August 1412.

²³ Ibid Article 18.

²⁴ Ibid Article 20.

²⁵ Ibid Article 21.

²⁶ Ibid Article 22.

²⁷ Ibid Article 23.

²⁸ Ibid.

²⁹ The Quran 42:38.

³⁰ Badawi al-Ṭahir, *'an Mabda' al-Shūrā fī al-Islām* (Bayrūt: Dār al-Kutub al-'Ilmīyah, 2008); see also Ragheb El-Sergany, 'Shura in Islam its Concept and Importance' (2010) Islam Story 1 <<https://ar.scribd.com/document/53677074/Shura>> accessed 9 May 2019.

experienced representative people of the nation.³¹ Saudi Basic law refers to the *Shūra* as the Regulatory Authority in Article 44, which provides that 'The Authorities of the State consist of: i) The Judicial Authority, ii) The Executive Authority, iii) The Regulatory Authority. These Authorities will co-operate in the performance of their functions, according to this Law or other laws. The King is the ultimate arbiter for these Authorities.'

This means that the Regulatory Authority is one of the authorities of state, and plays a role in the establishment and amendment of domestic laws and regulations as well as discussing international treaties that Saudi aims to sign up to or ratify.³²

The *Shūra* Council is an institution that exercises the function of discussing, proposing, enacting, and amending domestic law, and expressing opinions on international treaties in accordance with Article 15 of the *Shūra* Council Law. The Council of *Shūra* consists of a hundred and fifty women and men with experience and knowledge in various disciplines.³³ The members of the *Shūra* Council are appointed by Royal Decree issued by the King in accordance with Articles 10 and 11 of the Basic law. Members can only serve on the Council for four years in accordance with Article 13. The jurisdiction of the Regulatory Authority is specified in Article 15 as follows.

- a) To give an opinion on the public policies of the State.
- b) To discuss plans that support economic and social development, studying regimes, treaties, international agreements, proposals, and appropriate privileges for the benefit of the nation.
- c) To interpret and clarify regulations.
- d) To discuss the annual reports submitted by the government.

Powers of the Regulatory Authority in accordance with Article 15 are as follows.

- a) Proposing and enacting domestic laws in all aspects whether commercial, criminal, labour, economic, or personal statute regulations.
- b) Proposing amendments to existing laws.
- c) Discussing international treaties that the Kingdom intends to sign or ratify and expressing opinions about the provisions of any treaty under discussion.

³¹ El-Sergany (n 30) 1.

³² *Shūra* Law was issued by Royal Decree No 91/27-8-1412 H, Article 15(b).

³³ *Shūra* Council Law as amended by Royal Decree 44/29 -2-1434 H, Article 3.

All the functions of the Regulatory Authority must not contradict the provisions of Islamic law and the Basic Law of Governance, in accordance with Article 67 of the Basic Law of Governance.³⁴

Article 17 of *Shūra* Council Law provides that the decisions of the *Shūra* Council shall be submitted to the King and he shall decide what shall be referred to the Council of Ministers. If he refers the decisions of the *Shūra* Council to the Council of Ministers and the views of the Council of Ministers agree with the *Shūra* Council, a Royal Decree shall be issued by the approval of the King. If the views of the two councils differ, the matter will be returned to the *Shūra* Council to discuss again, bearing in mind the observations or comments of the Council of Ministers.

Article 20 of the Council of Ministers Law may give rights to the Council of Ministers to exercise the powers of the *Shūra* Council as follows: 'While deferring to Majlis [council] *Shūra* Law, laws, treaties, international agreements and "concessions" shall be issued and amended by Royal Decrees after deliberations by the Council of Ministers.'

There may be an overlap between the functions of the *Shūra* Council and the Council of Ministers in exercising powers to enact and regulate domestic laws and discuss international treaties. In this regard, the Prime Minister is also the King, and he is the ultimate arbiter of [three] Authorities in accordance with Article 44 of the Basic Law. There can be no real separation of powers between these authorities in the Kingdom.³⁵

It can be argued that (via the jurisdiction of the Regulatory Authority in exercising a consultative role) the opinions issued by the Authority are not binding until they are endorsed by the King in accordance with Article 18 of *Shūra* Council Law. In this regard, Article 44 of the Basic Law of Governance provides that the King is the head of the three authorities in the Kingdom. It should be noted that the power owned by the King is not absolute power but restricted to the opinions issued from the appropriate regulatory, administrative, or judicial authorities. These authorities must raise their opinions to the King, who will then decide whether to approve or not to approve. Furthermore, Saudi Basic Law requires that international conventions must be examined by the relevant legislative and executive

³⁴ *Shūra* Law Article 15 provides that 'The Regulatory Authority shall be concerned with the making of laws and regulations which will safeguard all interests, and remove evil from the State's affairs, according to Sharia. Its powers shall be exercised according to the provisions of this Law and the Law of the Council of Ministers and the Law of the *Shūra* Council.'

³⁵ Bassam Abdullah Albassam, 'Political Reform in Saudi Arabia: Luxury or Necessity?' Vol 2, No 3, (2011) Mediterranean Journal of Social Sciences 200.

authorities. They will consider compliance in accordance with domestic regulations, and make any amendments to the conventions in question, so that they are compatible with Saudi domestic regulations.³⁶ Furthermore, if the opinion of the *Shūra* Council and the Council of Ministers is similar, this gives an indication of a recommendation to accede to the opinion. If the views of the two councils differ, both views must be submitted to the King.³⁷ The King has the power to choose an opinion in accordance with Article 17 of the *Shūra* Council Law.

In addition, any enactment of a law or approval to accede to any international treaty must go through various stages of discussion by the Regulatory Authority, and then the Administrative Authority, before referral to the Council of Ministers by the King. The Council of Ministers will return the matter to the King if they agree with the opinion of the *Shūra* Council or if the King supports the draft law or accedes to sign an international treaty. If there is a difference of opinion within the Council of Ministers on the opinion of the *Shūra* Council, the King will return the draft to the *Shūra* Council to discuss again, taking into account the opinions of the Council of Ministers.

8.2.3 The Executive Authority

The legal system of Saudi Arabia comprises three authorities in accordance with Article 44 of the Basic Law of Governance. These authorities are as follows.

- a) The Executive Authority, which was formed according to the Council of Ministers Law issued by Royal Decree No. A/13 on 21 August 1993.³⁸
- b) The Legislative Authority, fashioned by *Shūra* Council Law and promulgated by Royal Decree No. A/91 on 2 March 1992.
- c) The Judicial Authority, enacted by Judicial Law issued by Royal Decree No. M/87 on 30 September 2007.³⁹

The Council of Ministers in Saudi Arabia was established in 1958.⁴⁰ This is a statutory body set up in accordance with law and presided over by the King. It comprises the following: a) the Prime Minister, b) the Deputy Prime Minister,

³⁶ Basic Law Article 70.

³⁷ The Bureau of Experts on the Council of Minister's Decision 380 in 2002.

³⁸ The Council of Ministers Legislation Preamble.

³⁹ Saudi Judicial Law Preamble.

⁴⁰ Royal Decree No 38 (12 May 1958) in Aum Al-Qura Gazette No. 1717 (17 May 1958).

c) the Ministers, d) advisers appointed by the King in the Council by royal decree.⁴¹

The term of membership of the Council of Ministers is four years (but is renewable).⁴² The Council of Ministers in Saudi Arabia is made up of three main departments: the Cabinet of Ministers, the General Secretariat of the Council of Ministers, and the Bureau of Experts, in accordance with Article 30 of the Council of Ministers.

The Council of Ministers is charged with running the executive branch of the state in accordance with Articles 19 and 20 of its law, which also specify competence.⁴³ Article 19 states the following.

While deferring to provisions of the Basic Law of Governance and the *Shūra* Council Law, the Cabinet shall draw up the internal, external, financial, economic, educational, and defence policies, as well as general affairs of the State and shall supervise their implementation. It shall also consider the resolutions of the *Shūra* Council. It has the executive power and is the final authority in financial and administrative affairs of all ministries and other government institutions.

The Council of Ministers is also charged with drawing up internal and external policies of the state in the areas of finance, economics, commerce, education, and the military.⁴⁴

The Council of Ministers examine draft regulations issued by ministries and governmental institutions.⁴⁵ Draft regulations are discussed by a Bureau of Experts in the Council, before they are referred to the *Shūra* Council.⁴⁶ The Council of Ministers draws together points of view before passing on the draft to the King who, in turn, refers the draft to the *Shūra* Council.⁴⁷ Additional jurisdictions of the Council of Ministers include the discussion of a general plan for economic and social development, discussing annual reports that are

⁴¹ The Council of Ministers Law Article 12.

⁴² Ibid Article 9.

⁴³ Ibid Article 19 stipulates that, 'While deferring to provisions of the Basic Law of Governance and the *Shūra* Council Law, the cabinet shall draw up the internal, external, financial, economic, educational and defence policies as well as general affairs of the State and shall supervise their implementation. It shall also review the resolutions of the *Shūra* Council. It has executive power and is the final authority in the financial and administrative affairs of all ministries and other government institutions.'

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ *Shūra* Council Law Article 15.

submitted by ministries and government agencies, formulating a general budget policy for the State, and a final accounting of the budget.⁴⁸

8.3 Saudi Domestic Provisions and the Rome Statute

8.3.1 General Principles

The general principles of law are stipulated in Saudi domestic laws, the Basic Law of Governance, and Criminal Procedural Law as explained below.

8.3.1.1 No Crime without Law and No Punishment without Law

These principles are inherent in both the Rome Statute and in Islamic criminal law, as detailed in previous chapters. The principle of no crime and no punishment without law are stipulated in the Basic Law of Governance in accordance with Article 38, which reads, 'There shall be no crime or punishment except on the basis of a *Shari'ah* or a statutory provision, and there shall be no punishment except for deeds subsequent to the effectiveness of a statutory provision.'⁴⁹ In Islamic criminal law, these principles are based on two sources: the *Shari'ah* and statutory provisions enacted by legislative authority. The main source of this principle is *Shari'ah*/Islamic law, according to Article 7 of the Basic Law of Governance, which stipulates that 'Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State.'⁵⁰ The second source is codified provisions that cannot contradict *Shari'ah*.

These principles are also confirmed by Procedural Criminal Law in Article 3, which stipulates that 'No person may be punished except for an act that is prohibited, punishable by law, and after conviction has been proved by a final judgment of the competent court.'⁵¹ These principles of legality are promoted in Saudi domestic law and are among the principles of the Basic Law of Governance. The Basic Law of Governance occupies a paramount position in the legal structure of the state and determines its form, the nature of the system, and its general powers. This is because crime and punishment are among the most important issues relating to the freedoms of individuals in

⁴⁸ Ibid Articles 19 and 21.

⁴⁹ Ibid Article 38.

⁵⁰ Ibid Article 7.

