Philosophy, Public Policy, and Transnational Law

ISLAMIC LAW and TRANSNATIONAL DIPLOMATIC LAW

A Quest for Complementarity in Divergent Legal Theories

MUHAMMAD-BASHEER .A. ISMAIL

Islamic Law and Transnational Diplomatic Law

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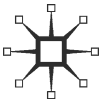

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Softcover reprint of the hardcover 1st edition 2016 978-1-137-55876-3

First published 2016 by
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire, RG21 6XS.

Palgrave Macmillan in the US is a division of Nature America, Inc., One New York Plaza, Suite 4500, New York, NY 10004-1562.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

ISBN 978-1-349-56416-3 ISBN 978-1-137-55877-0 (eBook)

DOI 10.1057/9781137558770

Distribution in the UK, Europe and the rest of the world is by Palgrave Macmillan®, a division of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Library of Congress Cataloging-in-Publication Data

Ismail, Muhammad-Basheer Adisa, author.
Islamic and transnational diplomatic law : a quest for complementarity in divergent legal theories / by Muhammad-Basheer A. Ismail.
pages cm.—(Philosophy, public policy, and transnational law)
Based on author's thesis (doctoral - University of Hull, England, 2012) issued under title: Islamic diplomatic law and international diplomatic law.
Includes bibliographical references and index.

1. International law (Islamic law) 2. Diplomatic and consular service, Islamic countries. I. Title.

KBP2400.I86 2015
342'.0412—dc23

A catalogue record for the book is available from the British Library.

This book is dedicated to the blessed memory of
my beloved mother, Madam Riskat Ogunbiyi
(Nee Animashaun), to whom I am greatly indebted
for giving me the opportunity to
become what I am today.

Contents

Series Editor Foreword

In the practical reality of the world in 2015, I can think of no more important legal matter than the implications of Muslim-Islamic law for international common law and the future of relations between the West and the Muslim world. A basic consideration of this age of "terrorism" is whether the fundamental law of diplomacy, upon which all the rest of the contemporary international legal system is built, is compatible with Islamic law or can be made so. With the growing responsibility of states to temper their sovereignty and their cultural-religious prerogatives for the sake of transitional cooperation and nonviolent change, this study on the theoretical and practical comparison of Islamic and conventional transnational diplomatic law could not be more timely.

What is especially important about this effort is that it begins with the normative principles that both undergirds approaches to the law and proceeds on the assumption that these are the key to finding the points of compatibility between the two systems of law. To this theoretical commitment, Muhammad-Basheer Ismail adds a dedication to understanding the historical development of both sets of principles, setting the evolution of the theory and practice of the law within the context of the development of diplomatic law from ancient times. Focusing particularly on the contribution made by Islamic civilization to modern diplomatic practice, he finds both the convergence and the profound influence of the former on the latter. On one level, this argument adds much to the history, theory, and practice of the law of diplomatic immunity, while more universally, it places into context the profound influence of conventional diplomatic law and its capacity to integrate what superficially seem like diametrically distinct lines of legal practice.

With this approach, emphasizing the determinate influence of core principles on the history of practice, which is at the core of this book series, Muhammad-Basheer Ismail has moved the entire field of both comparative and international law ahead both theoretically and

practically. Simultaneously, he has armed practitioners with the tools by which confrontations between competing systems of diplomatic law may be reconciled within the confines of legal usage and discourse rather than violence. With his masterful knowledge of both legal systems, he synthesizes his talents as an expert in both comparative and transnational law to create a very persuasive argument that the cooperation of Western and Muslim peoples in future transnational diplomatic relations is not only possible but probable given reasoned thought and action. His contention, confirming the "convergence in the legal purposes of the two legal systems" demands consideration, thought, and argument from lawyers, policy makers, and citizens alike.

I welcome this book to *Philosophy, Public Policy & Transnational Law* as an excellent example of connecting essential ideas to practical solutions, which is the imperative of our series.

John Martin Gillroy

Foreword

A number of scholars are trying to find ways of maximizing the application of international law in Muslim states. They focus on the relationship between domestic law and international law in Muslim states. As sharia occupies an important position in the legal systems of Muslim states, most scholarly discussion turns on the relationship between Islamic law and international law. Muslim states tend to accede to or ratify those treaties, without reservations, which do not conflict with sharia, for example, international humanitarian law treaties. Muslim states, however, enter reservations or interpretative declarations to those treaties that they consider could possibly conflict with their domestic law, that is, Islamic law. Scholars have been conducting compatibility studies trying to determine the extent of compatibility between sharia and branches of international law and, where they find incompatibilities, to offer mechanisms as to how to achieve greater compatibility. Studies looking at the compatibility of sharia and international human rights law are good examples. Ismail's work is a part of that scholarly endeavor seeking reconciliation between Islamic law and international diplomatic law.

Ismail has conducted a thorough and rigorous study on the doctrinal compatibility of Islamic law and diplomatic law. His research has established that greater compatibility exists between the two legal systems. He very convincingly argues that by using the reconciliatory approach, further compatibility can be achieved. As national implementation is given primacy, I find his argument that to provide better protection to diplomatic envoys, Islamic law should be used to complement international diplomatic law at the national level. One can hope that Muslim states will rely on both Islamic and diplomatic law and provide effective protection to diplomatic envoys.

Ismail's work also makes a decent contribution to the scholarly project, seeking greater compatibility between Islamic law and international law. Greater compatibility paves the way for maximizing the application

of international law in the parts of the world consisting of Muslim states. The robust and fair application of international law, no doubt, contributes to peace and security: a higher aim of the Charter of the United Nations 1945.

Niaz A. Shah is a Reader in Law at the University of Hull, England, and a barrister-at-law practicing from Nexus Chambers, Lincoln's Inn, London.

Niaz A. Shah

Preface

The publication of this volume on Islamic and transnational diplomatic law is very refreshing and welcome for its timeliness and relevance, particularly in relation to the promotion of international peace and security in today's world. In view of the many conflicts around the world in the past 20 years or more, a detailed comparative analysis of the concept and practice of diplomacy, particularly from Islamic and international legal perspectives, is long overdue. While there have been different publications in the past exploring the subject of diplomacy under Islamic law, international law, and other civilizations separately, this publication is apparently the first full-length book that, in recent times, has undertaken a thorough interlegal and intercultural comparative examination of the subject under both Islamic law and international law.

While the opening statement of the Charter of the United Nations (UN) is a declared determination "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,"[1] it is ironic that the strength of nations continues to be evaluated and demonstrated by the possession of armaments and the ability to subjugate one another through warfare rather than the ability to resolve international disputes and conflicts through constructive and positive diplomacy. Based on that declared determination in the UN Charter, one would hope that nations would persevere much more on the path of constructive and preventive diplomacy and that the strength of nations would now be evaluated and demonstrated by the mastery of and the ability to use constructive and positive diplomacy in solving the challenges in contemporary international relations. The adverse consequences of the quick recourse to the use of force in the past 20 years in different parts of the world, particularly in the Muslim world, clearly suggest that more attention should be paid to the need for perseverance on pacific constructive diplomacy in addressing the challenges in contemporary international relations and international law.

Although Carl von Clausewitz suggested in the nineteenth century that war is the continuation of political policy by other means,[2] that suggestion essentially reflects what we may call "negative diplomacy," which should be resorted to only when constructive and positive diplomacy has absolutely failed. But constructive and positive diplomacy often fails due to lack of cross-cultural understanding of diplomatic law or a monolithic perspective on diplomacy. This is why an interlegal and intercultural perspective to diplomacy and diplomatic law is very essential for all times.

The concept and the law of diplomacy have a long history in human relations and are recognized within different civilizations. The law of diplomacy has evolved significantly over time and, without doubt, holds the key not only to international peace and security but also to positive globalization and the pacific conduct of international affairs generally. Certainly, it is only through persistent preventive diplomacy that armed conflicts and other international challenges can be averted, and only through sustained constructive diplomacy that existing wars and conflicts in different parts of the world can be brought to an end. The appreciation of the need for interlegal and intercultural complementarity in diplomatic law can go a long way toward enhancing peaceful interstate relations in our contemporary world. Incidentally, this is one of the areas in which there can be significant mutuality between international law and Islamic law, but which has been highly underutilized in modern international practices.

The importance of this current study is well reflected in the 1988 observation by a former judge and vice president of the International Court of Justice (ICJ), Judge Christopher Gregory Weeramantry with reference to the 1979 to 1981 Iranian diplomatic hostage imbroglio with the United States as follows:

> There will be in the future an increasing need for non-Islamic countries all over the world to negotiate with Islamic countries on a multitude of matters ranging from questions of war and peace to mercantile contracts. Such negotiation will require more understanding of Islamic attitudes, history and culture. An excellent recent example of an opportunity lost through lack of such understanding was the hostage crisis in Iran. The USA, asserting the well-accepted principle of diplomatic immunity and right to protection, kept referring continually to the formulations of this rule in the Western law books. Islamic law is also rich in principles relating to the treatment of foreign embassies and personnel. These were not cited…nor was the slightest understanding shown of the existence of this body of learning. Had such authority been cited by the USA, it would have had a three-fold effect: its persuasive value would have been immensely

> greater; it would have shown an appreciation and understanding of Islamic culture; and it would have induced a greater readiness on the Iranian side to negotiate from a base of common understanding. It is not often sufficiently appreciated, especially in the Western world, that many of the current rules of international law are regarded by a large segment of the world's population as being principles from the rule-book of the elite club of world powers which held sway in the nineteenth century. In the midst of this general attitude of mistrust, the worthy rules are tarred with the same brush as the self-serving. World cultural traditions need to be involved, where available, to bolster up and reinforce these rules. Indeed, at the time of the hostage crisis, the author drew the attention of the US authorities to the need to research the Islamic material on this point and although this suggestion was referred to the Task Force in Washington handling the crisis, the author is not aware of any steps taken in this direction. He was never informed of any consequent action following from this proposal and can only presume that it lapsed through lack of understanding or lack of expertise in the US office handling the matter. The same considerations apply at many other levels. The non-Islamic world neglects them at its own cost.[3]

It is interesting to note, however, that the ICJ did acknowledge in its judgment in the consequent *Case Concerning United States Diplomatic and Consular Staff in Tehran*[4] that "the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime [of the rules of diplomatic law], to the evolution of which the traditions of Islam made a substantial contribution."[5]

In view of the continued importance of the development of diplomacy and diplomatic law to meet the many challenges of contemporary international relations, this volume makes an important contribution toward the enhancement of constructive and positive diplomacy by providing a thorough comparative analysis on the subject and its argument of compatibility and complementarity between international diplomatic law and Islamic diplomatic law. Academicians, diplomats, and policy makers alike will certainly find it indispensable both in theory and practice.

Mashood A. Baderin, PhD
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Acknowledgments

With appreciation to Allah and many people who have made this book a thing of reality, I would like to register my sincere acknowledgments. I am, particularly, most grateful to Dr. Niaz Shah, who supervised my PhD at the School of Law, University of Hull, England, for his interest in this book and his relentless encouragement that it be published. I also thank him for writing a foreword to this book. This book would not have seen the light of the day without the intelligent editing and unflattering comments of Professor John Gillroy, the series editor of Philosophy, Public Policy and Transnational Law, before the final manuscript was submitted. I cannot but express profound gratitude to Professor Mashood Baderin of the Law School, School of Oriental and African Studies, University of London, for taking time out of his very tight schedule to write a preface for this book. I thank him greatly for that. I am profoundly appreciative of the patience and understanding of all the editorial staff of Palgrave Macmillan, most especially Elaine Fan, Alexandra Dauler, and Sara Doskow. I would also express my profound gratitude to my friends who have, by their words of encouragement, given me the zeal to see to it that this book is finally published. They include Mr. Feisal Fara, a PhD candidate at the History Department, University of Hull; Dr. Rhuks T. Ako; Dr. Garba Malumfashi; Dr. Hakeem Yusuf; Dr. Lateef Adetona; and Barrister Nasir Adeniyi, who is about to commence his PhD program in law at the International Islamic University Malaysia.

Most importantly, I will always remain grateful to my wife, Fauziyyah Adebukola Ismail, for being there for me. Her enduring character and patience deserve a very big thank you. I must also acknowledge the unflinching support I received from my children, Hameedah, Sumayyah, Mus'ab, Yaasir, Rumaysah, and Hibatullah during the entire project.

Since all perfection belongs to Allah alone, I therefore, take responsibility of any errors contained in this book.

Dr. Muhammad-Basheer .A. Ismail

1

Introduction

General Background

It has been speculated that the practice of protecting foreign envoys from attacks and personal injury has been in existence since time immemorial.[1] Various studies on the history of ancient civilizations, whether in Asia, the Middle East, the ancient Near East, Africa, Europe, or North America, have always revealed the high degree of inviolability attached to the personality of foreign messengers.[2] The concept of immunity and the inviolability of diplomatic envoys is recognized by various religious beliefs, sanctioned by customs, and fortified by reciprocity.[3] Historically, most religions have underscored the essence of the inviolability of envoys to the extent that attack on the persons of ambassadors has been condemned as an impious act.[4] One may possibly argue that there is no particular civilization, nation, or community that can possibly claim to be the sole originator of this universally acknowledged concept.