⁵¹ Procedural Criminal Law Article 3.

society, and laws and punishments need to be preserved to protect the rights of individuals from criminal events.⁵²

The Basic Law of Governance directs itself to legislative authority, which is responsible for promoting the principles of no crime and no punishment.⁵³ This is based on Article 67, which reads as follows.

The regulatory authority shall have the jurisdiction of formulating laws and rules conducive to the realisation of the well-being or warding off harm to State affairs in accordance with the principles of the Islamic *Sharī'ah*. It shall exercise its jurisdiction in accordance with this Law, and Laws of the Council of Ministers and the *Shūra* Council.⁵⁴

Thus, the inclusion of these principles in the Basic Law of Governance reflects a set of important points: a) respect of the role of law in the state; b) promoting the rights of individuals to be free, with the exception of what is prohibited by law; c) embodying the principles of the separation of power in authorities of the state in order to promote legislative authority in enacting laws, and promoting the right of the judicial authority to issue/rule on laws; and d) restricting the use of power by executive and judicial authorities.⁵⁵ This is what can be achieved through legislative authority.

Legislative authority first works to formulate criminal acts/conduct using legal codification, and states punishments thereto. It also details the time and location of entry into the force of the law, and details the individuals who are subject to the law. The principle of no crime and punishment without law works to confer justice and legitimacy on criminal acts and penalties. This relates both to personal punishment and individual responsibility.

One may ask why Saudi Arabia has stipulated these principles in the Basic Law of Governance when they are already stipulated in Islamic law. This is because these principles are afforded a high status, and so have been outlined as constitutional principles in the Basic Law of Governance.⁵⁶

⁵² Ahmed Fathy Surur, *a-Lqānūn al-Jiyn' ai a-distury* (4th edn, Dār al-Shurūq Egypt 2006) 33 (Arabic source).

⁵³ This is based on Article 44, which explains the separation of powers in the hierarchical structure of the authorities and says that 'Authorities in the State shall consist of: Judicial Authority, Executive Authority, and Regulatory Authority. These authorities shall co-operate in the discharge of their functions in accordance with this Law and other laws. The King shall be the final authority.'

⁵⁴ The Basic Law Article 67.

⁵⁵ Khālid al-Shāfi', *Mabādi' al-Nizām al-Distwri fi al-Mamlakah al-'arabiyyah al-Su'ūdiyyah* . (Maktabat al-Malik Fahad al-Waṭaniyyah 2012) 188.

⁵⁶ Forms of individual responsibility in Saudi domestic laws are derived from Islamic law, which is discussed in chapter three.

8.3.1.2 The Principle of Personal Criminal Responsibility

The principle of personal criminal responsibility is included in the Rome Statute in Article 25 as one of its general principles.⁵⁷ As discussed in chapter four, there is harmony between the Rome Statute and Islamic law with respect to the principle of personal criminal responsibility. This principle means that individuals must bear the consequences of any unlawful conduct committed, depending on the awareness they have of the crime they are accused of.⁵⁸ Thus, no one can be responsible for a crime if they have not been involved in unlawful conduct, either as the principal perpetrator or as an accessory.⁵⁹ Saudi domestic laws do not have codified provisions that elucidate the principle of criminal responsibility exhaustively. This is because Saudi domestic law is based on Islamic law, which is applied in Saudi domestic courts.

The principle of personal criminal responsibility works as a legal fence for individuals in society and determines the legal status of a) the accused during the period of criminal proceedings, b) the period of judgment by a competent court, and c) the final judgment to carry out the sentence by the executive authority as stated in Article 3 of the Criminal Procedural Law, which reads that 'no penalty may be imposed on a person, unless a conviction has been found after a trial in accordance with the legitimate requirements.'

8.3.1.3 The Principle of Non-Retroactivity

The principle of non-retroactivity is stipulated in the Basic Law of Governance because it is derived from Islamic criminal law provisions. The principle means that the provisions of the law should not be applied until after they have been issued and have entered into force. Article 38 of the Basic Law of Governance states that 'there shall be no punishment except for deeds subsequent to the effectiveness of a statutory provision'.⁶⁰

⁵⁷ This sub-paragraph (a) refers to when a person 'Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.'

⁵⁸ Mohammad Saiful Islam, 'Criminal Accountability and Juvenile Offenders: A Study of Islamic Principles, International Law and the Children Act (2013)' (2015) *International Journal of Ethics in Social Sciences* Vol 3, No 2 51.

⁵⁹ Najaty Sanad, *The Theory of Crime and Criminal Responsibility in Islamic Law Sharia* (Office of International Criminal Justice, University of Chicago 1991) 71.

⁶⁰ Some argue that if the new law was issued during the investigation or during the judicial hearing, the accused will not benefit from the new law if it is in favour of the accused. Others argue that the state has a right to punish the accused from the time when the accused committed the criminal act, not from when the new law was issued; Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2013); Antonio Cassese,

The application of this principle aims to protect the interests of society, achieve justice, and protect the rights of the accused. Two main factors underlie this principle. First, if a law criminalises certain acts, it can only be effective after it has been issued and published, and in accordance with its provisions. This means that the effects of any previous legal text continue until any new law is issued. Second, if the principle of non-retroactivity is not applied, this compromises the principle of legality, which provides that no crime or penalty can be applied except as stipulated within the law. Thus, if an act was permissible when it was undertaken, but then a new law prohibiting it is issued, the offender cannot be punished under the new law because the act was not deemed criminal at the time of the offence.

8.3.1.4 A Person Shall Not be Tried Twice for the Same Criminal Conduct

The principle that a person shall not be tried twice for the same offence is recognised in Islamic law. This principle aims to protect the rights of individuals from double jeopardy.⁶¹ Saudi domestic laws do not explicitly mention the principle, but Saudi Criminal Procedural Law regulates the expiry of criminal proceedings when a final judgment is issued in a case in question.⁶² Saudi law is obliged to implement the principle in its domestic laws for two reasons. The first is that Islamic criminal law stipulates the importance of applying this principle and, since Islamic law is the main source of all Saudi legislations according to Article 1⁶³ and Article 48, the principle must be adhered to.⁶⁴ The second reason is that the Kingdom is a member of the League of Arab States and has ratified the Arab Charter on Human Rights, which states in Article 19(1) that 'no one may be tried for the same offence twice. This principle is binding at a domestic and international level'.⁶⁵

'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law' (2006) 4 Journal of International Criminal Justice; abdufatāh al- Ṣayfī, *Ḥaq al-Dawlah fī al-'iqāb* (Dār al-Hudā, Egypt 1995) (Arabic source).

⁶¹ Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (2nd edition Brill 2011) 162.

⁶² Criminal Procedural Law Article 22.

⁶³ *ibid* Article 1 states that 'The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH). Its language shall be Arabic, and its capital shall be the city of Riyadh.'

⁶⁴ *ibid* Article 48 stipulates that 'The courts shall apply to cases before them the provisions of Islamic Sharia, as indicated by the Quran and the Sunnah, and whatever laws not in conflict with the Quran and the Sunnah which the authorities may promulgate.'

⁶⁵ The Arab Charter on Human Rights, adopted in Cairo on 15 September (1994).

Saudi Arabia is committed to international conventions such as the Arab Charter on Human Rights, which prohibits the trial of a person twice for the same criminal act. The Saudi judiciary system may hear a case again that relates to *ḥudūd* crimes and *qīṣāṣ* crimes.⁶⁶ This is because these crimes carry specific sanctions imposed by Allah.⁶⁷ This is also because most national laws in the world and international conventions do not penalise such crimes in the same manner as Islamic law does.

This problem at a national level may not be a cause for grave concern because courts must abide by the rules contained in the Criminal Procedural Law, as stated in Article 22 of Saudi Domestic Law. Article 20(3) of the Rome Statute makes it clear that international criminal jurisdiction permits a retrial for the same criminal act twice.⁶⁸ This provision allows individuals who have already been tried before national courts, for acts constituting serious violations of international criminal law, to be tried again before international courts if the act for which the defendant is accused of is a) defined as an ordinary offence, b) if the proceedings before the national court were not independent or impartial, or c) if the proceedings of the national court are designed to protect the accused from international criminal responsibility, and d) in the event of a delay in proceedings before the national court.⁶⁹ In this regard, Lutfi explains that the Saudi judiciary system should follow the principles that a person shall not be tried twice for the same offence before the Saudi courts.⁷⁰

8.3.1.5 Equality before the Law

This principle is in the main sources of Islamic law, as mentioned earlier in chapter four.⁷¹ The source of its legality is derived from the main sources of Islamic law, but it also has procedural aspects and is applied in practice by states. Equality before the law in Saudi domestic law is seen as the right of all individuals to enjoy freedoms, rights, and the imposition of duties on an equal footing between individuals in society (within the rules of Islamic law). This means that no discrimination should be shown between individuals in relation to their legal positions in this respect. This principle also appears in the Basic Law of Governance, as part of the three fundamental pillars of justice. These

⁶⁶ Chapter four of this study deals with *ḥudūd* crimes and *qīṣāṣ* crimes.

⁶⁷ Aḥmad Luṭfī · *ishkāliyyāt ‘adam Jawāz Muḥākamat al-Muttaham Maratayn fī Dhāt al-Jurm* (Dār al-KutubCairo 2012) (Arabic source).

⁶⁸ See Article 20(3) of the Rome Statute.

⁶⁹ Ibid.

⁷⁰ Luṭfī (n 67).

⁷¹ See chapter four of this study.

pillars are stipulated in Article 8 of the Basic Law of Governance, which says that 'Governance in the Kingdom of Saudi Arabia shall be based on justice, *Shūra* (consultation), and equality in accordance with the Islamic *Sharī'ah*.' This means that the Saudi Government is obliged to apply the equality principle to all people without discrimination in all aspects within its sovereign borders.

The principle of equality before the law is affirmed in the Basic Law of Governance as the right of litigation for all people without exception, in accordance with Article 47, which stipulates that 'The right of litigation shall be guaranteed equally for both citizens and residents in the Kingdom. The Law shall set forth the procedures required thereof.' The Basic Law of Governance also states that any person who has a complaint has the right to lodge the complaint with the competent authorities. The Council of the King and the Crown Prince are open to every citizen.⁷² The Basic Law of Governance also prescribes the principle of equality of property rights and prohibits the expropriation of property only in accordance with expropriation laws, provided that the person is compensated in accordance with Article 47.⁷³

Criminal Procedural Law provides that no person shall be arrested, searched, or imprisoned, except in cases provided for by law.⁷⁴ In terms of the application of sanctions, Criminal Procedural Law provides that no person may be punished unless he or she is found guilty of a legally prohibited act in accordance with a fair trial.⁷⁵ This indicates that all individuals should enjoy their freedoms, and no one may be restricted except in accordance with the law, which affirms the principle of equality of all in the enjoyment of freedoms and equality before the law in due process, before a competent court, and in respect of punishment. Thus, the principle of equality before the law is a main axis for enforcing the rule of law and is connected to the principles of legality.