The need to give respect and protection to foreign representatives of other sovereigns constituted the bedrock of the law of nations in ancient times just as it does in today's international law. Meaningful negotiations between sovereign polities have been made possible by the instrumentality of diplomatic protection, the essence of which needs not be overstressed.

Hardly can any nation or community survive by isolating itself from others, particularly in this era in which globalization is fast becoming, if it has not already become, the new world order. The significant role of diplomatic personnel, in a period like this, cannot be underestimated.[5] This is so because the task of developing, formulating, and implementing states' foreign policies heavily rests on the shoulders of diplomatic personnel. In the same vein also, detailed analysis of contemporary issues

emanating from different parts of the world is often carried out by diplomats as one of their essential responsibilities.[6] The sensitive nature of the office of a diplomat and the enormous task attached to it require that adequate protection be put in place for the person of the diplomat, his family, and also the diplomatic mission. The amount of protection given to diplomatic agents stems from the great importance past civilizations attached to the need for nations to remain in constant communication and to have unimpaired interrelations. And for this to be the case, it is imperative that the diplomatic establishment must not be left unprotected.

The need for communication between sovereign nations also underscores the importance of giving proper protection to envoys. This effort has taken the form of permanent diplomatic and consular establishments in virtually all capital cities. This sacrosanct position of diplomatic envoys has been succinctly described by the International Court of Justice (ICJ) thus:

> There is no fundamental requisite for the conduct of diplomatic relations between states…than the inviolability of diplomatic envoys and embassies, so that throughout history, nations of all creeds and cultures have observed reciprocal obligations for that purpose.[7]

Similarly, the inviolability and immunity of diplomatic envoys have long been recognized and freely observed under Islamic law. This was demonstrated, for instance, by Prophet Muhammad (pbuh)[8] during the famous Treaty of Hudaybiyyah (628 AD),[9] when one Abu Raafi'i, a Quraysh, representing the Makkans at a meeting, indicated his intention to revert to Islam. There and then, Prophet Muhammad (pbuh) told him thus:

> I do not break a covenant or imprison envoys [you are an ambassador], but return, and if you feel the same as you do just now, come back.[10]

With this, Prophet Muhammad (pbuh) recognized not only the sanctity of the ambassadorial post such that the envoy most not be detained but also that host countries should not take advantage of envoys residing in their territory for their own benefit.

There is no record of any past civilization or nation in which the desecration of the inviolability of the envoy was institutionalized or, at least, tolerated. This must not, however, be understood to mean that foreign agents in the early period were freer from attacks than today. Far from it! Considering the peculiarity of the concept of diplomatic inviolability to nearly all known civilizations, one may therefore want to ask, why are

diplomatic missions and personnel still subject to terrorist attacks? Many reasons have been investigated regarding what appears to be responsible for these violent attacks. For instance, a one-time British diplomat who was also a victim of an attempted kidnap attributed the reason for these gruesome attacks to "the special status of the diplomatic agent."[11] Also, violence against diplomatic agents, according to Barker, can be politically motivated by those protesting against the policies of either the sending state or the receiving state.[12] These terrorist attacks range from the minor to the meanest, such as the kidnapping[13] and killing[14] of diplomatic personnel and the seizure of embassies.[15]

It would not be a stretch to say that a healthy diplomatic mission along with diplomatic personnel who are free from threats will, in no small way, contribute toward the guarantee of enduring international diplomatic relations. No doubt, crimes, such as murder, kidnapping, and arson against diplomatic agents and diplomatic facilities constitute a serious threat to international peace and security. Recognizing the danger embedded in the terrorist attacks on diplomats and diplomatic missions, a good number of multilateral conventions have been initiated and drafted, prominent among which are the 1971 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance[16] and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[17] It is rather disturbing that, in spite of the current positive developments made by most states in criminalizing terrorist acts in their domestic laws and regulations,[18] terrorist activities particularly against diplomats and diplomatic missions can still not be said to have abated. Can the reason for these attacks on diplomats and diplomatic missions be attributable to inadequacies in the Conventions or an absence of international cooperation? Or should we just throw our hands in the air and conclude that the "terrorists, whether they argued for the reinstatement of old laws and customs or for the destruction of the existing system to pave the way for a newer, more utopian order, no longer heeded the old taboos?"[19] Either of these questions must be looked into with a view to proffering answers to them, bearing in mind that terrorist outbursts are mostly precipitated, as observed, by disruptive conditions, rapid economic change, and political instability.[20]

What has now attracted a major concern among Islamic law scholars is the rate at which Islam has now been stigmatized with terrorism, most especially since the September 11, 2001, incident.[21] It could, however, be argued that the misinterpretation and misapplication of the rules of jihad by a few Muslim groups that are often nonstate actors seem to

justify the position of those who impute terrorism to Islam. In the same vein, it could be further argued that the gross misperception of the entire concept of jihad in relation to Islamic international law[22] by some non-Muslims remains a major problem. This problem is rightly described by Esposito when he gives an example of a US Senate leader who confessed that "I know a lot about many things but nothing about Islam and the Muslim world—and neither do most of my colleagues."[23] Another issue of great concern that falls under the searchlight is the rampancy of the acts of terrorism directed at diplomats and diplomatic missions, most especially within Muslim states, which are often carried out by individuals or group of individuals in the name of Islam.[24]

Diplomatic inviolability and immunity, being age-old concepts of international law, have been examined by both the classical as well as modern scholars.[25] For instance, Hugo Grotius (1583–1645), who is believed to be the father of international law, says, in his famous treatise *De Jure Belli ac Pacis*[26] regarding the rationale behind the diplomatic immunity enjoyed by an ambassador, that

> it is natural to suppose, that nations have agreed, in the case of ambassadors, to dispense with that obedience, which every one, by general custom, owes to the laws of that foreign country, in which, at any time, he resides. The character, which they sustain, is not that of ordinary individuals, but they represent the Majesty of the Sovereigns, by whom they are sent, whose power is limited to no local jurisdiction.[27]

Mattingly also writes, in analyzing the work of Bernard du Rosier (1404–1475) on the immunity and personal inviolability of diplomatic envoys, that

> [a]mbassadors are immune for the period of their embassies, in their persons and in their property, both from actions in courts of law and from all other forms of interference. Among all peoples, in all kingdoms and lands, they are guaranteed complete freedom in access, transit and egress, and perfect safety from any hindrance or violence.[28]

In the same vein, Shaybani[29] says in his magnum opus, *Kitab al-Siyar al-Saghir,*[30] regarding the need to treat a foreign envoy with respect once he carries with him a letter of credence, the following:

> If a Harbi is found in the Territory of Islam and claims to be an emissary and produces a letter from his King to this effect, he will be provided security if the letter is confirmed to be really from the King. He will be secure till he delivers the message and returns [to his territory].[31]

It has, however, been observed that most of these contributions, particularly by Western scholars, surrounding the development of this ancient but fundamental branch of international law, give much credence to the influence of the Greek and Roman civilizations, without paying deserved attention to the contribution of the Islamic civilization,[32] although, diplomatic missions in the early part of Islam was not permanent, as they are today. These missions were temporary because emissaries at that time were usually dispatched to foreign lands to give notice of alternative options before the commencement of hostilities and to resolve postwar problems.[33] But by the twelfth century, Islam had already put in place permanent representation in the form of the modern-day consulates, while prior to the twelfth century, legation in a permanent form was unknown to the West.[34] The idea of sending an emissary abroad with all the power to represent the state in the form of modern diplomacy started in Italy (the Republic of Venice) in the late fifteenth century.[35]

It has been observed that some writers, especially in the field of international law, do not see any congruity between the classical concept of Islamic international law and modern principles of international law.[36] Consequently, they give scant recognition to the legal position of diplomatic relations under Islamic law. They also give the so-called dichotomization of the world into *dar al-Islam*[37] (abode of peace) and *dar al-harb*[38] (abode of war) a fundamental justification against a permanent peaceful diplomatic relation between the Muslim world and the rest of the world.

Is Islamic Diplomatic Law Compatible with International Diplomatic Law?

This question requires comparing the set of principles of Islamic diplomatic law with the principles of international diplomatic law such as the immunity and inviolability of diplomatic agents; the concept of treaties (*mu'aahadaat*) as it relates to the principle of *pacta sunt servanda*; and the concept of *aman* (safe conduct). This question, in a sense, is a comparison of substantive principles of diplomatic law in the two legal systems: Islamic law and international law. It is argued that the foundational principles in Islamic diplomatic law and international diplomatic law are compatible. However, if there are incompatibilities, a detailed process for how to resolve the differences between the two legal systems that would lead to a harmonized interpretation and application are laid down in chapter 3. For instance, the principle of *maslahah*, which is generally translated

to mean "public welfare" or "public interest," could be resorted to as a reconciliatory concept in a situation in which the principles of Islamic diplomatic law and international diplomatic law appear to be incompatible. In Islamic jurisprudence, recourse can be made to the principle of *maslahah*, by making rules based on the general interests of the Muslim community in which there are no applicable provisions in the primary sources of Islamic law—the Qur'an and the *Sunnah*.[39] It must be borne in mind that in applying the principle of *maslahah*, it must not run contrary to the fundamental objectives of the sharia (*maqaasid al-Shari'ah*).

In international law, it is strongly presumed that normative conflict is generally frowned upon, since the business of the court entails the interpretation of treaties in such a way as to mitigate or avoid conflict.[40] It is, therefore, not surprising that Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties[41] (VCLT) empowers the judges of the ICJ or the International Tribunal to give consideration to relevant external sources while interpreting international norms. This, in the words of Tzevelekos, "should always be done following the so-called 'principles of harmonization,' according to which, when a plurality of norms affects the same subjects the interpretation should always attempt to achieve conciliation."[42]

International law also allows reservations and interpretative declarations to be made at the time a treaty is to be signed or ratified, provided they are compatible with the object and purpose test of a given treaty.[43] The International Law Commission Guide to Practice on Reservation to Treaties (referred to as the ILC Guide) does provide a helpful direction by defining a reservation as a unilateral statement that is formulated with the intention to exclude or to modify the legal effect of certain provisions of a treaty, or of the treaty as a whole, with respect to certain specific aspects, in their application to the state that formulates the reservation.[44] It further defines an interpretative declaration as the unilateral statement of a state that purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.[45]

It is worth mentioning that interpretative declarations do not have a binding effect, but may be considered while interpreting a treaty.[46] It is, however, important to determine the character of a unilateral statement either as a reservation or as an interpretative declaration "by the legal effect that its author purports to produce."[47] In determining this, the ILC Guide provides that "the statement should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying therefrom the intention of its author, in light of the treaty to which it refers."[48]

Before we get to a comparative examination of the substantive principles, it is important to clarify some definitional issues and mention how both legal systems evolved over centuries and what are their main sources. This requires the evolutionary study of Islamic diplomatic law and international diplomatic law and their legal sources. Diplomatic immunity is an age-old practice that has been generally attested to among various civilizations by scholars of history and international law.[49] Right from the early days of Islam, the inviolability and immunity of diplomatic envoys have been recognized and freely observed. For instance, Prophet Muhammad's (pbuh) statement that "if it were not the tradition that envoys could not be killed, I would have severed your heads,"[50] which later forms the *locus classicus* in Islamic diplomatic law, is instructive. This explains why the notion of diplomatic immunity occupies an important position in Islamic *siyar*, which is translated as "Islamic international law." Islamic diplomatic law forms part of Islamic *siyar*.

It is generally recognized that diplomatic law is considerably sourced from the customary rules of international law.[51] However, the importance of the international treaty and general principles of law as sources of international diplomatic law cannot be overemphasized. For example, the treaty has always remained functional to diplomatic law when a state agrees to accept the personnel or representative of the other state. Likewise, Islamic diplomatic law, which also forms an integral part of Islamic *siyar,* is an inseparable component of Islamic law since it shares the same sources with Islamic law.[52] The divine sources are the Qur'an and the *Sunnah*, followed by the mechanisms of *ijtihad*, which are given as follows: *ijmaa*', *qiyaas*, *maslahah*, *istihsaan*, and '*urf,* otherwise known as the methods and principles of Islamic law.

The sources of the two legal systems are viewed and generally examined together with a view to finding areas of compatibility by taking into account various opinions put forward by scholars of Islamic law and international law. The possible areas of tension between the two legal systems are also discussed in a way that brings about reconciliation by harmonizing the differences. A detailed explanation of this is contained in chapter 3 of this book.

Muslim States Practice in Their Diplomatic Relations

The second inquiry focuses on the practice of some Muslim states[53] with the view to confirming the extent of their compliance with the principles

of Islamic diplomatic law and international diplomatic law in their relationship with non-Muslim states. This is important because it forms one of the foundational bases for comparison between the application of Islamic diplomatic and international diplomatic law in this book. At least, there is the need to know the extent to which the Muslim states conform to international diplomatic law in their various diplomatic interactions among themselves and other non-Muslim states.

It should be noted that most Muslim states have signed and ratified the two globally recognized diplomatic and consular legal frameworks: the Vienna Convention on Diplomatic Relations (VCDR) and Vienna Convention on Consular Relations (VCCR). This invariably means that they are duty bound to carry out their commitments under the terms of these international treaties. It is important to point out at this juncture that I have decided to consider three states from among the Muslim states particularly, owing to the peculiar nature of the various diplomatic crises that have unfolded in these states. The states are the Islamic Republic of Iran, Libya, and the Islamic Republic of Pakistan. For example, the 1979 Iranian invasion of the American Embassy in Tehran; the 1983 shooting at the Libyan Embassy in which a British woman police officer was killed; and the 2011 killing of two Pakistanis by Raymond Davis, an American, who was initially considered by the US government as having diplomatic status, all give a picture of how these Muslim states respond to their diplomatic obligations and responsibilities.

This book critically analyzes and examines these three cases, relying on the parameter of the principles of Islamic diplomatic law in arriving at a conclusion of whether the Muslim states acted in conformity with the Islamic law rules of diplomatic relations. The book further considers whether any of these three Muslim states were influenced by the fact that there is incompatibility between Islamic diplomatic law and international diplomatic law. In approaching this issue, there is a need to inquire as to whether these Muslim states have entered reservations or interpretative declarations to the relevant international treaties and on what basis. If there are instances of reservations or interpretative declarations, efforts will be made to see whether the Islamic or international legal principles can be interpreted in a particular way to arrive at a harmonized interpretation.

The Attacks of Muslim Armed Groups on Diplomats and Diplomatic Facilities

The third inquiry raises a crucial question as to why Muslim armed groups have attacked and continue to attack diplomatic missions and

personnel. The recent killing of a Saudi Arabian diplomat and a string of attacks on the United States and other Western diplomatic missions and personnel in Pakistan are typical examples. The assertion made by Kelsay and Johnson that "[not] all Muslims are prepared to reach an accommodation with public international law"[54] is not far from the truth. This is so because there are some Muslims who strictly stand by the sharia to the extent that they will not accept "the legitimacy of any non-Islamic legal system."[55] Kelsay and Johnson further state that these individuals "include members of some of the radical, fundamental groups in the Muslim world."[56] They tend to find justification in their interpretation of the concept of jihad as the basis for their attacks. In their rebellion, they take up arms against Muslim state governments as well as foreign nations who sympathize with or openly support the Muslim states in their efforts to confront and suppress these domestic rebellions. These rebellions are generally described as terrorism and extremism. It is important to see the response of Muslim states to this misinterpretation and misapplication of the principles of jihad, and how these states eventually treat the violation of international diplomatic law by these Muslim groups, who are mostly nonstate actors. It is also important to state that the rebellious acts of these nonstate actors may not inform the interpretation of international law or Islamic international law principles since they are not considered as a sovereign entity. However, the practice of nonstate actors may provide evidence of how the two legal principles of diplomatic immunity are applied in and by Muslim states.

Theoretical Approaches to This Book

This book analyzes the two legal systems: international diplomatic law and Islamic diplomatic law with a view to ascertaining the presence of any compatibility or tension in their respective principles. In order to comprehend this analysis, the different approaches adopted by scholars both within Islamic jurisprudence and international law in arriving at their various conclusions will be considered. Three of these different approaches (noncompatibility approach, compatibility approach, and reconciliatory approach) are briefly discussed below.

Noncompatibility Approach

The question of noncompatibility between Islamic *siyar* and international law has generated controversy among scholars of international law. The exponents of the exclusivist theoretical view argue that modern international law along with its principles do not and cannot accommodate

any rules or principles of Islamic international law due to the absence of any grounds of congruency between the two legal regimes. Berger was quite blunt in his view regarding the noncompatibility between the two legal systems, and he maintains that "Islamic international law may be of great historical interest and Islamic source of inspiration for Islamic militants, but it has no relevance whatsoever for contemporary international law."[57] Also, in summarizing the argument on the cognitive differences between Islamic international law and public international law, Westbrook came to the conclusion that "Islamic law has no authoritative place for institutions, particularly nations, and institutional authority is basic to public international law . . . Islamic law takes meaning from certain narratives, and those narratives are inapposite to public international law."[58] To make his statement clear, he sums it up by stating that "Islamic international law, in the sense used by the scholars surveyed here, cannot speak to international environment composed of institutions, and so cannot address the business of public international law."[59]

The attempt of those who perceive Islamic *siyar* as being compatible in its sources doctrine with modern international law has been strongly criticized by Ford as attempts to "merely whitewash genuine discrepancies between international norms and the principle grounding the *siyar*."[60] He further specified areas that he sees as grounds of noncompatibility in the following statement: "The *siyar* 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 the teaching of eminent publicists."[61] The question of whether the sources of Islamic *siyar* are incompatible with the sources doctrine of international law, as mentioned above, is carefully considered in chapter 3 of this book.

Compatibility Approach

This approach is expounded by a considerable number of Muslim scholars.[62] The approach emerges from the argument on how the sources of the two legal systems are perceived and how some fundamental principles of Islamic law are applied, such as the concept of jihad; the concept of dividing the world into *dar al-Islam* (abode of peace), *dar al-harb* (abode of war), and *dar as-sulh* (abode of treaty); and the law of treaties. The proponents of this approach contend that the basic principles of Islamic *siyar* are not only identical with the modern principles entrenched in international law but also that they "may even be said to be part of that doctrine or philosophy" that constitute

international law.[63] They also contend that there are elements of similarities in the sources of Islamic international law and the sources of public international law as stated in Article 38(1) of the Statute of the International Court of Justice (SICJ). For instance, in the analogical deduction made by Zawati, in comparing the similarities in the two legal systems, he says that

> [t]he texts of international covenants may be compared to the texts of the *Holy Qur'an* and the true Prophetic *hadiths*. In many respect, the international agreements are equivalent to the treaties made by the Prophet Muhammad, the rightly-guided Caliphs (*al-Khulafa' al-Rashidun*) and later Muslim rulers. Moreover, the opinions of Western scholars often parallel the legal opinions and works issued by Muslim jurists.[64]

There is a need to understand that the compatibility approach is not raised as a ground of absolute similarity in the sources of these two legal systems or to forge recognition and relevance for Islamic law within the contemporary international legal order. But rather, the aim is to find grounds of commonality within the doctrinal sources of diplomatic law in Islam and international diplomatic law with a view to realizing for the benefit of humanity the universal principles set out in the United Nations (UN) Charter.

Reconciliatory Approach

The third approach is in a way connected with the compatibility approach in the sense that, where absolute compatibility is not achievable, then a reconciliatory bridge that is capable of linking the two legal systems will have to be resorted to.[65] This, in a nutshell, also explains, in addition to the compatibility approach, the approach the present study adopts.

There are many Muslim and non-Muslim scholars who suggest the adoption of the reconciliatory approach. Among them are Shihata,[66] Khadduri,[67] Baderin,[68] Shah,[69] Badr,[70] and Weeramantry,[71] to mention but a few. For example, Khadduri sees the active involvement of Muslim states in the activities of the UN and its agents and international conferences as a demonstration that "the *dar al-Islam* [abode of Islam] has at least reconciled itself to a peaceful co-existence with *dar al-harb* [abode of war]."[72] It may also be correct to suggest that the participation of Muslim states in these international gatherings may be as a result of embracing the third division of the world into *dar as-sulh* (abode of treaty). At least, it has long been established, in the words of Shihata, that once "fighting ceased to be normal state of affairs between the two *Dars*

[the two worlds], a third division [*dar as-sulh*] was formed to contain the territories which had treaty relations with Dar al Islam."[73] Of course, an international treaty plays a very important role in nations actively participating within the international community.

Also, it has been observed by Weeramantry that there is an urgent need for negotiation between "non-Islamic" and "Islamic" countries on a lot of matters, including "war and peace," which will facilitate a common understanding and cooperation. He cited the case of *US Diplomatic and Consular Staff in* Tehran,[74] in which the American government kept referring to well-accepted principles of diplomatic immunity, all from the Western law perspective, without making any reference to Islamic law, which is equally "rich in principles relating to the treatment of foreign embassies and personnel."[75] His conclusion, however, epitomizes the essence of the reconciliatory approach thus:

> Had such authority been cited by the USA, it would have had a three-fold effect: its persuasive value would have been immensely greater; it would have shown an appreciation and understanding of Islamic culture; and it would have induced a greater readiness on the Iranian side to negotiate from a base of common understanding.[76]

In addition, Badr also contends that there are specific principles of Islamic *siyar* that "lend themselves to consolidating and expanding the scope of contemporary international law."[77] He mentions the sanctity of agreements and the rule of reciprocal treatment as the principles of Islamic *siyar*, which also encompass the whole body of international law.[78]

After all, if international law of today is to remain truly international, there is a need for "greater participation by the other legal systems in the formulation and development" of its general principles. This becomes necessary because, as Baderin asserts, Muslim countries have "an important role to play in the modern international order through an evolutionary interpretation and injection of the paradigmatic ideals of Islam into the pragmatic policies of the modern international order."[79]

Significance of the Compatibility Approach

Methodological differences make the study of compatibility particularly important. Moreover, as one intends to adhere to the compatibility approach while analyzing legal questions in this book, it may also become necessary to apply the reconciliatory approach to resolve legal tension if need be. However, it is important to first consider whether Islamic law is

comparable with contemporary international law. Just as domestic law has been found to be comparable with international law,[80] it is also possible to make a comparative analysis between Islamic law and international law. It should be remembered that states that have adopted Islamic law as their legal system, such as Saudi Arabia, the Islamic Republic of Pakistan, and the Islamic Republic of Iran, considered it as their domestic law as well. Islamic law, though, is seen as religious law due to the Qur'an and the *Sunnah,* which are basic divine texts of Muslims and which are its primary sources.[81] The fact remains that Islamic law governs the activities between God and man on the one hand, and the dealings between man and man on the other hand.[82] This presupposes that it covers both religious and secular aspects of the law. Within the secular domain of the law there is Islamic international law, which regulates the conduct of Muslim states with the international community.[83] A comparative study has been considered necessary for the purposes of (1) analytical jurisprudence, which is the comprehension of the conceptions and principles of the two legal systems that are being compared; (2) historical jurisprudence, which is the understanding of the purpose of development of the two legal systems under consideration; and (3) ethical jurisprudence, which is having a better analysis of the practical merits and demerits of the two legal systems.[84] Aside from the purposes mentioned above, in the words of Salmond, "the comparative study of law would be merely futile."[85]

This book tends to make use of the analytical and historical jurisprudential purposes in its comparative approach with the aim of deducing any compatibility between Islamic diplomatic law and international diplomatic law, with the aim of achieving the following objectives. The first aim is to see whether Islamic law accords the same inviolability and immunity to diplomatic envoys as international diplomatic law, and also, to examine whether nonstate actors' actions against diplomatic missions can be successfully prosecuted based on the legal principles of Islamic law in Muslim states. The second aim, if both legal systems are compatible, is to determine whether Islamic diplomatic law complements international diplomatic law. The third aim, if both systems of law are incompatible, is to determine whether there can be ways of reconciling both legal systems, and in addition, to see how international diplomatic law can be applied in Muslim states in a fashion that is compatible with Islamic law.

Aims and Objectives of This Book

In an era in which the world is fast coming together under the canopy of globalization, it is necessary to bring Islamic law under the

searchlight of international legal mechanisms for the purpose of having a cross-fertilization of the two legal systems. This is true most especially in a period in which Islamic law—particularly Islamic *siyar* with its components, for instance, Islamic human rights law, Islamic environmental law, and the law of armed conflict in Islam—is being critically evaluated vis-à-vis modern international law. This also happens to be a period in which the legal atmosphere in most Muslim countries does not fully reflect the standards set down by Islamic law. However, regardless of the shortfall in the practices of these Muslim states, this does not diminish the importance of Islamic law principles as presented at the conclusion of a Seminar on Human Rights in Islam that "[r]egrettably enough, contemporary Islamic practices cannot be said to conform in many aspects with the true principles of Islam. Further, it is wrong to abuse Islam by seeking to justify certain political systems in the face of obvious contradictions between those systems and Islamic law."[86]

The book focuses on the compatibility of Islamic law and international diplomatic law with the aim of maximizing diplomatic protection in Muslim states by invoking Islamic law in support of international diplomatic law at the national level. The core of the book engages theoretical analyses of the two legal systems with a view to ascertaining the presence of any compatibility or tension in their respective principles on diplomatic law and then examines the practices of some Muslim States within the context of that theoretical analysis. The hypothesis of the book is that the two legal systems are compatible and can be harmonized to enhance the concept of diplomatic immunity and privilege in Muslim states. The book, therefore, aims at facilitating a better understanding of the relationship that exists between Islamic diplomatic law and international diplomatic law with the hope of ultimately maximizing diplomatic protection by clarifying and developing Islamic diplomatic law, which may, eventually, complement international diplomatic law.

Terminology Used in This Book

This book considers the notion of *ijtihad*, which is utilized to devise the methods by which Islamic law can be further advanced. These methods are known as the concepts of *ijma'a* and *qiyaas*. These sources and legal methods of Islamic law are guided by principles such as local customs (*'urf*), public interest (*maslahah*), and juristic preference (*istihsaan*).