8.3.1.6 The Presumption of Innocence

The principle of the presumption of innocence is not expressly mentioned or codified in Saudi domestic laws, namely in the Basic Law of Governance and

⁷² The Basic Law Article 43.

⁷³ Ibid Article 18. The equality principle is not limited only to certain areas, but also exists in relation to financial aspects; for example, tax is not taken except in accordance with law, Article 20, which provides that 'Taxes and fees may be imposed only if needed and on a just basis. They may be imposed, revised, abolished, or exempted only in accordance with the Law.'

⁷⁴ Criminal Procedural Law Articles 2 and 3.

⁷⁵ Ibid.

in Criminal Procedural Law.⁷⁶ However, the idea and application of this principle is dealt with in Islamic criminal law.⁷⁷ Article 1 of the Basic Law of Governance confirms that the Quran and Sunnah are its constitution.⁷⁸ In addition, Article 26 of the Basic Law of Governance says that 'The State shall protect human rights in accordance with the Islamic *Sharī'ah*.' Article 48 obliges the Kingdom to apply Islamic law principles in its rulings and states that 'The courts shall apply to cases before them the provisions of Islamic *Sharī'ah*, as indicated by the Quran and the Sunnah, and whatever laws not in conflict with the Quran and the Sunnah which the authorities may promulgate.' Thus, domestic courts in Saudi Arabia must apply the presumption of innocence in all processes, whether during the prosecution process or judicial trial. The reason is that this principle is one of the most important forms of protection for personal freedoms, in that no one should be investigated or imprisoned except in accordance with the law. The presumption of innocence is the right of every person, including the accused, and this principle is protected by the constitution, which is the Quran and Sunnah, in Saudi Arabia according to the above-mentioned Articles.

Taking all of the above into account, Baderin explains that 'this is a major omission, considering the fact that the presumption of innocence of an accused person is recognised and greatly emphasised under the general principles of Islamic law'.⁷⁹ He adds that Saudi domestic courts are obliged to apply the general principles of Islamic law.⁸⁰ Furthermore, this principle is included in the legislative texts of Saudi laws, although not explicitly. The principle of the presumption of innocence is implicitly referred to in the Basic Law of Governance in Article 36, which emphasises that freedoms should not be restricted except in accordance with the law.⁸¹

The principle of presumption of innocence is based on two main factors: the first is the right of society for the accused to receive a fair trial; the second is

⁷⁶ Mashood A Baderin, 'A Comparative Analysis of the Right to a Fair Trial and Due Process under International Human Rights Law and Saudi Arabian Domestic Law' (2007) 10(3) *The International Journal of Human Rights* 241.

⁷⁷ See chapter four of this study.

⁷⁸ The Basic Law of Governance Article 1 says that 'The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH). Its language shall be Arabic, and its capital shall be the city of Riyadh.'

⁷⁹ Baderin (n 76) 262. The principles of law had been discussed in this thesis in chapter four.

⁸⁰ *Ibid*.

⁸¹ The Basic Law Article 36 says that 'The State shall provide security to all its citizens and residents. A person's actions may not be restricted, nor may he be detained or imprisoned, except under the provisions of the Law.'

the right of the accused to be presumed innocent until he/she is proven guilty under the law.⁸² Thus, the provisions of criminal procedural law must guarantee a balance between these two rights.⁸³

8.3.2 Protection from Prohibited Acts

8.3.2.1 Protection from Killing

Saudi domestic laws do not explicitly codify the right to life. However, Article 26 of the Basic Law of Governance explains that 'The State shall protect human rights in accordance with the Islamic *Sharī'ah*.' Thus, the right to life is derived from Islamic law. The right to life is the first right in Islamic law for individuals because it is granted by Allah to a person, and no one has the right to remove it; only Allah has the right to take it.⁸⁴ This right is guaranteed by three principles. The first is that the individual must preserve themselves and not seek to kill themselves, according to the following Quranic verse: 'And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful.'⁸⁵ The second principle is responsibility to the community in accordance with the following Quranic verse: 'And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly.'⁸⁶ The third principle is the responsibility of the state. The state must protect the lives of individuals in society through its mechanisms and authorities, through enactment of laws and the implementation of punishments imposed by Islamic law.⁸⁷

These elements are considered in Saudi Arabian domestic laws as follows.

a) Adopting the Quran and Sunnah as the constitution of the state in accordance with Article 1 of the Basic Law of Governance, which reads as follows: 'The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH). Its language shall be Arabic, and its capital shall be the city of Riyadh. This principle does not differentiate between people in the society and shall be applied to all according to the Quranic verse, "And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear

⁸² al-Shāfi' (n 55).

⁸³ Ibid.

⁸⁴ Wahbah al-Zuhaylī, *Huqūq al-ʿinsān fī al-ʿislām* (Dār al-Kalām al-Ṭayb, Beirut 1424H) 143.

⁸⁵ The Quran 4:29.

⁸⁶ Ibid 17:33.

⁸⁷ Hani Tua'ymāt, *Huqūq al-Insan wa al-ḥuriyāt al-a'sasi'yāh* (Dār al-Shurūq Jordan 2001)115 (Arabic source).

for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers".⁸⁸

b) Islamic law permits certain prohibited acts if these acts can save one's own life or the life of another person from imminent death. For example, eating pork is permitted if no other food apart from pork is available. Another example is drinking alcohol. Islamic law allows drinking alcohol in the event of imminent death if there is nothing else available to drink or to save a life. Another example is not fasting at Ramadan if this could lead to illness or death.⁸⁹

c) The right to life is enshrined in Article 26 of the Basic Law of Governance, which deems that 'the State shall protect human rights in accordance with the Islamic *Sharī'ah*.' The exception to this is the death penalty as issued by judicial ruling from a competent independent court after a fair trial.

d) Punishments for *qisās* must pass through several stages: a) the ruling must be issued by three judges in the Pre-trial Court, b) it must be reviewed by five judges in the Court of Appeal, c) the ruling must be reviewed by the Supreme Court, d) then all documents must be submitted to the King to issue a royal order to the executive authorities to implement the sentence.⁹⁰

8.3.2.2 The Protection of Dignity

The protection of dignity is affirmed in Saudi domestic law. The latter derives all human rights from Islamic law, which honours individuals' dignity as stated in the following Quranic verse: 'And We have certainly honoured the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference.'⁹¹ Thus, Saudi law provides for the preservation of human dignity through the following mechanisms.

a) From a criminal procedural legal perspective. Saudi Criminal Procedural Law obliges domestic authorities (such as the police, investigative authorities, or public prosecution authorities) to respect human dignity and prevent

⁸⁸ The Quran 5:45.

⁸⁹ al-Zuhaylī (n 84) 21-22.

⁹⁰ Criminal Procedural Law Article 10 states that 'All court rulings issued by the Court of Appeal in cases of murder, stoning, cutting, and retribution must be brought to the Supreme Court.' This is even in cases where the plaintiff or prosecutor does not object to the ruling; Criminal Procedural Law Article 195; Criminal Procedural Law Article 227 says that 'All sentences issued for killing, cutting or stoning or *qisās* must be submitted to the King prior to their execution in order to issue an order for implementation.'

⁹¹ The Quran 17:70.

physical or mental harm.⁹² The same law also prevents torture or degrading treatment at the time of arrest, inspection, or investigation. This is according to Article 2, which says that 'it is prohibited to commit physical or mental abuse against the arrested person, and also to be subjected to torture or degrading treatment'.

b) In the Basic Law of Governance. Saudi laws establish a moral basis for the domestic media, whether newspapers, television, radio, or social media, by preserving the dignity of individuals for preventing abuse against the dignity of others and not compromising them in any degrading manner. This is according to Article 39 of the Basic law, which states the following.

Mass and publishing media and all means of expression shall use decent language and adhere to State laws. They shall contribute towards educating the nation and supporting its unity. Whatever leads to sedition and division or undermines the security of the State or its public relations or is injurious to the honour and rights of man, shall be prohibited. Laws shall set forth provisions to achieve this.

These principles are also enshrined in Anti-Cyber Crime Law to prevent spying into other people's personal lives.⁹³

c) At international level. Saudi Arabia has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This treaty has become domestic law and affirms that the state is committed to protecting dignity and preventing torture and all inhumane and degrading treatment.⁹⁴

8.3.2.3 Unlawful Deportation and Forced Transport

The forced deportation of people is prohibited in Saudi domestic law. This prohibition is derived from Islamic law, which affirms the right of a person to live peacefully, and affirms the right to free movement. The Quran states that 'It is He who made the earth tame for you - so walk among its slopes and eat of His provision - and to Him is the resurrection.'⁹⁵ The same right is expressed in the Sunnah, in Sahefat Al-Medina (the first constitution in Islam) as written by the Prophet, when he says, 'Whoever enters the city is safe and whoever

⁹² Criminal Procedural Law Articles 2 and 3.

⁹³ Articles 3 and 4 of the Anti-Cyber Crime Law were established by Royal Decree No M/17 26 March 2007.

⁹⁴ On 23 September 1997, Saudi Arabia ratified the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (New York, 10 December 1984, entered into force on 26 June 1987).

⁹⁵ The Quran 67:15.

comes out of it is safe.⁹⁶ Islamic law also affirms the right of free movement; in this regard, the severe punishment *ḥirābah* is imposed for armed robbery in order to protect travellers from roadside thieves.⁹⁷

The Basic Law of Governance mentions the right to live peacefully and have freedom of movement in Article 36, which says that 'The State shall provide security to all its citizens and residents. A person's actions may not be restricted, nor may be detained or imprisoned, except under the provisions of the Law.' Moreover, Article 2 of Criminal Procedural Law states that 'no one's actions, arrest or detention shall be restricted except under the provisions of the Law'.

The right of individuals to free movement and protection from forced transport is an important right in most societies. It is needed in order to secure political and economic stability.⁹⁸ In addition, the state also stresses the right of the family to protect its family members, as mentioned in Article 10, which explains that the forcible transfer of children from their parents or relatives goes against the child's right to care.⁹⁹ This kind of domestic legislation regulates relationships between individuals and the state, and between individuals themselves, and goes hand in hand with legislation relating to the economy, politics, education, and health.

8.3.2.4 Protection from Unlawful Imprisonment

Unlawful imprisonment and physical deprivation of liberty are explicitly prohibited in Saudi domestic laws. The prohibition of these unlawful acts can be found in three main legal provisions. Article 38 of the Basic Law of Governance states that 'punishment shall be carried out on a personal basis. There shall be no crime or punishment except on the basis of a *Sharī'ah* or a statutory provision, and there shall be no punishment except for deeds subsequent to the effectiveness of a statutory provision.' Furthermore, Article 36 of the same law stipulates that 'a person's actions may not be restricted, nor may he be detained or imprisoned, except under the provisions of the

⁹⁶ Abd al-Malik Ibn Hishām, *Sīrat al-Nabī ṣallā Allāhu 'alayhi wa-sallam* (Dār al-Qal'am Egypt 1424 H) 102 (Arabic source).