The book also recognizes the difficulty in the vocabulary used in some chapters, particularly for those who are not familiar with the Arabic terms. I have carefully set out their meanings in a brief glossary.

The word *siyar*[87] has been used as a rough equivalent of "Islamic international law." Literally, the term *siyar* means "a particular manner of conduct as recorded in the biography of an exemplary person,"[88] and it can also, when used in the singular form (*seerah*), refer to any biography, but generally, it is used in reference to the biography of Prophet Muhammad (pbuh). In discussing Islamic international law, it is generally used by jurists to mean the conduct of a state in relationship with other communities and nations. The usage of the term *siyar* was first popularized in the second century of Islam by Hanafi jurists, particularly Muhammad ibn Hasan As-Shaybani (d. 804), although the actual meaning of the word *siyar* was not given by Shaybani.[89] As-Sarakhsi (490/1096), who wrote commentary on Shaybani's Siyar, gave a clear definition of *siyar* as "the conduct of the believers in their relations with the unbelievers of enemy territory as well as with the people with whom the believers had made treaties, who may have been temporarily (*musta'mins*) or permanently (*Dhimmis*) in Islamic lands; with apostates, who were the worst of the unbelievers, since they abjured after they accepted [Islam]; and with rebels (baghis)."[90] Various issues touching on Islamic international law are mostly discussed by jurists under *siyar*. The two terms *siyar* and "Islamic international law," are therefore used interchangeably in this book. It is worth mentioning that the term Islamic diplomatic law, which is used throughout this book, forms part of *siyar*.

Synopsis of Chapters

This book is divided into seven chapters including the introduction. Chapter 1, being the introductory chapter, which covers the general background and conceptual framework of the book, provides a broad introduction that aims to discuss diplomatic immunity and practices from Islamic law and modern international law perspectives. It stresses, as background, the importance of having meaningful negotiations between independent sovereign polities through the instrumentality of diplomatic practice, based on the consideration that globalization is fast becoming the new world order. With the sensitive nature of discharging diplomatic transactions between different States coupled with the immensity of the tasks attached to the office, the need to provide adequate protection for the diplomat therefore becomes imperative. This study demonstrates ample familiarity with the relevant academic work on the subject through an in-depth review of some pertinent literature and different approaches adopted by scholars on the subject. It also explains theoretical concepts and terms related to the subject from both Islamic and international legal perspectives.

Chapter 2 provides a historical overview of the universality of diplomatic practice, starting with the definition of diplomacy and diplomatic law and moving to a historical analysis of diplomatic practice in different ancient civilizations, such as the Greek, Roman, Hindu, Chinese, African, and Islamic civilizations, as part of the world major civilizations. It is obvious that these civilizations share little or nothing in terms of religious and cultural affiliation; rather, this chapter considers whether there was any intercivilizational contact between them in terms of their respective diplomatic practices. Chapter 2 further argues that, in view of the intercivilizational contacts that gave each civilization the opportunity to borrow from each other, diplomatic relations today have the potential for building a cross-cultural understanding among members of the international community. The chapter also discusses the impact on and contribution of Islamic law to the growth and development of international diplomatic law.

Chapter 3 provides a theoretical analysis of the sources of Islamic law and of international diplomatic law respectively by examining relevant areas of tension and compatibility between the two systems. The chapter seeks to provide an answer to the question, to what extent can the argument of some writers who hold the view that there is no element of materiality between Islamic *siyar* and the rules of modern international law be said to be correct? Chapter 3 critically evaluates and examines the argument of materiality or otherwise by considering the proper meaning and implication of the provisions of Article 38 of the Statute of the ICJ.

Chapter 4 engages with the salient comparative insight, which contains a macroscopic overview of diplomatic immunity and privileges by expatiating on the three classical theories—representative character, exterritoriality, and functional necessity—that represent the juridical rationale for diplomatic immunity. Also contained in this chapter is a quest into which among these three classical diplomatic theories forms a basis for diplomatic immunity under Islamic law. The chapter also discusses events leading to the codification of diplomatic relations and the various kind of diplomatic inviolability and immunity spelled out in the VCDR and the VCCR. Islamic law, in a similar fashion, also confers an important status on the diplomatic envoy so much, so that it is considered unlawful to maltreat or kill a foreign envoy either during peace- or wartime. The chapter then examines, in much detail, the relevance of the Treaty of Hudaybiyyah (628 AD) to modern diplomatic law by considering issues that relate to its compatibility with the provisions of the VCDR, VCCR, and the VCLT; the concept of *pacta sunt servanda* as it relates to treaties; the concept of reciprocity; and the concept of *aman*, or safe conduct.

Moving from theory to practice, chapter 5 provides a pragmatic analysis of diplomatic immunity in Muslim states, using Pakistan, Iran, and Libya as relevant case studies. The chapter evaluates the case involving the double murder committed by Raymond Davis, an American, in Lahore, Pakistan, who the United States claimed had diplomatic immunity in light of Pakistani diplomatic. The chapter also gives a thorough analysis of the 1979 *Case Concerning United States Diplomatic and Consular Staff in Tehran*, in which a group of militant students invaded and held members of the US diplomatic staff hostage based on the parameters of Islamic diplomatic law. It also discusses the implications of the 1984 shooting at the Libyan embassy in London, in which a woman police officer, Constable Yvonne Fletcher, was killed, had the case been considered under Islamic law. Generally, the chapter demonstrates a critical engagement with the issues in the cases analyzed from both Islamic and international law perspectives.

Chapter 6 examines the vulnerability of the diplomatic mission and personnel especially in the current era, in which terrorism has become not only institutionalized but also internationalized. In doing so, the chapter highlights the doctrine of jihad under Islamic law in contradistinction with the acts of terrorism, and further considers whether the act of terrorism perpetrated against diplomatic missions and personnel is justified under the principles of Islamic jihad. The chapter suggests how the acts of terrorism are treated in Muslim countries under Islamic law.

Chapter 8 then concludes the book by highlighting its major findings and providing recommendation in this regard.

2

Historical Overview of the Universality of Diplomatic Practice

Introduction

The world at large appears to have adopted a uniform kind of diplomatic practice that could be described as universal, particularly with respect to the exchange of diplomatic missions and personnel and the various types of diplomatic immunity attached to them. The amount of immunity given to diplomatic agents stems from the great importance ancient civilizations attached to the need for nations to remain in constant communication and to maintain unimpaired interrelations. When we talk of communication between societies, an embassy plays a different and vital role in this regard. It is quite different from the communication one gets from commercial exchanges; religious pilgrims; educational pursuit; transfer of slaves; and communication provoked by soldiers during war.[1] This is so because of the peaceful role that embassies play, even during wartime, to enhance communication between nations.[2]

This chapter first considers various meanings surrounding the word "diplomacy" and "diplomatic law," and then emphasizes its relevance to international law. Then, a historical analysis of diplomatic practice in different civilizations, such as the Greek, Roman, Hindu, Chinese, African, and Islamic civilizations, is presented with a view to establishing commonality in their various diplomatic practices. This chapter also discusses the contribution of Islamic law to the development of the concept of international diplomatic law by examining the interactions between the Islamic and Western civilizations. By so doing, it will then become easier to determine whether there is compatibility between Islamic diplomatic law and international diplomatic law.

Defining Diplomacy and Diplomatic Law

It has been observed that the word "diplomacy," along with its derivatives, such as "diplomatist" and "diplomatic envoys," only gained currency following the institutionalization of permanent legation in the late eighteenth century.[3] In contrast to this observation, Jonsson and Hall[4] perceive diplomacy as existing beyond the modern-day structure of state system. According to them, diplomacy is a "perennial international institution that expresses a human condition that precedes and transcends the experience of living in the sovereign territorial states of the past few hundred years."[5] To them, diplomacy is a phenomenon that is timeless in its existence.

Diplomacy, by its concept and practice, is a field of study that cannot be said to reside exclusively in or relate only to a particular discipline. It outstrips the boundaries of any particular discipline as it is interdisciplinary in relevance and scope.[6] In spite of its general relevance to various fields of knowledge, it remains, however, "a neglected field of academy study."[7] Nevertheless, there have been commendable attempts by many writers to give a lucid meaning to the term "diplomacy." Satow, for example, in his magnum opus, *A Guide to Diplomatic Practice,* has compendiously defined diplomacy as "the application of intelligence and tact to the conduct of official relations between the governments of independent states, extending sometimes also to their relations with vassal states."[8]

Diplomacy has also been defined by the *Oxford English Dictionary* as the "management of international relations by negotiation; the method by which these relations are adjusted and managed by ambassadors and envoys; the business or art of the diplomatist."[9] It is pertinent to mention that Nicolson's liberal realist perception of diplomacy, though firmly rooted in Graeco-Roman ancient political theory, is not in substance different from the previous definition given by the *Oxford Dictionary.*[10] Nicolson also makes clear his lack of conviction regarding the indivisibility of foreign policy and diplomacy when expounding, by way of distinction, "the curative methods of diplomacy" and the "surgical necessities of foreign policy"[11]:

> Diplomacy…is not an end but a means; not a purpose but a method. It seeks, by the use of reason, conciliation and the exchange of interests, to prevent major conflicts arising between sovereign states. It is the agency through which foreign policy seeks to attain its purposes by agreement rather than by war. Thus when agreement becomes impossible diplomacy, which is the instrument of peace, becomes inoperative; and foreign policy, the final sanction of which is war, alone becomes operative.[12]

Meanwhile, Nicolson's distinction between foreign policy and diplomacy has not gone unquestioned. Kissinger, in particular, has challenged it for being inadequate because, according to him, the effectiveness of diplomacy cannot be divorced from the domestic structure of states, which invariably, includes international order.[13] In acknowledging the fusion that exists between diplomacy and foreign policy, Burton also argues that the use of diplomacy will be maximized when it includes the entire process of managing relations with other states and international institutions.[14] The all-involving nature of diplomacy brings a considerable amount of exactitude to the statement of Lord Strang, a former British diplomat, who is reported to have said that "[i]n a world where war is everybody's tragedy and everybody's nightmare, diplomacy is everybody's business."[15] The fact is that diplomacy can no longer be restrictively seen in its traditional sense as the mere conduct of the foreign affairs of sovereign nations. It has indeed outlived that era. Diplomacy has now become much more relevant and related to foreign policy and to the process of foreign policy making.[16]

It is important to state that likening diplomacy to an obscure art concealed in the folds of deceit, believing that "it can exist only in the darkness of mystery,"[17] will not, arguably, garner any momentum. Accepting this contention amounts to giving credence to the view that the ambassador can be depicted as "an honest man sent to lie abroad for the good of his country."[18] The mere fact that the diplomat is saddled with the task of managing and portraying the beautiful image of his country abroad, will not still justify this assertion. This is because the functional essence of diplomatic relations transcends the art of lie telling or deceit. The main essence of diplomatic intercourse has, from time immemorial been and still remains an amiable apparatus through which nations ensure and maintain regular contacts.[19] One cannot but agree with the view that contemporary diplomacy now finds comfort in adapting to new prevailing conditions.[20] This view cannot be far from the truth, more so as it has now become apparent that twenty-first-century diplomacy is not just an amicable process of interstate relations, but an all-purpose modus of communication among the international community.[21]

Diplomatic law, however, has become necessary for enhancing the smooth conducting of official relations and negotiations between independent polities, including other subjects of international law. It therefore becomes imperative that a set of rules is in place to govern the business of international diplomacy. This, in other words, accentuates the essence of diplomatic law, the primary aim of which is not only to facilitate international diplomacy between the sending state[22] and the receiving state[23] but

also to govern the relationship between representative organs of major players in the international diplomatic business.[24]

Diplomatic law can also, by extension, if considered from a wider perspective, refer to the norms of international law regulating all other international law subjects such as international organizations, in addition to diplomatic institutions.[25] It has been observed, however, that the international law norms regulating diplomatic and consular interactions for ages were basically customary[26] before they were later codified and embodied in the two Vienna Conventions: the 1961 VCDR and the 1963 VCCR.

It is important to mention that the general scope of this book is confined within the context of diplomatic law as it relates to diplomatic missions and their personnel.

Diplomatic Law in Antiquity

The prehistoric nature of the concept of diplomatic immunity and inviolability has been extensively discussed in various distinguished scholarly publications.[27] However, a cursory glimpse into the pages of history regarding this important concept of international law will immensely benefit the purpose of this chapter. It is paramount to mention that the intention here is to place diplomatic immunity in historical perspective with a view to making a comparative elucidation and examination of its practice among various ancient civilizations.

The fact that diplomacy by its nature is primordial and also universal in its practice regarding the immunity and inviolability of its personnel is remarkably attested to in the preamble to the VCDR, which commences thus: "recalling that people of all nations from ancient times have recognized the status of diplomatic agents." In further confirming the age-long historical relevance of diplomatic institution along with its attendant privileges and immunity, no truer remark can be made of it other than that it has enduringly "withstood the test of centuries,"[28] if we may use the words of the ICJ.

It has been copiously argued by legal scholars that the law of diplomatic immunity, in its prehistoric contexts, owed its existence and relevance to religious belief systems rather than to any legal obligations in the name of treaties. The special privileges and immunities enjoyed by emissaries in the ancient period were not as a result of strict adherence to any law in the form of the present-day international law.[29] The nexus between the sanctified position of the envoys and religious beliefs in ancient Greek, for example, is discernable from the declaration made

by Alexander when he stated that no one shall perform the functions of an embassy "unless he had first washed his hands in water poured over them by heralds, and had made a libation to Zeus from goblets wreathed with garlands."[30] This influence of religion in the early practice of diplomatic immunity is present in virtually all known civilizations of the past. It has, however, been submitted that the influence of religion on this age-long concept of international law cannot claim to be dominant.[31] But then, it remains a historical fact that early diplomatic practice relied, to a great extent, on the sanctity of religion to safeguard and protect the personof the envoys.[32]

Various civilizations of the past confirm the universality of the early practice of diplomatic intercourse and diplomatic inviolability, albeit in varying degrees. A glance into the pages of history reveals the presence of historical evidence pointing toward the availability of the rudiments of diplomatic activities and the sanctity of diplomatic envoys, which are traceable to ancient civilizations of the Greeks, Romans, Muslims, Chinese, Africans, and Hindus, to mention but a few.[33] It has, however, been observed that members of medieval societies evolved their own methods of declaring wars, resolving conflicts, and negotiating commercial transactions among themselves. These critical activities inevitably required the services of intercommunity messengers whose freedom of movement, personal immunity, and safety had to be guaranteed if they were to discharge their tasks effectively.[34] An insight into the extent to which the concept of diplomatic immunity left its impression on the pages of early history will be better appreciated by considering, with substantial amount of precision, some of these civilizations.

Diplomatic Practice in the Greek Civilization

The classical age of the Greek states was overwhelmed by intrastate wars, which necessitated the formation of loose and temporary alliances with a view to the states fortifying themselves against their adversaries.[35] The services of envoys were required to facilitate the endorsement of these alliances and also broker peace if need be. Not only were these emissaries granted immunity to enable them safely discharge this highly exacting task but also they were equally placed under the divine protection of Zeus.[36] Desecration of the sanctity of any of these emissaries was considered to be synonymous with perpetrating a heinous sin against the gods.[37]

The diplomatic system of the ancient Greeks, though considered to be parochial and rudimentary in scope and application,[38] has often been considered as a source of reference when talking about the history of

diplomatic immunity.[39] Just as in most ancient civilizations, ambassadorial position in ancient Greece was strictly ad hoc in character. However, much emphasis was placed on oratory skills, in addition to the wisdom and respectability of those to be appointed with discharging this highly honored task as they were not professional diplomats. This explains why ambassadorial assignments in early Greece were usually carried out by professional orators or actors. The diplomacy of the Greeks has been observed as being characterized by two distinct types of diplomatic representatives—heralds and ambassadors.[40] The heralds were, in most cases, individually sent to deliver messages that were uncomplicated, while on the other hand, the ambassadors, who were usually larger in number, had the task of advocating and negotiating on behalf of their states in the courts of other sovereigns.

While acknowledging the unparalleled depth of the mechanism of the Greeks' international and diplomatic intercourse in the fifth century, having evolved concepts touching on the declaration of wars, initiation of peace, exchange of diplomatic personnel, and many more, one still finds the idea behind the Greeks' diplomacy elusive. Perhaps this points to why it appears difficult to find a reason for believing that ambassadors in the ancient Greek states had the privilege of absolute immunity and inviolability.[41] Ambassadors in these states not only suffered physical assault at the hands of the receiving states but also endured enormous physical harm and even death, resulting from the unexpected interception by a third state. An example can be seen in the delegation of Corinthian, Spartan, and Tegeate envoys who were killed in Athens. These envoys were on a mission to Persia to solicit the support of the king against Athens. They stopped on their way through Thrace to persuade Sitalces to revoke his alliance with Athens. Unknown to them, two Athenian envoys were also visiting Sitalces who had also succeeded in persuading Sadocus, the son of Sitacles, to have these Peloponnesians arrested and subsequently executed in Athens.[42]

In addition to the foregoing details, Nicolson was able to identify three reasons to justify his conclusion that the Greeks "made a mess of their diplomacy"[43] notwithstanding its acclaimed excellent concepts:

> In the first place, they were afflicted with what Herodian has called "that ancient malady of the Greeks, the love of discord." Their jealousy was so poisonous that it stung and paralysed their instinct for self-preservation. In the second place the Greeks were not by temperament good diplomatists, but bad diplomatists. Being an amazingly clever people, they ascribed a wrong value to ingenuity and stratagem, thereby destroying the basis

> of all sound negotiation, which is confidence. They were moreover tactless and garrulous; they lacked all sense of occasion; and they were woefully indiscreet.... In the third place they failed, in their external as in their internal affairs, to establish a correct distribution of responsibility between the Legislature and the executive.... It was this final fault that brought them to ruin.[44]

Diplomatic Practice in the Roman Civilization

The diplomatic practice in ancient Rome, though ad hoc in nature, was in the same way as the Greeks, firmly embedded in their religious beliefs. The Romans' practice of diplomatic immunity not only originated from their belief system but also had a strong affinity for the "custom of respect for the sacred character of envoys during the early republican era."[45] All issues relating to or emanating from the external relations of ancient Rome were handled by a body referred to as the College of Fetials,[46] which relied on the instrumentality of its fetial law. It has also been observed that the making and the application of this law were again deeply rooted in the Roman religion.[47] Adherence to external obligations in the form of treaties was perceived as the fulfillment of oaths made to the Roman gods, such as Jupiter. Perhaps, this might account for the credence given by writers like Hill[48] and Frank[49] to the College of Fetials as an important point of reference when talking about diplomatic activity in early Rome, Aside from the fetials, there were the *nuntii* or *oratores* (other names) who were ambassadors, usually appointed by the Senate from among the Knights. Upon appointment, they were given credentials and specific instructions that also defined the extent of their authorities.[50]

The Romans' respect for the inviolability of the person of the foreign ambassador also extended to his property throughout the duration of his diplomatic mission. There is no evidence, however, that this privilege covered the official correspondence of the envoy, which in most cases, were subjected to great controversy.[51] If any member of a foreign mission violated the law, such an envoy would be sent back to his country for appropriate punishment.[52] The Roman state took serious exception to any act of maltreatment against a foreign envoy to the extent that any of its citizens found to have breached this *hospitium*[53] would be made to face the consequence of noxal surrender.[54] This is another form of extradition practiced by the early Romans whereby a person who desecrated the sanctity of the *hospitium* bestowed on the foreign envoy would be surrendered to the aggrieved nation for the necessary punishment.[55] Instances of such extradition have been amply cited by Bederman[56] in discussing the "Reception and Protection of Diplomats and Embassies."

There are however, reported instances in which the Roman authority failed to adhere to its proclaimed principle of diplomatic inviolability. One such failure was when the Roman Senate rejected the demands made by the *fetials* calling for the extradition of Fabius Ambustus to the Gauls for waging war against his host, the Gauls, who had received him as ambassador.[57] Bederman, however, still finds reason to applaud the diplomatic conduct of the Romans, which, according to him, generally complied with established norms in spite of this ugly incident, which he himself considered to be an aberration.[58]

The increase in the dominant strength of the Roman Empire has been observed to be a factor responsible for the contempt with which the Romans treated foreign embassies.[59] A visiting emissary, for example, had to seek approval from a Roman general, permission to send envoys. Upon arrival, these envoys had to wait at the outskirts of Rome and then announce their presence to the *quaestor urbanus,* who would not give permission for them to be admitted to the Graecostasis[60] until thorough identification and verification of their credentials had been made.[61] Where such credentials were assessed to be defective or inadequate, the emissaries would not only be denied audience but also will be required to, without any delay, vacate the territory of the Romans.[62] But where their credentials were found to be in order, they would be required to wait until an audience was arranged for them with the Senate. Not until then would they be allowed to address the Senate at the Curia. At the end of the address, they would be conducted back to the Graecostasis and thereafter returned to the Curia to get the senatorial reply.[63]

It can, therefore, be rightly submitted that perhaps the diplomatic intercourse of the Roman Empire with other foreign emissaries, whose missions mostly revolved around rendering tribute and reaffirming unwavering loyalty to the Roman hegemony, was a reflection of the imperialistic nature of the Roman Empire.[64] Such a relationship, in the words of Cohen, can best be described as one between "suzerain and vassal"[65] rather than between two equal sovereigns as it ought to be. No wonder, then, that Nicolson unhesitatingly attributed the inability of the Romans to appreciate diplomatic niceties and their failure to bequeath useful lessons that could aid good negotiations to their being "too dictatorial" and "too masterful."[66]

Diplomatic Practice in the Hindu Civilization

In ancient India, emissaries sent on foreign assignments were of three different categories: *Nisrishtartha*— an ambassador endowed with full authority to negotiate on behalf of the sending state; *Parimitartha*—an

ambassador who must not, on any condition, deviate from his instructions; and *Sasanahara-duta*—though an ambassador, literally the title means a messenger whose main task was to deliver a message without the authority to negotiate.[67] Like in many other civilizations of ancient times, the exchange of diplomatic envoys in the ancient states of India was of temporary nature, just as the protection of foreign emissaries was firmly sanctioned by the Indian ancient religion. It is evidenced from the *Ramayana*[68] that the *duta*, being a mere messenger charged with the duty of delivering the message of his master, must not be subjected to any punishment even when found to have acted in a provocative manner.[69] Similarly, a king who killed an ambassador, according to the *Mahabharata*,[70] would end up in hellfire along with his ministers.[71] It must, however, be mentioned that the degree of immunity and protection the Indians gave to envoys was not without limitations, thereby undermining the amount of inviolability an envoy was privileged to enjoy in India.[72] A foreign envoy, for instance, who was found to have committed a crime, flagitious in nature, would not be protected by reason of immunity, as he could still be mutilated, but then he must not be put to death.[73] It was an established principle in the ancient Indian foreign relations that representatives of a foreign mission must not, for fear of death, be dissuaded from accomplishing their mission.[74]

There is historical evidence confirming the existence of diplomatic intercourse, not only between the ancient Indian states but also between the Mauryan Empire of India and some of the Hellenistic kingdoms that emerged consequent upon the break-up of Alexander's Empire.[75] History has it that during the period of Emperor Ashoka, *dutas* were sent to far-off states like Syria, Egypt, Macedon, Epirus, and Cyrene.[76] It has also been recorded that Indian emissaries on missions of good will were sent to China with requests for certain commercial concessions.[77] Based on such evidence, it therefore becomes difficult to agree with the submission made by Bederman that "there is simply no historical evidence to suggest that there was any substantial diplomatic contact between Indian and Chinese cultures, nor between these great Asian international systems and those of the Near East and Mediterranean."[78] This submission appears to form the basis by which Bederman excluded India from prominent civilizations that have contributed to the development of international law. It is to be noted that the distance of India from other countries accounted, to some extent, for the irregularity in its diplomatic contacts with other civilizations.[79] Also, identifiable in the Indian diplomatic tradition was the undaunted will of the Indian envoy in carrying out espionage activities in the host state on behalf of his country. While

overtly orchestrating the claims of his state in the court of the host state, he would, at the same time, clandestinely be assessing the strengths and weaknesses of the host state, even if it meant resorting to means that can, at best, be described as bizarre.[80]

Diplomatic Practice in the Chinese Civilization

The diplomatic tradition of the Chinese can be rightly depicted, just like that of Greece, as imperialistic and parochial in nature, resulting from its "rigidly hierarchical and ethnocentric attitude."[81] The ancient Chinese empire so much believed in the superiority of its culture that it failed to acknowledge the existence of other civilized nations.[82] Since to the Chinese, China was the sole world state just as it was the center of humanity,[83] all other non-Chinese were, therefore, regarded as barbarians who could only be interacted with as unequal vassals.[84] It could, therefore, not be expected that such a nation would relate diplomatically with other nations on equal terms.