⁹⁷ See chapter four for more information about *ḥirābah* punishments. There are exceptional cases where forced deportation can be applied as follows: (i) as punishment for an offender who commits a crime of *zinā'*, and (ii) where there is a contagious disease that is spreading between people.

⁹⁸ Nasar al-Buqmi, *Huqūq al-'insān fī al-'islām wa-Taṭbīqātihā fī al-Anzimāh a-Sudiyāh* (Maktabat al-Malik Fahad al-Waṭaniyyah, Riyadh 2005) 155 (Arabic source).

⁹⁹ The Basic Law Article 10 provides that 'The State shall endeavour to strengthen family bonds, maintain its Arab and Islamic values, care for all its members, and provide conditions conducive to the development of their talents and abilities.'

Law'. Finally, Article 2 of Criminal Procedural Law affirms that the unlawful imprisonment or physical deprivation of the liberty of individuals is prohibited, except in accordance with the law.¹⁰⁰

8.3.3 Considering Article 81 of the Saudi Basic Law of Governance

Before discussing issues of inconsistency between the Rome Statute and Saudi domestic laws in the next section, it is important to elucidate the context of Article 81 of the Saudi Basic Law of Governance. The Article states that 'the enforcement of this Law shall not prejudice whatever treaties and agreements with states and international organisations and agencies to which the Kingdom of Saudi Arabia is committed'. This Article concerns the Saudi government's international obligations with the international community, especially with respect to international treaties and conventions. Thus, an agreement or a treaty that is signed by the Saudi government with a Muslim or non-Muslim state/organisation has its legal obligations at both domestic and international levels. This is based on two legal ideas. The first is derived from the *Shari'ah* concept of contractual commitment as set out in Quranic verse 5:1 as follows: 'O you who have believed, fulfil [all] contracts.' The second idea is that the Article, namely 81, provides that the provisions of the Basic Law of Governance should not affect any international conventions that the Saudi Government has ratified. Moreover, this Article indicates that all Articles of the Basic Law of Governance must not affect any international obligation to which the Saudi government has ratified, whether international treaties or bilateral. Consequently, it can be said that this explanation applies to all Saudi domestic laws, given that the Basic Law of Governance in Saudi Arabia is at the top of the legal pyramid of the state; thus, all Saudi domestic laws should not affect any of the provisions of international agreements that the Saudi government has regulated.

¹⁰⁰ Criminal Procedural Law Article 2 provides that 'no one's actions, arrest or detention shall be restricted except under the provisions of the Law'.

8.4 Inconsistencies with the Rome Statute

8.4.1 The Extradition of a Muslim to be Tried Before a Non-Muslim Court

There are obligations upon state parties of the Rome Statute to cooperate with the Court in respect of the investigation and prosecution of crimes within its jurisdiction.¹⁰¹ The Rome Statute Article 89(1) explains the mechanisms of the surrender of persons to the Court as follows.

The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in Article 91, to any State on the territory of which that person may be found and shall request the co-operation of that State in the arrest and surrender of such a person. State Parties shall, in accordance with the provisions of this Part, and the procedure under their national law, comply with requests for arrest and surrender.¹⁰²

This Article requires State parties of the Statute to cooperate with Court requests for the surrender and/or arrest of accused persons. Article 87(5)(b) also requires non-state parties to co-operate with the requests of the Court as follows.

Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to co-operate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of State Parties or, where the Security Council referred the matter to the Court, the Security Council.¹⁰³

The extradition or surrender of a Muslim accused by a Muslim country to a non-Muslim state or court to be prosecuted may be not allowed in Islamic law, as well as Saudi domestic law, if the latter does not have an extradition treaty with another state, or more than one state, or with an international organisation, depending on Article 81 of the Saudi Basic Law of Governance. However, Articles 87(5) and 87(7) of the Rome Statute do not talk about the procedures that the Security Council may apply to a non-state party that does not cooperate with the Court's request. The question is left open as to whether

¹⁰¹ The Rome Statute Article 86; The Rome Statute Article 102 provides an explanation of the terms of surrender and extradition as follows: '(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute; (b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.'

¹⁰² The Rome Statute Article 89.

¹⁰³ The Rome Statute Article 87(5)(b).

the Security Council will take further measures or enact international obligations.

In Islamic law, the extradition of a Muslim person living in a Muslim state to a non-Muslim state, or to a non-Muslim organisation whether or not international, has raised debate among Muslim jurists. Their main concern is that the court to which the accused is extradited will not apply Islamic law and its punishments.

The majority of Islamic jurists believe that Islamic law has authority and sovereignty in Islamic countries. Thus, there is no other legal power or influence within Islamic states. They argue that if international conventions/courts are not derived from *Shari'ah* and do not apply Islamic law's procedures and punishments, the extradition of a Muslim person from a Muslim state to a non-Muslim state is not allowed.¹⁰⁴ This is based on the following Quranic verse: 'and never will Allah give the disbelievers over the believers a way [to overcome them]'.¹⁰⁵ A second group of jurists argue that it may be possible to extradite a Muslim person living in a Muslim state to a non-Muslim court based on what the Prophet agreed in the Treaty of Al-Hudaibiyah.¹⁰⁶ This Treaty says that 'any Muslim man coming from the Quraysh to join the Muslims would be sent back but any man going from the Muslims to Quraysh would not be sent back'.¹⁰⁷ The Prophet sent Abu Basir and Abu Jandal back to Quraysh when they left Mecca without permission from their tribe, the Quraysh. The Prophet resorted to this decision as a basis for permitting extradition in the Treaty of Hudaibiyah.¹⁰⁸ The first group of jurists argue against the second group, stating that this incident was dealt with by the Prophet Mohammed, but was not meant to be undertaken after his death, because of the need for the Muslim community to undertake *hajj* (pilgrimage). They argue that the Prophet wanted to show how tolerant Islam was. Thus, extradition or the surrender of persons to other courts is not

¹⁰⁴ These jurists are *Abo Hanifa*, *Ahmed al-Kasani*, and *al-Mauardi*; see Bilāl Şaffī al-Dīn wa 'anwar Şaţūf, 'al-Jarā'im al-Musnadah 'ilā Walī al-'mr al-Muslim wa-Ikhtişāş al-Maḥkamah al-Jinā'iyah al-Dawliyyah fī Muḥākamatihi 'alayhā min Manzūr al-Fiqh al-Jinā'ī al-'islā' (2011) 27 Majalat Dimashq li-L'ulūm al-'iqtisādiyyah wa-Lqānūniyyah 365 (Arabic source). However, based on the sovereignty principles in international law, if a Muslim living in a non-Muslim state has committed a crime in violating its national laws, he or she can be prosecuted by its own domestic law.

¹⁰⁵ The Quran 4:141.

¹⁰⁶ See Labeeb Ahmed Bsoul, 'The Concept of Treaty in Islamic Jurisprudence: A Comparative View of the Classical Jurists' (2010) 7 (1) *Journal of Islam in Asia* 54. For more information about The Treaty of Al-Hudaibiyah, see chapter three of this study.

¹⁰⁷ 'abduļmajīd al-Zanddānī, *Ḥukum Tasallum al-Muslim li-Lkāfir* (al-'īmān at the University of Yemen).

¹⁰⁸ *Ibid.*

regulated in Saudi domestic law. However, this matter is dealt with in the Arab Agreement 1983, which the Saudi Government adheres to and implements in its territories.

Saudi Arabia does not operate domestic legislation with respect to the extradition or surrender of its citizens to another state or court. Its domestic law of criminal procedure is silent in this respect in relation to both citizens and/or residents. However, Saudi Arabia ratified the Riyadh Arab Agreement for Judicial Co-operation in 1983.¹⁰⁹ This Agreement prohibits the surrender or extradition of Saudi citizens who have committed crimes in the territories of any state party of the Agreement, unless the state agrees to prosecute the offender in its domestic courts. This is stipulated in Article 39, which reads as follows.

Each of the contracting parties may refuse to extradite its nationals provided that it undertakes within the limits covered by its jurisdiction to charge whichever such national who has committed crimes punishable by law in the territories of any other contracting party, whenever the laws of the two states concerned impose a deprive penalty of at least one year, or if a more severe penalty is foreseen in the laws of any of the two contracting parties, once the other contracting party issues a request for legal prosecution accompanied by the appropriate files, documents and information in its possession. The requesting party shall be notified of measures taken in this regard.

Article 41 of the Agreement defines crimes that are not subject to the provisions of the Agreement. It stipulates that no extradition may be carried out in the following cases.

a) 'If the crime for which extradition is requested is considered by the laws of the requested party as a crime of a political nature.' (This paragraph is inconsistent with the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide Article VII. The latter stipulates that 'Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purposes of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.')

b) If the crime for which extradition requested is limited to a breach of military duties.

¹⁰⁹ The Riyadh Arab Agreement for Judicial Co-operation (6 April 1983) available at <<https://www.refworld.org/docid/3ae6b38d8.html>> accessed on 20 February 2019.

c) If the crime for which extradition requested was committed in the territory of the requested party, except when such crime has caused damage to the interests of the requesting party and its laws stipulate that the perpetrators of such crime be prosecuted and punished.

d) If the crime has been the subject of a final judgment by the requesting party.

e) If the legal action, at the time of receipt of the request for extradition, has lapsed or has been revoked, or the penalty has lapsed by the passage of time in accordance with the laws of the requesting party.

f) If the crime has been committed outside the territories of the requesting party by a person not carrying its nationality, and the law of the requested party does not provide for prosecution of such a person when this crime is committed outside its territory.

g) If an amnesty has been issued by the requesting party. (This paragraph is inconsistent with the Rome Statute, which does not give amnesty for crimes within its jurisdiction. The Preamble to the Rome Statute states 'the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain 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 Nations'.)

h) If charges relating to any crime have been made in the territory of the requested party, or if a judgment had been passed in respect of such crime in the territory of a third contracting party.

In the application of the provisions of this Agreement, the following crimes, even when they have a political purpose, shall not be considered crimes of a political nature in accordance with paragraph (a) of this Article.

a) Assault on Kings and Presidents of the contracting parties or their wives or their ascendants or descendants.

b) Assault on heirs apparent or vice-presidents of the contracting parties.

c) Murder and robbery committed against individuals, authorities, or means of transport and communications.

Article 41 of the 1983 Agreement describes crimes that are not subject to extradition rules. One of these exceptions is when the crime is committed in accordance with military obligations by military men. The Article states, 'if the crime for which extradition requested is limited to a breach of military

duties.’¹¹⁰ This Article is inconsistent with Article 28 of the Rome Statute because crimes under the jurisdiction of the ICC are mostly committed by military superiors or commanders of state, or soldiers who serve in military operations.