The failure of the Chinese to see other nations as equals has been attributed to their tremendous population; the overwhelming quality of their civilization; and the remoteness of their geographical location.[85] The response of the Chinese emperor to Lord Macartney's attempt (acting on behalf of King George III of the United Kingdom) to establish diplomatic ties with China was an indication of the nature of the Chinese diplomatic practice:

> As to the request made in your memorial, O King, to send one of your nationals to stay at the celestial court to take care of your country's trade with China, this is not in harmony with the state system of our dynasty and will definitely not be permitted. Traditionally people of the European nations who wished to render some service at the celestial court have been permitted to come to the capital. But after their arrival they are obliged to wear Chinese court costumes, are placed in a certain residence and are never allowed to return to their own countries.[86]

Of equal relevance in appreciating the parochial nature of Chinese diplomacy is the majestic letter of the emperor of China to King George III of Great Britain, which reads thus:

> Swaying the wide world, I have but one aim in view, namely, to maintain a perfect governance and to fulfil the duties of the state. Strange and costly objects do not interest me. I…have no use for your country's manufactures.…It behoves you, Oh King, to respect my sentiments and

> to display even greater devotion and loyalty in the future, so that by perpetual submission to our throne, you may secure peace and security for your country hereafter.... Our Celestial Empire possesses all things in prolific abundance and lacks no product within our borders. There was, therefore, no need to import the manufactures of outside barbarians for our produce.... I do not forget the lonely remoteness of your island, cut off from the world by intervening wastes of sea, nor do I overlook your excusable ignorance of the usages of our Celestial Empire.... Tremblingly obey and show no negligence.[87]

In spite of these seeming limitations of traditional Chinese diplomacy, the Chinese empire was able to develop a scheme that aptly and amply reflected its claim to universal superiority.[88] This scheme, which has been described as being tributary in nature, defined the kind of relationship the Chinese empire was willing to have with its neighbors and even far-off states.[89] The tribute envoy was accompanied to the capital by Chinese officials upon arrival at the Chinese border. The envoy did not have the privilege of an audience with the emperor until he had been thoroughly taught the protocol relating to an appearance at court, which most importantly, must include the *Kotow*.[90] A proper assimilation and successful exhibition of these rituals by the tribute envoys in the presence of the emperor was regarded as a tacit acceptance of his superiority, while at the same time their acknowledgment of the inferiority of their status as envoys of a vassal state.[91] After observing the Kotow, the envoys enjoyed a further privilege of moving closer to the emperor on his throne for a majestic conversation. The envoys and their ruler were usually, in return for their tribute, bestowed with valuable gifts by the emperor, and at the end of their visit, they were given within three to five days to transact with Chinese merchants and then vacate the Middle Kingdom.[92] Rossabi has given a vivid description of the tribute system of the Chinese Empire:

> The tribute system enabled China to devise its own world order.... Equality with China was ruled out. The court could not conceive of international relations. It could not accept other states or tribes as equals. Foreign rulers and their envoys were treated as subordinates or inferiors. It refused entry into China to those who rejected its system of foreign relations. The Chinese emperor was not just a *primus inter pares*. He was a Son of Heaven, the indisputable leader of the people of East Asia, if not the world.[93]

Diplomatic Practice in African Civilization

Most scholars have refused to ascribe any recognition to a distinct African civilization due to what appeared to be the multifragmentation

of different civilizations, all within what is now known as African civilization.[94] For instance, the eastern coast and the North of Africa were considered as of the Islamic civilization; Ethiopia was viewed as a distinct civilization; and the manifestation of Western civilization as a result of European imperialism was predominant in some other parts of Africa. For the purpose of this discussion, without necessarily delving into an unending polemics, this writer will rather ally himself with the opinion of some scholars who strongly believe in the existence of an African civilization.[95]

In traditional African communities, the people largely recognized and observed the principles of diplomatic interactions among themselves and with other non-African communities. The Egyptian-Hittite relations, which occurred about 1350 BC, can serve as one of the classical examples of the diplomatic activities of the people of ancient Egypt. It has been recorded, as narrated by McClanahan, that an Egyptian queen, a royal wife of Tutankhamen, sent a letter to the Hittite monarch explaining that she had no husband and sons. She requested that if the Hittite king would allow one of his sons to marry her, that son had the chance of becoming the Pharaoh of Egypt.[96] The king, of course, gave his permission to her proposal after sending envoys to verify the veracity of her story in Egypt. The Hittite prince who was to marry the Egyptian queen was attacked and killed in Syria on his way to Egypt.[97] According to Wilson, "[t]he Hittite army marched into Syria, captured the murderers, and led them to the Hittite capital to be tried and condemned in accordance with international law."[98] This incident, at least, confirms the existence of diplomatic understanding along with some diplomatic privileges between the Hittite kingdom and ancient Egypt.

In the West African region, different communities were in the habit of receiving diplomatic missions and sending them to each other.[99] It is a fact known to history that the earliest African diplomatic envoys enjoyed diplomatic immunity in order to give a measure of protection to their persons and personal belongings throughout the duration of their official assignments.[100] That is, the practice required that they could not be harassed, maltreated, or even killed, which traditionally conformed to the African principle of hospitality that was usually and readily extended to visitors from near and far.[101] It was the custom among different communities in the West African region, particularly at the beginning and end of diplomatic negotiations, to break and serve kola nuts to their visitors as a way of expressing their hospitality.[102] In the account given by Polk regarding the diplomatic intercourse of

Nuban[103] people, a primitive tribe in Africa, with their hostile neighbors, he says that

> [t]he ambassador was often a captive or former slave who knew the language, the customs, and perhaps some of the members of another tribe. That helped, but he could not rely upon these things for protection. Rather, he was protected by ritual status symbolized by a special spear. Carrying it, he could go inviolate into villages to negotiate with his counterparts. When agreements were reached, the chiefs of the path sanctioned them with religious or magical rites and threatened truce violators with curses thought to produce leprosy.[104]

Diplomatic envoys were generally referred to as "messengers," "heralds," or "linguists," depending on the tasks assigned to them. They were often chosen from among those individuals who were close to the monarchs from among the slaves and captives, and occasionally, from members of the royal household. There was an instance in which the Congolese embassy that was sent to Rome in 1514 had a royal prince as one of its emissaries.[105]

In the old Oyo Empire,[106] for instance, the Alaafin of Oyo[107] usually had at his disposal, those known as the *Ilari*,[108] also referred to as "half heads," attesting to the custom of having to shave half of their heads and apply a magical substance into it. The senior males within the *Ilaris*, according to Smith, "acted as a bodyguard to the Alafin and also as his messengers to the outside world,"[109] while the junior ones within the *Ilaris* were charged with the menial and administrative duties at the palace.[110] Usually, in ancient Africa, diplomatic envoys carried a form of credentials such as a staff, spear, wand, a cane, baton, a whistle, or a sword as official symbolic emblems, which was an almost universal practice.[111] Particularly famous among these credentials were the staffs carried by the Ashanti and Dahomey ambassadors, which were generally adorned with gold or silver leaf.[112]

Diplomatic missions in ancient Africa, just like in other ancient civilizations, were temporarily dispatched for different purposes.[113] That is not to say that the idea of harboring resident envoys from abroad was completely alien to African diplomatic practice. There are, of course, copious instances of rulers who had resident representatives in outside communities for the collection of tributes or war spoils. For instance, in the early sixteenth century, the Askia Muhammad, the ruler of the Songhay Empire, was reported to have stationed "some of his courtiers perpetually residing at Kano"[114] for the purpose of collecting tribute

that was due to him from that kingdom. Similarly, the account given by Argyle suggests that the Alaafin of Oyo had his ambassadors stationed in Dahomey, in the latter part of the eighteenth century, for the purpose of collecting tribute that was due to him, and possibly gathering his share of the proceeds from any Dahomean military successes.[115]

African people were conversant with the principles of diplomatic immunity since they understood the sacred nature of the duties that diplomatic envoys had to discharge. Therefore, it was considered sacrilegious and, in fact, taboo to maltreat or kill an emissary, inasmuch as he did not act as a spy.[116] It is generally common among all peoples, in all kingdoms and lands, that when diplomatic envoys have credentials that proclaim their official status as the representatives of any rulers or sovereigns, then, "they are guaranteed complete freedom in access, transit and egress, and perfect safety from any hindrance or violence."[117] That is, they must be adequately protected. According to Ajisafe, in describing the Yoruba native custom regarding diplomatic immunity, the "[e]mbassy between two hostile tribes, countries, or governments is permissible in native law and the ambassador's safety is assured; but he must not act as a spy or in a hostile way."[118] It must be said, however, that there may be instances in which diplomatic immunity was circumscribed.[119] Such cases can only be described as exceptions to the general rule of diplomatic practice.

Diplomatic Practice in the Islamic Civilization

Diplomatic interaction, being a universal bequest of antiquity, was also practiced in Islam starting right from the periods of Prophet Muhammad (pbuh) (570–632 AD); the first four Caliphs (632–661 AD); the Umayyad dynasty (661–750 AD); the Abbasid Empire (750–833 AD); and on down to the Ottoman Empire (1260–1800). This section looks at various examples from these periods to ascertain the extent of diplomatic practice in the early periods of Islam.

The Islamic Connotation of Safara

First, the Arabic terms *saafir* or *rasul* are often used by commentators on Islamic law when referring to a diplomatic agent or envoy. The word *saafir*, which means ambassador, is a derivative of the verb *safara*, the original meaning of which is "conciliation or peaceful settlement."[120] *Rasul*, however, is a word derived from the verb *arsala*, which means "to send or dispatch." In practice, the usage of the term *saafir* has generally been reserved for a diplomatic agent, unlike *rasul*, which is understood to have a religious connotation.[121]

The Arabs, prior to the advent of Islam, were not unfamiliar with diplomacy and diplomatic relations, the scope and practice of which became elaborate and widened with the emergence of the Islamic civilization.[122] Records shows that 'Umar ibn Khattab (577–644 AD) was once the Quraishite[123] ambassador to other Arab tribes prior to the emergence of Islam, while the foreign affairs of Makkah were then left in the hands of Banu 'Uday.[124] The mission led by Abdul-Muttalib (the grandfather of Prophet Muhammad), consisting of his sons and some of the leaders of Makkah, to have a direct talk with Abrahah, who was bent on destroying the Ka'bah,[125] was also considered as a diplomatic conversation—a *safaarah*—according to some historians.[126]

The Emergence of Islamic Diplomatic Law

It must be mentioned that diplomatic practice in the early days of Islam, just as it was the practice in other ancient civilizations,[127] was not carried out on a permanent basis.[128] It was, however, obvious that no receiving state was willing to take the risk of accommodating an envoy for a period longer than necessary so as not to compromise its state security. Abu-Bakr (573–634 AD), the immediate successor of Prophet Muhammad (pbuh), was explicit in his instruction to Yazid ibn Abu Sufyan regarding foreign envoys that he should "make their period of stay (residence) at your camps short, so that they quit while they are still ignorant. Let them not look about, so that they may not see your weakness and know your disposition."[129]

The practice of diplomacy in the early days of Islam was not only utilized as a necessary postwar tool to pave the way for peace but also was resorted to in times of peace. An appropriate instance can be seen in the treaties signed by the Islamic *ummah* (community) as represented by Prophet Muhammad and the Madinites, the Jews, and the Christians, and the famous Treaty of Hudaybiyyah (628 AD) between the Islamic *ummah* and the Makkans.[130] These treaties are considered to have been signed not as result of any looming war or as a consequence of any hostility. If one also considers the overwhelming peaceful intercourse that existed between the early Islamic community of the Umayyad period and the Byzantine Empire, in spite of the seeming irreconcilable nature of the hostility between these two great nations, one would challenge Khadduri's view that Islam cannot be said to have adopted diplomacy "essentially for peaceful purposes as long as the state of war was regarded as the normal relation between Islam and other nations."[131] In fact, it cannot be truer that this belligerent attitude between these two avowed enemies was never allowed to constitute an impervious obstacle to harmonious

relations.[132] No wonder Abdul Malik bin Marwan (684–705 AD), the fifth Umayyad Caliph, signed an agreement to pay a weekly tribute to the Byzantium Emperor.[133]

It has also been reported that the Islamic state under the reign of the Umayyads executed a diplomatic treaty with Cyprus after it had been conquered by Muawiyyah bin Abi Sufyan (602–680 AD) as the then-governor of Syria, allowing the Cypriots to exhibit dual loyalty to both the Romans and the Muslims. The people of Cyprus, by the said treaty, were under an obligation to pay an annual tribute to the Islamic state, while at the same time, they were not to abate their commitment to remitting taxes to Byzantium. They will also, in addition, were exonerated from partaking in any warfare with the Muslims against the Byzantines, provided that they did not fail to warn the Islamic state of any impending hostility by the Romans.[134] These instances, among others, give credence to why one may find it arguably unacceptable to assume that an unrelenting state of war or bellicosity was the most essential hallmark of the relation Islam had with other nations. One cannot, therefore, but agree with the submission of Zawati that, "based on the doctrine of *jihaad*, in which 'peace is the rule, war is the exception,' diplomacy has played a distinctive role in the peaceful missionary work of Islam."[135]

Some writers are of the view that the theory of diplomatic relations was embraced by Islam as "a temporary necessity,"[136] given the "Islamic concept" of dividing the world into two—*dar al-Islam* (abode of peace) and *dar al-harb* (abode of war).[137] With the application of the third division of the world into *dar as-sulh* (abode of treaty),[138] Muslim states and non-Muslim states were able to interact among themselves peacefully while observing the terms of the treaties. The history of Islam is replete with factual instances accentuating the importance of the concept of diplomatic relation to the political life of Islam right from its inception. In fact, the spirit of diplomatic practice has for a long time formed and still forms today, the basis of interaction between Muslim states and other nations. For a comprehensive understanding of diplomatic practice in Islamic law, this section carefully examines the various stages of Islamic history commencing with the period of Prophet Muhammad (pbuh).