Some points arise from the above provisions. The first is that most Muslim countries, including Saudi Arabia, have ratified the UN Charter, which binds signed up Islamic countries to international rules and principles, whether or not the sources of these rules and principles are derived from Islamic law. Thus, in this context, and in theory, Muslim countries must adhere to these international rules, even when the source of law is not Islamic law. The second point here is that most Muslim countries have also ratified the four Geneva Conventions and their Protocols, which allow the extradition and prosecution of prisoners of war in their countries. This indicates an acceptance of the extradition of prisoners of war to non-Muslim countries. The third point concerns instances where crimes are committed by non-Muslim persons in the territories of Muslim countries.

8.4.2 Applying the Provisions of the Rome Statute instead of *Sharí'ah*

Paragraph 6 of the Preamble of the Rome Statute states the following: ‘Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes at the first place.’ This sentence indicates that all member states must adhere to the prosecution of perpetrators, whether or not the perpetrators are citizens of the parties to the Court. Furthermore, if the authorities of the state where the crimes have been committed are unable or unwilling to prosecute the perpetrators who have committed crimes within the ICC jurisdiction, the Court's jurisdiction will still arise. This is in accordance with Article 17(1), which reads as follows.

Having regard to Paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

- a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or the prosecution.
- b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless

¹¹⁰ *ibid* Article 41(b).

the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

Thus, the jurisdiction of the International Criminal Court is based on the principles of complementarity.¹¹¹ However, Articles 1, 46, and 48 of Saudi Basic Law preclude applying any laws or regulations that are inconsistent with *Sharí'ah*, even though there is compatibility between Islamic law and the Rome Statute with respect to prohibiting heinous crime against humanity.¹¹² These Articles oblige Saudi domestic courts to apply the provisions of Islamic law, even though the provisions of Islamic law may not be applied by other non-Saudi courts.

8.4.3 The Issue of Applicable Punishments

Applicable punishments are outlined in the ICC Treaty in Article 77 as follows.

a) Subject to Article 110,¹¹³ the Court may impose one of the following penalties on a person convicted of a crime referred to in Article 5 of this Statute: i) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or ii) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

b) In addition to imprisonment, the Court may order: i) A fine under the criteria provided for in the Rules of Procedure and Evidence; ii) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Looking at the above, it is clear that there is incompatibility between the punishments determined by *Sharí'ah*, as adopted by Saudi domestic courts, and punishments meted out in accordance with the ICC Statute. Saudi Arabia applies *Sharí'ah* punishments as they are outlined in the main sources of the Quran and the Sunnah. These *Sharí'ah* punishments are classified according to *hudúd* and *qisás* crimes, all which are explained in chapter four of this study. Furthermore, Article 81 of the Basic Law of Governance states that 'the enforcement of this Law shall not prejudice whatever treaties and agreements with states and international organisations and agencies to which the Kingdom

¹¹¹ See Paragraph 10 of the Preamble of the Rome Statute, which states 'that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'.

¹¹² Saudi Basic Law Article 48 stipulates that 'The courts shall apply to cases before them the provisions of Islamic Sharia, as indicated by the Quran and the Sunnah, and whatever laws not in conflict with the Quran and the Sunnah which the authorities may promulgate.'

¹¹³ *ibid* Article 110 relates to the reduction of sentences.

of Saudi Arabia is committed'.¹¹⁴ Thus, the following question arises: if the Saudi Government ratified the ICC Statute, what jurisdiction for punishments shall be applied?

It can be argued that there are two main interpretations in respect of jurisdictional punishments. The first is a narrow interpretation and the second is a broad interpretation. The narrow interpretation deems that the Saudi judicial system must judge cases that fall within its jurisdiction, as well as those that fall under ICC jurisdiction, under Islamic law. The broad interpretation of Saudi law deems that cases can be dealt with under the jurisdiction of the ICC under the Rome Treaty, since ratification of the Treaty forms part of a contract in Islamic law, which must be respected in accordance with the principles of Islamic law.

8.4.4 The Right of the Prosecutor of the ICC to Initiate an Investigation

The Preamble of the Rome Statute explains that the jurisdiction of the Court shall be complementary to the national criminal jurisdictions of the member states, and that each member state can exercise its own national criminal jurisdiction over individuals responsible for committing crimes that fall under the jurisdiction of the Court. The Rome Statute grants permissions for the Prosecutor to start an investigation by either a) referring it from the member state or b) obtaining the permission of the Pre-trial Chamber of the Court or the Security Council.¹¹⁵ Thus, the Prosecutor of the Court has the right to initiate a lawsuit, start an investigation, and gather evidence by himself or herself, according to Article 17 of the Rome Statute, after he or she receives authorisation from the Pre-trial Chamber I.¹¹⁶ Article 54(3) explains the powers and duties of the Prosecutor as follows.

- a) To collect and examine evidence.
- b) To request the presence of and question persons being investigated, and victims and witnesses.

¹¹⁴ The Saudi Basic Law Article 81.

¹¹⁵ The Rome Statute Articles 13 and 14.

¹¹⁶ The Rome Statute Article 15 (3) states that 'If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.'

- c) To seek the Co-operation of any State or inter-governmental organisation or arrangement in accordance with its respective competence and/or mandate.
- d) To enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the co-operation of a State, inter-governmental organisation or person.
- e) To agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.
- f) To take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

In light of the above, the role of the Prosecutor in the Rome Statute may conflict with the provisions of Saudi domestic law. Article 46 of the Basic Law of Governance stipulates that 'the Judiciary system shall be an independent authority. There shall be no power over judges in their judicial function other than the power of the Islamic *Shari'ah*.' Furthermore, Article 1 of Saudi Criminal Procedural Law provides that the judicature is independent but has no authority or power to affect or amend judicature because paramount authority is derived from *Shari'ah*. This principle conflicts with Article 17, Paragraph 10 of the Preamble to, and Article 1 of, the Rome Statute with respect to the prosecutorial discretion of the ICC. However, this conflict must be understood in the context of measuring the inability of domestic judicature to deal with a case, and in cases where a Prosecutor of the International Criminal Court wants to initiate an investigation using his or her powers but, at the same time, the Saudi domestic authorities want to conduct the investigation. This may lead to a situation where the independence of the judiciary is compromised, because conducting an investigation is one of the most important processes of exercising judicial power, even though the Court's jurisdiction would be classed as a complementary jurisdiction.

Article 42 of Saudi Criminal Procedural Law prohibits processes connected with starting an investigation, except in cases provided for in the law and when permission has been issued by the Prosecution Authority. Thus, the only power able to begin an investigation under Saudi law is the Saudi Prosecution Authority. In this respect, the provisions of the Rome Statute seem to be in

conflict with Saudi Criminal Procedural Law in relation to conducting an investigation, even if the crime is within the jurisdiction of the Court.

The Rome Statute is also not compatible with Saudi law in terms of the procedures it outlines in connection with collecting evidence and hearing witnesses. Saudi law gives the Saudi Public Prosecutor the right to collect evidence and hear witnesses without any influence or interference from an internal or external authority.

Another contentious issue relates to when domestic courts are unable or unwilling to conduct an investigation of a crime committed in Saudi's territories because of Article 17(a) of the Rome Statute. This Article contradicts Article 44 of the Saudi Basic Law of Governance, which reads as follows: 'Authorities in the State shall consist of: the Judicial Authority, the Executive Authority, and the Regulatory Authority. These authorities shall cooperate in the discharge of their functions in accordance with this Law and other laws. The King shall be their final authority.' The last sentence here indicates that when the judiciary is unable or unwilling to perform its duties, it is the King of Saudi Arabia who has the right to initiate an assessment of the judicial system.

8.4.5 Political Asylum

Genocide is prohibited under the provisions of the Rome Statute. This rule is derived from the provisions of the Genocide Convention (1948). The latter does not class genocide as a political crime for the purposes of extradition. Indeed, Article VII of this Convention provides that 'genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition'.

Article 42 of the Basic Law of Governance of Saudi Arabia states that the Saudi Government 'shall grant political asylum if public interest so dictates. Laws and international agreements shall specify the rules and procedure for the extradition of ordinary criminals.' The granting of political asylum is provided by the King in accordance with Article 42, which states that 'the King shall be their final authority'. However, the meanings of 'public interest' and 'ordinary criminals' are not clear. Nevertheless, the Kingdom of Saudi Arabia has ratified the Genocide Convention (1948) and so has an international commitment to extradite persons who have committed genocide to The International Criminal Court. This suggests that a reform of the terms of Article 42 of the Basic Law of Governance is needed so that it reads as follows: 'The State shall grant political asylum if public interest so dictates in line with the international conventions to which the Kingdom is a party. Laws and

international agreements shall specify the rules and procedures for the extradition of criminals.’

8.4.6 The Right of a Victim’s Family to Initiate a Lawsuit

In cases of murder or injury, under Articles 6, 7, and 8 of the Rome Statute, the ICC Prosecutor has the right to initiate an investigation after obtaining judicial permission from the Pre-Trial Chamber I in accordance with Articles 56 and 59 of the Statute.¹¹⁷ However, in Islamic law, the victim’s family or relatives have the right to initiate a lawsuit and to demand *diyyah* (blood money)¹¹⁸ as an alternative to the relevant *qisās* punishment. Thus, the two approaches conflict. Articles 75 and 77 of the Rome Statute give rights to judges to impose the Court’s punishments and undertake an assessment of reparation.¹¹⁹ However, Article 16 of Saudi Criminal Procedural Law reads as follows: ‘The victim or his/her representative or his heirs shall have the right to file a criminal action in all cases in which a special right is concerned and to initiate proceedings before the competent court.’¹²⁰

8.4.7 Women Judges

Article 36 of the Rome Statute states that the Court has eighteen judges elected by the two-thirds of the Assembly of State Parties. It also states that these judges must be well-qualified and have experience working as a judge or prosecutor in international criminal law, human rights, or international humanitarian law.¹²¹ The Statute does not discriminate based on gender when appointing judges. However, the question of whether women should work as judges remains an issue of controversy and debate among Muslim jurists.¹²² It is only very recently that Saudi Arabia has begun to discuss the idea of appointing women to the judiciary, even though the Saudi judiciary does not specify gender in the requirements to be a judge. However, in 2013, the King appointed thirty women to serve on the *Shūra* Council.¹²³

¹¹⁷ The Rome Statute Articles 56 and 59.

¹¹⁸ For more information about *diyyah*, see chapter three of this study.

¹¹⁹ The Rome Statute Articles 75 and 77.

¹²⁰ Criminal Procedural Law Article 16.

¹²¹ The Rome Statute Article 36(3).

¹²² International Islamic Fiqh Academy Resolution 211 (22/7) <<http://www.iifa-aifi.org/3993.html>> accessed 20 February 2019 (Arabic source); Muḥammad al-Qurṭubī, *Bidāyat al-Mujtathid wa-Nihāyat al-Maqāsid* (Dār al- Ḥadīth, Maṣr 2004).

¹²³ Saudi Arabia’s King Appoints Women to the *Shūra* Council <<https://www.bbc.co.uk/news/world-middle-east-20986428>> accessed 8 June 2019. Some Muslim countries allow a woman to serve as judge such as Kuwait, Tunisia, Malaysia, and

In Islamic law, Abu Hanifa, namely the *Ḥanafī* school of thought, believes that women are able to work as judges in relation to all cases that they share the right to testify in, with the exception of *ḥudūd* and *qiṣāṣ* crimes.¹²⁴ al-Tabari argues that if women are able to interpret the law as a Mufti, then women can work as judges in the same capacity as outlined by Abu Hanifa. This is because the requirements for working as a Mufti are as stringent as those needed for working as a judge. This school of thought also notes that Aisha, the wife of the Prophet, acted as a Mufti of the Caliphs after the death of the Prophet on issues of inheritance.¹²⁵ However, all other Muslim schools of thought traditionally believe that women should not be allowed to work as a judge.¹²⁶ This is based on the following Quranic verse: 'Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth.'¹²⁷

Furthermore, in respect of the judiciary, if the Saudi Government ratified the entire Rome Statute and the ICC wanted to select judges from Saudi Arabia, this would pose problems because, currently, most Saudi judges are only conversant in, and have experience of, applying Islamic law and not international law. Indeed, most Saudi judges are not conversant in the aforementioned system of law but specialise in Islamic law.

8.4.8 Accepting Amendments to the Rome Statute

The Court Statute gives rights to any state party, its judges (by majority), and the Prosecutor of the Court to suggest amendments relating to the Rules of Procedure and Evidence in accordance with Article 51.¹²⁸ Paragraph 6 of

Syria. While some countries do not allow this; for example, Saudi Arabia, Egypt, Yemen, UAE, and Qatar.

¹²⁴ Karen Bauer, 'Debates on Women's Status as Judges and Witnesses in Post-Formative Islamic Law' (2010) 130(1) *Journal of the American Oriental Society* 1.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ The Quran 4:34.

¹²⁸ The Rome Statute Article 51 stipulates the following: '1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by: (a) Any State Party; (b) The judges acting by an absolute majority; or (c) The Prosecutor. Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties. 3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties. 4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.'

Article 121 of the Rome Statute says that 'If an amendment has been accepted by seven-eighths of State Parties in accordance with Paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding Article 127, Paragraph 1, but subject to Article 127, Paragraph 2, by giving notice no later than one year after the entry into force of such amendment.' This Article indicates that when a state has ratified the Statute, but does not accept new amendments, it can either withdraw from the ratification or accept the amendments, if the amendments have been accepted by seven-eighths of the state parties.

This Article, namely 121, of the Rome Statute is not compatible with the Procedures for Ratifying International Conventions as stated in Articles 6 and 13 of the Procedures for Conclusion of International Treaties in the Kingdom of Saudi Arabia. Article 6 provides that 'If the other party does not agree to the amendments that the Council of Ministers has seen, or requests that a party make substantive amendments to the Convention, the concerned body shall submit this to the Council of Ministers with its views thereon.' Article 13 of the Procedures for Ratifying International Conventions states the following.

The renewal, termination, withdrawal or suspension of the Agreement shall be in either of the following cases: (1) According to its provisions. (2) Agreement at any time with the Party or with other parties. Except in cases of automatic renewal or termination of the Convention in accordance with the provisions thereof, the concerned party shall submit to the Office of the Presidency of the Council of Ministers in case of the renewal, termination, withdrawal or suspension of the Convention, or if it has received a request from the other Contracting State, This is done well in advance of the expiry date of the agreement, with reasons given.

Under ICC rules, amendments that are suggested by a state party, by judges, or the Prosecutor can be accepted and enter into force if these amendments have been agreed by seven-eighths of the state parties of the ICC. If Saudi Arabia ratified the Rome Statute, but did not agree with a certain amendment, then it could either accept the amendment or withdraw from the Statute. Article 121 paragraph 5 of the Rome Statute states the following.

Any amendments to Articles 5, 6, 7 and 8 shall enter into force for those State Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

Thus, in this context, the Court cannot exercise its jurisdiction over a) land that is located in the territory of the state that has not accepted the amendments and b) citizens of the country that has rejected the amendments. Consequently, in this scenario some state parties have limited options with respect to amendments relating to rules, procedures, and evidence in the Treaty (namely either to accept or to withdraw). Any amendment to Articles 5, 6, 7, and 8 in relation to rules, procedures, and evidence put before the Court can only be accepted if the approval of seven-eighths of the state parties of the ICC is gained, and countries who object have only the options of either acceptance or withdrawal.

8.5 Conclusion

This chapter has examined Saudi domestic provisions compared with the provisions of the Rome Statute and has looked at inconsistent issues. Thus, in order to conclude this chapter, recommendations must be suggested that may work to solve these issues of inconsistency. To do this, two sources are consulted. The first is *maslahah mursalah* (public interest). The second is Article 81 of the Basic Law of Governance. *maslahah mursalah* is a means of the sources of Islamic law that is sometimes used to resolve problems relating to Islamic law, such as the extradition of a Muslim to a non-Muslim country or organisation. Furthermore, Article 81 of the Basic Law of Governance provides that 'The enforcement of this Law shall not prejudice whatever treaties and agreements with states and international organisations and agencies to which the Kingdom of Saudi Arabia is committed.'¹²⁹ This article indicates that the provisions of the Basic Law of Governance do not always negate the provisions of international conventions that the Kingdom has ratified, and can be used to resolve problems of compatibility between Saudi domestic laws and other laws.

Maslahah Mursalah (public interest) is used as a means of interpretation, *ijtihad*, by jurists who seek to offer proportionate interpretation in order to maintain the public interest based on the needs of a community.¹³⁰ It is described by Hallaq as 'a rational' principle that examines the public interest by protecting society from what is harmful and promoting what is appropriate. Thus, *maslahah mursalah* can be used to interpret the suitability of the public

¹²⁹ The Basic Law Article 81.

¹³⁰ Natana J Delong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad* (Oxford University Press 2004) 103.

interest and 'to conform to the spirit of the law'.¹³¹ Moreover, it is usually associated with necessary procedures not explicitly mentioned in the main sources of Islamic law.¹³² It is often used to reform legal texts and international treaties in order to maintain international peace and security between Muslim countries and other Muslim states.¹³³

Maslahah Mursalah considers changes over time but requires two fundamental conditions for its use: it must bring benefits and must protect from harm.¹³⁴ The significance and application of *maslahah mursalah* lies in the interpretation made by jurists/scholars of contemporary issues that do not appear and are not mentioned in the sources of Islamic law, namely the Quran, the Sunnah, *ijmá'* (consensus), and *qiyás* (analogy). Jurists study these new cases and incidents, whether civil, commercial, criminal, economic, or international, in order to assess disadvantages and benefits that will accrue to Muslim society as well as to prevent harm.¹³⁵

Maslahah Mursalah is classed as a means of the sources of Islamic law and, in terms of how it relates to international treaties, as one of the sources of international Islamic law. This is because an agreement between a Muslim state and a non-Muslim state or organisation is treated as a treaty in Islamic law. The concept of the treaty is derived from the idea of the contract (*pacta sunt servanda*). Entering into a contract obliges Muslims to follow the terms and conditions of the contract as the following Quranic verse says: 'O you who have believed, fulfil [all] contracts.'¹³⁶ Thus, an agreement signed between a Muslim state and a non-Muslim state/organisation has the same legal obligations that cover the idea of the contract as it is set out in the Quran.¹³⁷ The obligation of honouring a contract was referred to in Roman law as *pacta sunt servanda*, namely the contract is the law of parties.¹³⁸ Thus, it is possible to class the Rome Statute as a contract.

¹³¹ Wael Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) 25.

¹³² Delong-Bas (n 130).

¹³³ Muhammed al Tahir ibn Ashur, *Treaties on Maqasid* (The International Institute of Islamic Thought 2006) 131.

¹³⁴ Abdallah Sālih 'al-Maṣlahah al-Mursalah wa-Taṭbīqātihā' (2000) 15 (1) Majalt Dimashq Damascus 354 (Arabic source).

¹³⁵ al-Tahir ibn Ashur (n133).

¹³⁶ The Quran 5:1.

¹³⁷ Michael Lecker, *The Constitution of Medina Muhammed First Legal Document: Studies in Late Antiquity and Early Islam* (The Drawn Press Inc 2004) 80-91.

¹³⁸ The Oxford Law Dictionary refers to this Latin term as 'Agreements are to be kept; treaties should be observed; *pacta sunt servanda* is the bedrock of the customary international law of treaties and, according to some authorities, the very foundation of international law. Without such an acceptance, treaties would become worthless.'

Although some provisions of Saudi domestic laws are not consistent with the provisions of the Rome Statute, Article 81 of the Basic Law of Governance covers contentious points that may arise if the Kingdom wants to proceed to ratify the Rome Statute. In addition, the main principles, jurisdiction, and objectives of the Rome Statute are consistent with the main provisions of Islamic law, namely preventing heinous crimes against humanity and punishing perpetrators to achieve peaceful coexistence among the countries of the world. Thus, *maslahah mursalah* could be applied by the *Shūra* Council in Saudi Arabia because one of its responsibilities, according to Article 15, is 'revising laws and regulations, international treaties and agreements, concessions, and providing whatever suggestions it deems appropriate'.¹³⁹

The Saudi Arabian government can resort to *maslahah mursalah* (public interest) to reconsider the aforementioned inconsistencies. For instance, the extradition issue in relation to the ratification of the Rome Statute (if the government ratified the Rome Statute). The application of *maslahah mursalah* can be understood, as explained earlier, in the context of when the Prophet signed the Treaty of Al-Hudaibyah with the non-Muslim community in Mecca, namely the Quraysh tribe. In the Treaty of Al-Hudaibyah, the Prophet considered the public interest of the Muslim community to do *hajj* (pilgrimage). Signing this treaty was favourable to both parties because it sought to maintain peace and security between them; moreover, each community of the parties could practise its own worship. A current example of applying and considering *maslahah mursalah* to be a means in Islamic law for demonstrating the good office of the Saudi government in joining the international arena by ratifying international treaties that maintain peace and security, and to show the tolerance of Islam, is the government's ratification of the Genocide Convention and the Fourth Geneva Conventions, both of which are significant parts of the Rome Statute in Articles 6 and 8. Consequently, this thesis suggests that the Saudi government should consider the 'public interest' interpretation and application to overcome inconsistencies between its domestic laws and the Rome Statute through the Saudi *Shūra* Council. This is based on Article 81 of the Basic Law of Governance, which gives a strong legal statement for the Saudi government whereby it is bound by the international agreements that it has ratified and shall not violate commitments of the Kingdom of Saudi Arabia towards other states, international organizations, and bodies. Thus, if the Saudi government has ratified the

<<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100300496>>
accessed on 27 February 2019.