Diplomatic Practice at the Time of Prophet Muhammad (570–632 AD)

Aside from the first set of envoys sent by Prophet Muhammad (pbuh) to Negus, the Emperor of Abyssinia,[139] many more Muslim envoys and ambassadors were sent, particularly during and after the signing of the

famous Treaty of Hudaybiyyah (628 AD), to other Arab tribes. In a bid to convince the Makkans about the good intentions of Prophet Muhammad (pbuh) and the Muslims to enter Makkah only for the purpose of performing the *'Umrah* (the lesser pilgrimage) and to return immediately afterward, Prophet Muhammad first dispatched Khirash ibn Umayyah and thereafter, 'Uthman ibn 'Affan (577–656 AD)[140] to the Quraysh, even though Khirash suffered an attack at the hands of the Qurayshites and it was also rumored that they had killed 'Uthman.[141] Perhaps it should be mentioned that the conclusion and execution of the Treaty of Hudaybiyyah was made possible as a result of the diplomatic acumen tremendously displayed by Prophet Muhammad (pbuh) as opposed to the confrontational attitude of the Makkans.

With this epoch-making event came the dispatch of Muslim envoys to various kingdoms consisting of Arabs and non-Arabs. For instance, Haatib ibn Abi Balta'a was sent to Muqawqas, the governor of Alexandria; Abdullaah ibn Hudhaafa al-Sahmi to the king of Persia; Dahiyyah ibn Khalifah al-Kalbi to Heraclius, the emperor of Byzantine; 'Amr ibn Umayya al-Damri was sent to Negus (As'hamah Ibn al-Abjar), the Abyssinian emperor; 'Amr ibn al-'As to the kings of Oman; Salit ibn 'Amr to the kings of Yamama; al-'Ala' ibn al-Hadrami to the king of al-Bahrain; Shuja' ibn Wahb al-Asadi to the Ghassanid king; al-Muhaajir ibn Abi Umayya al-Makhzumi to the Himyarite king; and Mu'aadh ibn Jabal to the kings in Yemen.[142]

Prophet Muhammad, in selecting the bearer of his message in the courts of the world powers at the time, was quite aware that eloquence was one of the highly cherished qualities a diplomatic agent must possess. The envoys were men endowed with the power of language, and were particularly conversant with the languages and political atmosphere of their hosts. Perhaps this explains why the two eminent authors of *Tabaqaat*[143] and *Khasaa'is al-Kubra*[144] described these envoys as men who have received the miraculous gift of languages, owing to their ability to speak the languages of the countries they were deputed. These envoys were dispatched with the requisite credentials, specifically addressed to individual potentates. Interestingly, these emissaries were warmly received and their messages favorably responded to by the potentates of the respective states to which they were sent, except Chosroes, the king of Persia, who out of irrepressible rage tore the Prophet's letter to shreds.[145]

It has also been documented that Sa'd ibn Abi-Waqqas (595–674 AD) was the first Muslim envoy sent to China. This fact is attested to by the Chinese Muslims' reverence for a tomb in Canton, which up until the present day bears the name of Sa'd ibn Abi Waqqas (595–674 AD).[146]

Also, attesting to the existence of diplomatic interactions between the Islamic world at the time and China as far back as the mid-eighth century is evidence from Chinese records referring to *amir al-mu'minin* (a title for the head of the Islamic state) as *hanmi-mo-mo-ni;* abu-al-Abbas (the first caliph of the Abbasid dynasty) as *A-bo-lo-ba;* and Haarun (the famous caliph of the Abbasid dynasty) as *A-lun*.[147] The intercourse between the Muslims and the Chinese can again be inferred from the instructions of Prophet Muhammad (pbuh) to the Muslims charging them not to relent in their quest for knowledge even if it means traveling as far as China.[148]

Not only were emissaries and ambassadors dispatched to foreign lands in the early days of Islam, as outlined above, but records also show that Prophet Muhammad (pbuh) had a designated place in his mosque known as *ustuwanaat al-wufuud*—pillars of embassies—in which he usually received foreign delegations and embassies.[149] He was not discourteous to visiting foreign envoys despite the horrendous treatment meted out to his emissaries. A typical incident was the killing of Al-Harith ibn 'Umair Al-Azdi, an envoy of Prophet Muhammad (pbuh), by Shurahbil ibn 'Amr Al-Ghassani, who was then the governor of Al-Balqa'. This envoy was intercepted on his way to the ruler of Busra by Shurahbil, who had him tied up and beheaded.[150]

The historic and bloodless conquest of Makkah by the Muslims was followed by an unimaginable wave of deputations from neighboring Arab states that came to signify their submission to the rule of the Islamic state. Among the tribes and states whose emissaries Prophet Muhammad received were the Banu Tamim; Banu Zubayd; Banu Hanifah; Himyar; Kinda; Banu 'Aamir; and Banu Tayy.[151] These envoys, in addition to being warmly received, were also presented with gifts and comfortably accommodated. Additionally, it was the practice in the early days of Islam for visiting envoys to be instructed on what protocols to observe when meeting with Prophet Muhammad (pbuh).[152]

The immunity and personal inviolability of foreign envoys was upheld by Islam, as exemplified by Prophet Muhammad's reaction to the two envoys of Musaylimah Ibn Habeeb. These envoys, named Ibn An-Nawaahah and Ibn Uthal, were sent by Musaylimah to deliver a letter to Prophet Muhammad (pbuh) which read thus:

> From Musaylimah, the apostle of God, to Muhammad, the Apostle of God. Peace be unto you. I, then, inform you that I have been associated with you in this mission, and that we have half of the territory, and Quraysh has the other half, but Quraysh is an aggressive community.[153]

When these envoys reiterated their firm believe in the contents of Musaylimah's message, Prophet Muhammad (pbuh) then gave the following response, which was to become the substratum upon which the Islamic concept of diplomatic immunity and inviolability was built: "By God, if it were not the tradition that envoys could not be killed, I would have severed your heads."[154] This response gives a vivid picture of the level of respect that was accorded to envoys in the early period of the Islamic civilization, which was that under no circumstances must an envoy be killed, punished, or maltreated. An envoy would, however, be declared persona non grata rather than being killed or maltreated if found guilty of espionage against the Islamic state or found to have committed any of the prohibited acts.[155] With this classical pronouncement of Prophet Muhammad, it therefore becomes imperative to question the exactitude of Khadduri's submission that, while the envoys are still on the Muslims' soil and hostility arose, "they (envoys) were either insulted or imprisoned or even killed."[156]

Diplomatic Practice: The First Four Caliphs (632–661 AD)

Just like in the time of Prophet Muhammad, the era of his foremost successors also recorded some diplomatic relations with foreign states. In strict adherence to the teachings of Prophet Muhammad (pbuh), Abu-Bakr (573–634 AD), the first caliph, was reported to have instructed, as part of his farewell speech, Yazid Ibn Abu Sufyan, when the latter was leading an expedition to Syria, in the following words: "in case envoys of the adversary come to you, treat them with hospitality."[157] This era witnessed a tremendous exchange of envoys between Muslim and non-Muslim states. It has been further reported that the eighth century witnessed more than 30 missions from the Muslim state to the Chinese Empire.[158]

Diplomatic Practice: The Umayyad and Abbasid Periods (661–750 AD)

The diplomatic intercourse of the then-Islamic empire with neighboring kingdoms, according to Zawati, attained the height of "sophistication" during the period of the Umayyad and most especially, the era of the Abbasid dynasty.[159] The large number of peace treaties conclusively negotiated with other kingdoms at that time attests to the diplomatic successes achieved by this Muslim state.[160] Muawiyyah bin Abi Sufyan (602–680 AD), an Umayyad caliph, was known for his preference for diplomatic methods, which has been observed to be a reason behind the longevity of his reign.[161] Hitti, in his *Makers of Arab History,* refers to a

statement by the caliph that signifies the level of his penchant for diplomacy: "I apply not my lash where my tongue suffices, nor my sword where my lip is enough, and if there be one hair binding me to my fellow men, I let it not break. If they pull, I loosen, and if they loosen, I pull."[162] These periods also witnessed quite a number of Muslims sent on diplomatic missions to the courts of various potentates for reasons ranging from political to commercial to social purposes, and on some other occasions, just for the purpose of exchanging friendly gifts.[163]

The period of the Abbasid has particularly been acknowledged to have expanded, in no small magnitude, the ambit of the international connections the Islamic state had with other nations, especially in the area of commerce.[164] The Abbasid sovereigns created the office known as Nizam-ul-Hadratain, which was in charge of employing a "special envoy to transact confidential business with neighbouring potentates."[165] The foreign relations of the Abbasid Caliphate have been identified and greatly applauded for being a monumental factor upon which rest the enormous power, glory, and progress recorded by the caliphate.[166] It is most likely correct that the emergence of *siyar*, as a new area of jurisprudence in Islamic law at that time, must have been prompted by this outstanding advancement in the Muslims' foreign relations. Historians have identified Harun Ar-Rashid (763–809 AD) as one of the most outstanding and powerful caliphs of the Abbasid dynasty. Under his reign, the four famous schools of Islamic jurisprudence[167] were established, and he requested that Abu Yusuf (735–798 AD)[168] author his magnum-opus, *Kitab Al-Kharaj*', which up until today remains a valuable reference when considering issues touching on foreign relations under Islamic law.[169]

Of great significance were the mutual friendly relations established between the two great powers of that period as represented by Harun Ar-Rashid in the East and Charlemagne (742–814 AD)[170] in the West. The Islamic empire under the leadership of Harun al-Rashid and the Franks had strong and cordial diplomatic relations.[171] This friendly relationship between the Frankish emperor and Caliph Harun, the essence of which, although tainted with suspicion,[172] will always be remembered for the warm reception given to the Franks' emissaries and the lavish gifts with which they returned. Hitti has, while describing the immensity of the gifts presented to the Frankish embassies by al-Rashid, referred to the following statements attributed to a Frankish author that "the envoys of the great king of the West returned home with rich gifts from 'the king of Persia, Aaron,' which included fabrics, aromatics and an elephant."[173] According to the accounts given by Vasiliev on the nature of the hospitality lavished on the Muslim embassies dispatched to Constantinople, he

says that "[it] was minutely elaborate, and the ambassadors were welcomed with all sorts of brilliant court ceremonies, diplomatic courtesies, and the astute display of military strength."[174] In the same way, the Byzantine diplomatic envoys were impressively received in Baghdad by the Muslim caliph with full paraphernalia of Oriental magnificence.[175] Also, there are records of ambassadors having been received from the Chinese emperor and from India, along with plentiful gifts for the caliph, and they also received reciprocal treatment in return.[176]

Diplomatic Practice: The Ottoman Era (1260–1800 AD)

The Ottoman Empire came into the historical limelight in about 1260, and it steadily kept expanding toward the West and the East, crushing the strength of the Byzantine, Serb, and Bulgarian kingdoms, and the Anatolians, and even the Mamluk Sultanate stationed in Egypt was not spared.[177] In 1500, the Ottoman Empire arguably became one of the most powerful empire in the world. The Ottoman armies made an attempt in 1529 and 1683 to overrun Habsburg Vienna. At that time, the strength and power of the once invincible Ottoman Empire began to dwindle to the extent that the Ottoman state started to lose its military superiority over to the West. The two wars against the Russians and the Austrians that the Ottomans failed to win, which resulted in the treaties of Carlowitze in 1699 and Passarowitze in 1718, marked "the resulting shift in the balance of power between the Ottoman Empire and the West."[178]

The diplomatic relations of the Ottoman Empire with other nations always remained cordial, although, prior to 1700, it was said to be on an ad hoc basis, which almost "came close to being a form of permanent diplomacy."[179] Successive Ottoman sultans who reigned many centuries before Selim III (1761–1808) would only send representatives to other nations if it became necessary.[180] From the eighteenth century onward, Ottoman diplomacy started drifting toward a more permanent status through the empire's stationing residential embassies in major European capitals that had once played hosts to its temporary ambassadors. In 1793, for example, the first permanent embassy of the Ottoman Empire was established in London, and a few years later, more of were established in Paris, Vienna, and Berlin.[181] But the question is why did the Ottoman Empire adopt a temporary diplomacy when its military strength was preeminent? Could this have been as a result of its inclination toward the principles of Islamic international law that the world is divided into two—*dar al-Islam* (the abode of peace) and *dar al-harb*

(the abode of war)? Or could it have been that the Ottoman Empire was mainly adhering to its own method of diplomacy that it had created? Answers to these questions are necessary in order to appreciate what really influenced the Ottoman kind of diplomatic interactions with other foreign nations.

Historically, the Ottoman sultans were in the habit of sending diplomatic envoys to friendly foreign nations for the purposes of greeting ascension to the thrones; discussing treaties and ratifying peace agreements; conveying credentials on behalf of the sultan; establishing frontier demarcations; and continuing peaceful and friendly relations.[182] The journey of these emissaries to foreign courts for negotiations and other diplomatic contacts was usually very short, and upon conclusion of their visits, all diplomatic affairs came to an end.