¹³⁹ Article 15 of *Shūra* Council Law in Saudi Arabia.

Rome Statute, its citizens or residents who have committed international crimes within the ICC jurisdiction should be extradited to the ICC when Saudi domestic courts cannot deal with such crimes.

Moreover, the Saudi government is a member of The Organisation of Islamic Co-operation. The Charter of this organisation provides that all member states should 'contribute to international peace and security, understanding and dialogue among civilizations, cultures and religions, and promote and encourage friendly relations and good neighbourliness, mutual respect and Co-operation'.¹⁴⁰ Thus, it is possible to deem that the Kingdom of Saudi Arabia's ratification of the Treaty of Rome can be achieved by applying *maslahah mursalah* (public interest).

¹⁴⁰ The Organisation of Islamic Co-operation was established in 1969 <<https://www.oic-oci.org/home/?lan=en>> accessed on 14 May 2019; paragraph 8 of the Charter of the OIC.

Chapter Nine

Conclusion

The research presented in this study has shown that there is compatibility between the principles of law and jurisdiction of both Islamic law and the Rome Statute. It is with regard to noted obstacles to ratifying the Rome Statute by the Kingdom of Saudi Arabia, which are mainly of a procedural nature such as extradition, the employability of women judges, the right of the victim's family to initiate a lawsuit, the right of the prosecutor of the ICC to initiate an investigation, and political asylum, that incompatibilities arise. The aim of this study is to focus on substantive law and explore the extent to which there are similarities and commonalities between the principles underpinning Islamic international law and the law of the Rome Statute. A further aim is to suggest reforms to the Saudi government if there is a desire to ratify the Rome Statute.

9.1 The Commonalities Between the Other Tiers of Sources of Both Legal Systems

Although the main sources of the Rome Statute and Islamic law differ, there are commonalities between the sources of both legal systems in terms of international treaties, general principles, and custom. Compatibility also appears in terms of the concepts and philosophies used in both legal systems. In this context, differences between the two legal systems do not necessarily add up to a fundamental lack of commonality in the objectives and principles applied in both. Indeed, the commonalities between the two systems reveal the following picture at an international level: a) a respect for the importance of the existence of the sources of both legal systems used in international treaties, and b) a respect for the diversity of sources in Islamic law and international criminal law. This picture reveals a desire to preserve the security of mankind, ensure peace, respect human rights, and employ preventive international tools against people who seek to commit crimes against humanity, genocide, and war crimes. The commonalities between the other tiers of sources in terms of jurisprudence, analysis, and the evaluation by scholars and researchers, works to encourage the development of both legal systems for maintaining international security and stability.

International conventions constitute a core source of international law in terms of demonstrating commitment to the provisions of various conventions at an international and national level. The commitment is based on the *pacta sunt servanda* principle. This principle provides that the parties of the contracts must be committed to the provisions and terms of the contracts. The concept of

commitment to international conventions in Islamic international law falls under the concept of agreements that shall be fulfilled, as noted in Quranic verse 5:1, which indicates that contracts are binding on parties, whether these parties are Muslim and/or non-Muslim, by its provisions. Thus, the commitment of international treaties is undeniable at the international level in accordance with Islamic international law provisions. Indeed, Saudi Arabia has complied with various international treaties and classes them as entering into a contract, which carries both legal and religious obligations. Thus, international treaties under Islamic international law are one of its most important sources. Moreover, Islamic international law has developed into an independent international body of law, despite differences in the civilizations, history, geography, and cultures of Muslims countries. Islamic international law, in general, reflects the substantial influence of the Islamic regions and peoples living in these countries, and in this context, Islamic international law is based on rational and academic methods.

Compatibility could be understood in terms of the general principles as stipulated in Article 38(1)(c) of the International Court of Justice Statute. This Article provides that general principles that have been accepted and applied by civilised nations should be recognised as sources of international law. Since Islamic law is one of the major legal systems of the world, it could harmonise with and accommodate international rules. Islamic law represents Muslim civilised nations worldwide, and compatibility should be viewed in terms of the legality principle that is applied and accepted among the major legal systems in the world.

Compatibility between international criminal law and Islamic law is notable in the use of custom as one of the sources of law. Custom is considered to be one of the oldest legal sources and is shaped by the practices of states and by *opinio juris* in international law. In Islamic law, customs are formed by what is unanimously agreed by those dealing with the law, especially those who are well-informed, such as jurists. Customary international law is one of the sources of international law. Islamic law recognises that a custom, whether domestic or international, can be the source of law if it does not contradict its provisions, namely the Quran and Sunnah. Such an identified custom relates to the reciprocity rule in international law: when a custom has been practised and accepted, it shall be fulfilled. This rule has been embedded in both legal systems, especially in diplomatic international law. The reciprocity rule is described in international law as a guide rule and has powerful support. A similar

notion exists in Islamic law in accordance with the following Quranic verse: 'And if they incline to peace, then incline to it [also] and rely upon Allah.'

It is noted that the concept of consensus is one of the sources practised in Islamic law by the companions of the Prophet Mohammed and then by Muslim jurists throughout the ages. The concept has been used to discuss and agree upon a number of cases in order to attain justice and protect human rights. Moreover, the concept has been considered in meetings and discussions connected with international law, whether at the General Assembly of the United Nations or its sub-committees, or at meetings of the State Parties of the International Criminal Court. These meetings and discussions practised in both legal systems aim to promote effective co-operation among the states in the world in order to contribute to the maintenance of international peace and security by opening up dialogue and discussion surrounding various embargoes, cultures, and religions. Thus, there are common values between the two legal systems that concur that the concept of meetings in international law and the concept of consensus in Islamic law through discussion and dialogue lead to an agreed opinion in order to protect mankind from any practices that violate people's rights.

The confluence of the other tiers of sources in both legal systems constitutes a real harmony that is revealed through jurisprudence and debate among scholars, either by making comparisons or by discussing the sources of each law separately. This confluence reveals a shared aim to protect human beings. Hence, it is impossible to deny the existence of compatibility between the other tiers of sources of both legal systems, as well as certain mechanisms used to achieve justice.

9.2 Compatibility Between General Principles of Law of Both Legal Systems

The principles of Islamic criminal law and the Rome Statute are universal principles, respected in both legal systems. This is evident through the continuous emphasis of these principles at domestic, regional, and international levels, where we find that the majority of conventions/charters, whether regional or international, assert to include the same principles. These principles cover the full application of human rights from arbitrary arrest or detention, whether domestic or international. This study shows that certain shared principles are rooted both in Islamic criminal law and in the Rome Statute in the main sources of both legal systems. However, what distinguishes Islamic criminal law is that these same principles are stipulated in the Holy Quran and are ordained by

Allah. What distinguishes international criminal law, as exemplified by the Rome Statute, is that it requires agreed views from representatives of states to agree to the principles contained in international conventions.

The promotion of the shared principles of Islamic criminal law and the Rome Statute works to protect human rights and to promote the concept of the rule of law at national, regional, and international levels. Thus, there is universal acceptance between both legal systems to apply certain principles, and to codify these principles as important rights. There is also a commitment from competent authorities to apply these principles to show their legal effect. Both legal systems are vibrant and share common principles and interests with other legal systems relating to human rights.

The main features of Islamic criminal law are a) its inclusiveness of Muslim persons covered/addressed by the law and the application of the law's principles to Muslims and non-Muslims (both *dhimmi* and *mu'ahid*); b) its inclusiveness of territorial jurisdiction, which must be applied over all Muslim regions and Muslim countries; and c) its inclusiveness in *ratione temporis* jurisdiction, since these principles originate from the beginning of Islam and will continue until the Day of Resurrection. The problem faced by the ICC is that it may lose credibility and disappear if member States start to withdraw from the treaty.

As discussed in chapter four of this study, the legality principles of no crime and no punishment without law are confirmed in both legal systems in order to protect individuals' rights and respect the role of law. The application of these principles reflects the human rights of freedom in society. Thus, in both legal systems, prosecution and judicial authorities cannot proceed with the trial of a person if the law does not include the prohibited crime and its relevant punishment.

The principle of presumption of innocence in Islamic criminal law begins with the birth of man and must be applied in all cases, whether criminal or financial. In the Rome Statute, the application of this principle begins at arrest and trial proceedings and is considered a procedural principle. Both legal systems confirm that reasonable doubt is not accepted as evidence to prosecute or convict the accused: thus, reasonable doubt is interpreted in favour of the accused. In addition, the burden of proof in both legal systems is placed upon the accuser or the prosecuting authority.

The principle of non-retroactivity is confirmed by Allah in Islamic criminal law; thus, this principle must be respected, whether or not it is codified in the domestic laws of Muslim countries. All countries that apply Islamic law, whether

Islamic law is the main source or one of its sources, understand that it is the duty of judges and prosecutors to apply this principle. Both legal systems share exceptions relating to the non-retroactivity principle. In the Rome Statute, one exception can be when the law of the ICC is changed or amended before the release of a final judgment, during an investigation, or during prosecution from the Court. If the change in law favours the accused, the latter law shall be applied. Another exception in the Rome Statute is articulated in Article 17(2), which provides that when domestic courts are unable or unwilling to prosecute criminals or exercise their jurisdiction over crimes (within the ICC jurisdiction), the ICC will exercise its jurisdiction. In Islamic criminal law, there is one exception to the application of the principle of non-retroactivity. This exception belongs to the rights of the accused. This means that if the accused benefits from previous laws, their punishment will remain unchanged.

The principle of non-prosecution/trial for the same offence twice, together with the principle of equality before the law, and the principle of individual criminal responsibility are covered in the main sources of Islamic criminal law and in the Rome Statute despite the existence of different interpretations and applications. There is a minor difference between Islamic criminal law and the Rome Statute in relation to the principle that a person shall not be tried twice for the same criminal conduct. The minor difference is that Islamic criminal law focuses on the work of previous courts and procedures, documents, and witnesses in the case as an exception to the application of the principle. However, Article 20 of the Rome Statute focuses on the work of the Court, meaning that if there is doubt about the fairness of the previous trial in respect of independence and impartially, this principle shall be applied.

In relation to the principle of individual criminal responsibility, the discussion has revealed that some differences exist between both legal systems. However, in this respect, differences also exist between the jurists and scholars of Islamic criminal law, although it is undeniable that all views seek to represent 'diversity within unity'.¹ It has been also noted that both legal systems carry the same factual meaning of the principle of equality before the law, which means providing rights and opportunities as well as imposing duties equally to all individuals of society in terms of not distributing wealth, jobs, and education equally among individuals.

¹ Mohammed Kamali, *Principles of Islamic Jurisprudence* (3rd edn, The Islamic Texts Society 1991)169.

9.3 Compatibility Between the Jurisdiction of the Rome Statute and Islamic International Law

International rules governing armed conflict, whether internal or international, have emerged because of lessons learned about the kind of methods used by persons who seek to commit heinous crimes against humanity. These rules seek to prevent harm, prevent recurrence, and to protect innocent people. Crimes of genocide, crimes against humanity, and war crimes are criminalised under Islamic international law and the Rome Statute. Both legal systems offer protections to civilians in times of peace or armed conflict. This compatibility is undeniable and covers the criminalisation and prosecution of international crimes.

The main source of Islamic international law offers provisions that prohibit attacks against, and fighting with, non-combatants because Allah says, 'And fight in the way of God those who fight against you.' However, some jurists view that if non-combatants play a role in fighting a Muslim army in an actual battle and are captured alive, they must not be killed. Furthermore, if they constitute a danger to a Muslim army, or become involved in fighting, they lose their immunity. In international criminal law, attacking non-combatants during war is prohibited. With regard to the rights of civilians to receive a fair trial, the Rome Statute provides for this right in the detaining state, but Islamic international law provides for this right under its own laws.

In relation to prisoners of war, the Rome Statute states that the killing of prisoners of war amounts to criminal conduct and is punishable. Islamic international law uses a comparable concept to prevent the killing of prisoners of war. This can be found within its main sources. However, Islamic international law is administered in accordance with the choices of the leader of an Islamic state based on certain criteria, such as releasing prisoners in exchange for a ransom, an exchange with Muslim prisoners, or a gratuity. In some cases, Muslim jurists permit the killing of prisoners of war if the prisoners constitute a danger to a Muslim community; for example, if they are working as spies against the Muslim community or pose a risk to the community.

Islamic international law and the Roma Statute prohibit the destruction of property unless there is military necessity. With regard to human shields, Muslim jurists agree to attack the enemy when they are using a human shield if there is 'military necessity', but attacks on protected people should generally be avoided. This means that Muslim jurists may allow an attack but will not allow the killing of protected people because Islamic international law seeks to avoid

the targeting of protected people. However, any such attack is prohibited in the Rome Statute.

In relation to crimes against humanity, Islamic international law may not rely on modern criminal terms that exist in the Rome Statute. However, it covers the rights of individuals. These rights must be respected and not violated in peacetime and/or during conflict. In addition, if these rights are violated, and when the crimes cannot be categorised under *hudúd* and *qişáş*, Islamic international law looks to the decisions of Muslim jurists and Muslim states, and considers the public interest of Muslim nations at an international and/or national level. Thus, there is compatibility between the provisions of the Rome Statute and those of Islamic international law in terms of criminalising and punishing crimes against humanity because both legal systems look to prohibit acts that violate fundamental human rights. However, although the Rome Statute includes a definition of crimes and describes elements of the crimes, Islamic international law prohibits crimes that violate inherent human rights, and leaves some punishments that are not mentioned in the main sources of Islamic law (*hudúd* or *qişáş*) to the discretion of jurists and/or to a Muslim state to set up definitions, elements, and punishments. In future, it may be necessary to codify crimes against humanity in Islamic international law.

Islamic international law does not explicitly refer to the terms 'genocide' and 'special intent'; however, it can be compared with international criminal law (the Rome Statute) under broad provisions prohibiting murder and acts constituting the physical element in the Rome Statute based on discrimination. This is because Islamic international law deems that genocide is prohibited under its provisions, whether or not these provisions have been recognised, or if certain acts have been criminalised at an international level. This means that Islamic international law prohibits crimes at all levels because its focus is on the prohibition of crimes per se, whether these are committed by authorities, states, a group of people, individuals, or militias (and whatever the basis for committing a crime). International criminal law recognises and defines that genocide must be committed systematically and organised with special intent against a group of people in whole or in part, and that these actions must threaten the existence of mankind at all levels and result in a serious threat to international peace and security. The Rome Statute deals with attempts to commit the crime of genocide as well as its actual realisation even if the result did not occur. While Islamic international law deems that crimes of genocide are not classed as 'genocide' unless the crimes have been committed in reality because Islamic international

law deems that human intention should not be punished, except in the hereafter, and because the terms of Islamic criminal law require a criminal result.

A historical overview of the kind of heinous crimes committed during times of international conflict began to develop after World Wars I and II when international calls were made to set up various meetings/conferences to discuss a way forward to try to govern international armed conflicts and the conduct of military personnel and national leaders during armed conflict. Islamic international law draws its rules from the main sources of Islam, which lays down basic rules, and also draws on interpretations made by jurists/scholars in the public interest of Muslim communities in accordance with the main sources of Islamic law. In this context, there is no doubt about the legitimacy of the rules of Islamic international law because its main source is divine law. However, rules set up by international criminal courts and organisations needs the approval of a number of member states connected to an agreement. However, this thesis has not sought to defend one system or another; instead, it has sought to examine both legal systems in order to seek benefits to enhance international peace and security.

Both legal systems have been influenced by different cultures. Islamic international law has been influenced by various Islamic cultures, while international law has been influenced by various Western cultures. However, there is no barrier to the harmony between both legal systems to reach unity and protect humanity because protecting humanity is at the heart of the enactment of international criminal laws. This study has not sought to criticise the scope of international laws but to undertake a comparative approach in order to identify points of commonalities and differences in both legal systems.

The provisions of Islamic law prove that it is not merely an archaic religion that has not evolved. It comprises a set of sophisticated laws, both domestic and international, developed from incontrovertible main sources through the ages. Thus, in theory, Islamic international law is part of the level of evolving international law, regardless of some heinous practices against humanity conducted by some 'in the name of Islam'. Ultimately, however, there is a common challenge that faces both legal systems, namely the enforcement of international laws that do not discriminate on the basis of political interests.

9.4 How Can Saudi Domestic Law be Reconciled with the Rome Statute?

The study has outlined two kinds of Saudi domestic laws: Islamic laws and those laws that are concerned specifically with Saudi Arabian domestic issues. In

terms of the former, the study has explained that there are divergent views between Muslim jurists with respect to the extradition of Muslim people to non-Muslim states or courts in order to be prosecuted, since non-Muslim states or courts do not apply Islamic law. In addition, the issue of women serving as judges was raised. These issues are under discussion by contemporary Muslim jurists/scholars in order to try to rethink ways of overcoming these obstacles to the benefit of Muslims worldwide, taking into consideration *maslahah mursalah* (public interest) as a means of interpreting Islamic law based on variable changes/events in the world, and the extent of the need for Muslim societies to be protected from such international crimes.

Other inconsistencies between the provisions of Saudi domestic laws and the provisions of the Rome Statute concern the right of an ICC Prosecutor to initiate an investigation, issues surrounding political asylum, and the acceptance of amendments to the Rome Statute. Article 81 of the Basic Law of Governance provides that the provisions of the Basic Law of Governance should not affect any international conventions that the Saudi Government has ratified. It reads as follows: 'The enforcement of this Law shall not prejudice whatever treaties and agreements with states and international organisations and agencies to which the Kingdom of Saudi Arabia is committed.' Thus, applying the broad interpretation that was mentioned earlier, Article 81 of Saudi Basic Law deems that cases can be dealt with under the jurisdiction of the ICC under the Rome Treaty since the ratification of the Treaty forms part of a contract in Islamic law that must be respected in accordance with the principles of Islamic law. Consequently, the *Shūra* Council in Saudi Arabia should be responsible for considering essential amendments regarding the inconsistencies between Saudi domestic laws and some provisions of the Rome Statute. This approach is based on Article 15(b) of the *Shūra* Council, which gives the right to suggest amendments to domestic laws and international treaties, and provide whatever suggestions it deems appropriate. These suggestions should be made with careful consideration by using *maslahah mursalah* (public interest) because the latter is a significant means in Islamic law by which it is possible to bring benefits to Muslim societies and prevent harm to them in general and to Saudi society in particular.

9.5 Recommendations

As this study has shown, there is compatibility between the Rome Statute and Islamic international law with respect to general principles and jurisdiction,

namely substantive law with regard to war crimes, crimes against humanity, and genocide. Thus, it is appropriate for researchers to start a codification project regarding the provisions of Islamic international law in line with the Organisation of Islamic Co-operation Charter's role as an international treaty.

For Saudi Arabia, non-ratification of the Rome Statute is not a key point. This is because the Kingdom has signed up to similar treaties and because a) the Saudi Government is committed to Islamic international law which, in many respects, is consistent with the Rome Statute in its provisions and goals to prevent international crimes; b) it is implicitly committed under the United Nations Charter to avert heinous crimes against humanity; and c) it is committed to prevent genocide and war crimes because it has ratified the Genocide Convention and the four Geneva Conventions. However, ratification of the Rome Statute is seen as substantial by some because Saudi Arabia plays a leading role in the Muslim world, and ratification would reflect the principle of good faith in terms of international law. Moreover, ratification is desirable in order to complement a system of compliance with the provisions of international criminal law. With regard to the domestic law issues that have been raised by the Saudi government as incompatible with the Rome Statute, they remain problematic and need to be tackled.

Recommendations in relation to the reform of certain provisions of Saudi domestic law are elucidated below.

i) Although Saudi domestic law is silent on the extradition of accused persons, the Riyadh Arab Agreement for Judicial Co-operation in 1983 prohibits the extradition of accused persons who have committed crimes in the territory of any state party to another state if the crime is considered political (the Agreement does not define political crime). Thus, if Saudi Arabia ratifies the Rome Statute, there will be a conflict between the ICC's provisions and the Riyadh Agreement for Judicial Co-operation.

ii) Although the ICC's jurisdiction is complementary, it contradicts Saudi domestic law with regard to the right of the Court's prosecutor to initiate an investigation based on his own discretion. This is because the Court's provisions do not specify who can assess the judicial system (within specific conditions) if the state concerned was unable, unwilling, or impartial to investigate a case in its territories.

iii) The provision in relation to political asylum stipulated in Saudi Basic Law Article 42 should be reformed so that it reads as follows: 'The State shall grant political asylum if the public interest so dictates in line with the international

conventions to which the Kingdom is a party. Laws and international agreements shall specify the rules and procedures for the extradition of criminals.'

If Saudi Arabia joins the International Criminal Court, it should take into account the inconsistencies mentioned in chapter nine by adopting amendments to some domestic provisions.

General recommendations are also outlined as follows.

- a) It is advisable that Muslim and Arab countries should take into consideration their parts in codifying the provisions of Islamic international law or joining international criminal justice. This is because the general principles and jurisdiction of the ICC are compatible with those in Islamic law.
- b) Muslim or Arabic countries that wish to ratify the Rome Statute should consider reforms to their domestic legislation so as to be compatible with the Rome Statute provisions, especially regarding criminal laws.

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