The Ottomans system of capitulations, which is predicated upon each country having its own laws, was popular, although not unique to the Ottoman Empire alone. The Chinese, for instance, were known to have something similar to the Ottoman concept of capitulations. Once the Ottomans received foreign ambassadors, they are unilaterally granted capitulations throughout the period of their stay even though this was nonreciprocal. The grant of capitulation was synonymous with the modern-day concept of diplomatic privileges and immunity. Immediately, the capitulatory favor was granted to a diplomatic envoy, and the envoy was henceforth deemed to be under the laws of his king or republic.[183] Foreign emissaries were considered as guests within the Ottoman domain, and as such, the provision of free food, travel accommodations, and also a daily allowance were all guaranteed.[184] Anybody with capitulatory status within the Ottoman Empire enjoyed full exemption from Ottoman taxes and custom duties.[185]

It has, however, been contended that the Ottomans embraced and adopted a negative attitude toward diplomacy as a result of their faithfulness to "Islamic precepts," which dictate that permanent diplomatic missions should not be sent to the European capitals.[186] There was an assumption that there could not be a smooth diplomatic intercourse and exchange of diplomatic personnel by way of reciprocity between Muslims and non-Muslims.[187] This contention properly fits with the account of Naff when he says that the Ottoman Empire, in its relations with Europe, were under the guiding principle of "the inadmissibility of equality between *Dar al-Islam* (the abode of Islam) and *Dar al-Harb* (the abode of war, i.e. the Christian West)."[188] Meanwhile, most of the European states kept sending resident ambassadors to Istanbul as far back as the sixteenth century even though the Ottoman Empire did not

deem it appropriate to reciprocate, but instead, embraced a unilateral diplomacy with respect to its European neighbors.[189]

There are four theoretical arguments behind the origin and nature of the system adopted by the Ottoman Empire. The first argument is that the Ottoman Empire was a direct or indirect continuation of and derivation from the Byzantine Empire.[190] The second argument is that the origin and character of the Ottoman Empire could be traced to the movements of migrating Turkish tribes.[191] As such, the Ottoman Empire fell within the Turkic tradition. The third argument is the ghazi state theory. That is, the Ottoman state was ghazi in that it was predicated upon the Islamic precept and concept of jihad.[192] The fourth argument sees the Ottoman Empire as exemplifying nomadic empires emanating from tribal institutions.[193] Many scholars have, however, widely argued in support of the ghazi thesis that the Ottoman Empire was an Islamic empire,[194] seeing the Ottoman territories as the land of Islam; its army as the soldiers of Islam; and recognizing that the Ottoman Empire would not hesitate to go to war if it was attacked or if Islam was being threatened;[195] and that the entire Empire claimed to be governed under Islamic law. But can it be said to have been truly and strictly an Islamic empire in all its ramifications?

It is doubtful that the Ottoman Empire in its governmental and administrative activities strictly complied with Islamic law. After all, the Ottomans were known for their adherence to Turkish local customs and tradition, one of which was the right to make laws for the running of state affairs, to which the Ottoman sultans always resorted by issuing the *qanun-nameas,* otherwise known as "books of law."[196] At best, it is safer to suggest that there was an amalgamation of Islamic law and the Turkish tradition in the administration of the Ottoman Empire.[197] For instance, during the reign of Mehmed II in 1454, he granted capitulations, otherwise known as *ahdname*,[198] to the Venetians with the understanding that the decision was in accordance with the existing custom, referring to the former capitulatory agreements that existed between the Byzantine Empire and the Venetians.[199]

The theoretical notion of perpetual war existing between Muslim and non-Muslim states may be difficult to justify. This is especially so when one considers the context and implication of *Qur'an 8 v 61*,[200] which urges Muslims to make peace inasmuch as non-Muslims are inclined toward peace. Moreover, whether jihad implies a state of regular or perpetual war against non-Muslims remains contestable.[201] Furthermore, there is the additional concept of *dar as-sulh* (abode of treaty), in which Muslims and non-Muslims live in peace while observing the terms of the treaties. This approach takes away the duality or dichotomization

of the entire world into the perpetual *dar al-Islaam* (the abode of peace) and *dar al-harb* (the abode of war) once the *dar as-sulh* (peaceful co-existence based on treaty) is resorted to. In addition, the reason for the argument that Islam prescribes an impenetrable duality in terms of *dar al-Islaam* and *dar al-harb*, as expressed by Yurdusev, "is indeed the analogy between the medieval Christian conceptualization of *Christendom* versus *non-Christendom* and that of Islam."[202]

While the diplomatic practice that was established during the Ottoman Empire can be said to be mostly shaped by the principles of Islamic international law, at the same time, it may be equally correct to suggest that the Ottomans devised their own method of diplomacy. In other words, the Ottoman Empire appeared to be structured based on tenets of Islamic law blended with the Turkish tradition.

Historical Survey of the Contribution of Islamic Law to the Development of International Diplomatic Law

Many scholars of international jurisprudence have always seen modern international law as a legal system that is deeply rooted in Western culture, even when it has been overwhelmingly admitted that it has its roots firmly entrenched in and traceable to various ancient civilizations of the world.[203] This explains why the system of diplomatic immunity and privileges, being an integral aspect of international law, has also been perceived as "essentially Euro-centric based."[204] Perhaps the argument of some commentators against "the continued European and Christian underpinnings and influences on modern international law," to use the words of Baderin,[205] justifies the need for further research into the contributions already made and most likely to be made by Islamic law to the development of modern international law. It is not a case of the expression of mere optimism that the evidence for proving the possibility of the influence of Islamic law "may yet be uncovered,"[206] when there is ample historical evidence pointing toward a significant contribution made by Islam jurisprudence. This contribution has received little or no mention in most Western literature, probably due to what Boisard has described as "psychological prejudice."[207]

The ICJ has equally attested to the contribution of Islam when it said the following:

> But the principle of the inviolability of the persons of diplomatic agent and the premises of diplomatic missions is one of the very foundations of

> long-established regime, to the evolution of which the traditions of Islam made a substantial contribution.[208]

The historical accounts regarding the genesis and development of modern international law along with its principles have always been fashioned around Western civilization. Oppenheim, for instance, just like many other Western scholars of international law, was unequivocal in his submission that international law "is a product of modern Christian civilisation."[209] This conclusion has been met with serious criticism by some commentators who would rather argue that modern international law owes its growth and development to the "coexistence of plural civilizations," with each of these civilizations proudly attached to its culture and normative value system, which were considered to be of universal applicability.[210] While it is not the intention here to dwell on how all the various civilizations have contributed to the making of modern international law, this section intends to scrutinize the most probable influence of Islamic civilization on the principles of contemporary international law, of which the concept of diplomatic immunity is one.

It has been rightly argued that the contemporaneous existence of the Islamic civilization alongside the Western civilization, coupled with the inevitable interactions between the two civilizations, point toward the possibility of influence.[211] That the Islamic civilization had a legal influence on the West, particularly at the time of its emergence from the Middle Ages, can be gleaned from the juristic writings of early Muslim jurists, mostly during the Abbasid Caliphate; the protracted contacts between Europe and Islam both in war and peace, and most especially before and after the recapture of Spain and Sicily by the Crusaders; the peaceful interaction between the Christian and Islamic civilizations brought about through commercial transactions; and military confrontation, which appeared unending between the West and the East.

In addition to the general acceptability, particularly among Western scholars, that the development of the principles of modern international law was initiated by the West, the notion has equally gained tremendous currency that the creation of modern international law principles revolved around the likes of Francisco De Vitoria (1480–1546), Suarez (1548–1617), Alberico Gentili (1552–1608), Hugo Grotius (1583–1645), and Emerich de Vattel (1714–1767), who are referred to as the founders of international law.[212] The most prominent among these names was, of course, Grotius, author of the famous, *De Jure Belli ac Pacis*, which appeared in 1625. He was, on the strength of this book, singled out and styled by some Western historians of international law as "the father of

international law."[213] Western commentaries touching on the origin of international law have often been noticed to concentrate heavily on the periods of the Greek civilization, the Roman era, and then swiftly to conclude with modern times. This historical account is always nicely manipulated in such a way that it thus appears as if the intervening period of about ten centuries between the Roman era and the period of modernity was of no significant momentum in the making of modern international law.[214] It is, perhaps, for this reason that the conclusion of Oppenheim that there was no form of intermediary link between the Roman period and modern times has not been allowed to go unchallenged.[215] The assertion of Oppenheim that there was "neither room nor need for an International Law"[216] during the Middle Ages underscores the essence of in-depth scrutiny into the jurisprudential contribution of early Muslim scholars to the development of what became modern international law. To justify his submission that there arose no need for a law of nations at that period, he maintains that the Roman Empire "hardly knew of any independent civilised states outside the border of their Empire"[217] as it almost absorbed the whole civilized ancient world. This submission cannot be seen or held to be congruent with the historical facts, which point to the existence of the Islamic civilization in the medieval period and its interaction with other civilized nations of that epoch, including the Byzantium Empire. If one of the core purports of international law is to regulate how independent states relate to and deal with each other, and if history strongly supports the coexistence of the Islamic civilization in the Middle Ages alongside other civilizations, it is only logical to conclude that the need for an international law cannot be more expedient.

According to Oppenheim in his further account, the need for an international law only became paramount sometime between the fifteenth and sixteenth centuries when Europe was "divided up into a great number of independent states."[218] It may therefore become necessary to ask at this juncture, what makes the period witnessing the fragmentation of Europe more deserving of the law of nations than the medieval period? This may appear to be a clandestine attempt not to give any credence to, or to acknowledge, the contribution of the Islamic civilization to the making of modern international law, thereby strengthening the highly contestable assertion that modern international law is the product of Christian European civilization.

Grotius became, though arguably, "the father of modern international law" for writing the *De Jure Belli ac Pacis* in the seventeenth century to satisfy the urgent need of the newly founded "multitude of independent States established and crowded on the comparatively small

continent of Europe"[219] with a view to salvaging them from plunging into what Oppenheim has described as "international lawlessness."[220] It is worth mentioning the famous Muslim jurist, Muhammad Ibn Hassan as-Shaybani (750–805 AD), who authored at the end of the eighth century the world's earliest treatise on international law. His book is entitled *Kitab as-Siyar al Kabir*, the original text of which, according to Khadduri, appears to have been lost, but fortuitously was preserved in the elaborate commentary of Sarakhsi (d. 490/1096), otherwise known as the *Sharh Kitab as-Siyar al-Kabir.*[221] It was the admiration for this remarkable work that led Joseph Hammer von Purgstall, after reviewing same, to designate this classic author as "the Hugo Grotius of the Muslims."[222]

It, however, remained unclear whether, prior to the writing of Grotius' famous treatise, there were traces of any standard legal work on international law imputable either to the Greeks or Romans that could have served as a source of influence or reference for Grotius. What remains evidently apparent is that, at the time Grotius was putting together his *De Jure Belli ac Pacis,* there was already in existence, and had been for more than 800 years, the work of Shaybani, which Weeramantry rightly refers to as "the world's earliest treatise on international law."[223] Taking into account the perceived quest of Grotius to unify mankind under a universal rule, a quest that would have undoubtedly propelled him into elaborate research of the diverse cultural bequests of various civilizations, one will admit that Grotius, with his high level of erudition, could not have ignored valuable jurisprudential materials emanating from the world of Islam, a civilization that, for almost ten centuries, unflinchingly, engaged the world of Christendom in both peaceful and belligerent interactions.[224] Doubt as to whether or not Grotius was ever aware of the existence of the Muslim *siyar* might as well be put to rest by the amazement that surrounded Grotius' discovery that the legal concept of *postliminium* has a place in the Islamic international law.[225] Weeramantry, in his analysis of the possible impact of the Islamic civilization upon Grotius' *De Jure Belli ac Pacis,* has carefully outlined one of these possibilities, saying

> Grotius finalized his *De Jure Belli ac Pacis* in France, where he had fled after his escape from imprisonment in the fortress of Louvestein. In France he worked on his book in the chateau of Henri de Meme, where another friend, de Thou, "gave him facilities to borrow books from the superb library formed by his father" (*Encyclopaedia Britannica,* 1947 ed., vol. 10, p. 908). A "superb library" in France in the early 1600s could not have been without a stock of Arabic books and other materials on Islamic civilisation. Moreover, if Grotius had no Arabic himself it is highly unlikely that he could not have found a translator in France.[226]

It has been strongly argued that Grotius' legacy to modern international law cannot be said to be free from the indirect influence of the several juristic endeavors of early Muslim scholars belonging to the glorious era of the Islamic civilization.[227] This argument is based on Grotius' acknowledgment of having been greatly influenced by one of his Spaniard predecessors, De Vitoria, who was indebted to the prominent Spanish writers of international law who came before him, such as King Alfonso X of Castle.

It must, however, be noted that King Alfonso's *Las Siete Partidas* of 1263 unequivocally proclaims the significant influence Islamic law had on international law.[228] It has also been observed that the fact that most of the prominent and earliest European scholars of international law, like Vitoria, Ayala, Suarez, and Gentili, were known to have come from those parts of Spain and Italy that had been strongly influenced by the Islamic legal system, gives more weight and credence to the possibility of the influence of Islamic law on the development of a modern law of nations.[229] The analytical summation of Weeramantry on the implied influence of Islam on Grotius' famous work is of particular interest:

> We must note also that Grotius was preceded not merely by one Spanish theologian who wrote on the laws of war, but many, such as Suarez and Ayala and others going all the way back to King Alfonso and beyond. All those writers wrote against the background of a dominant Islamic culture and could not have been unaware of or uninfluenced by it. For example, Suarez was born in Granada in 1548, barely half a century from the time when it was the last stronghold of the Moorish kings in Spain. Suarez' *De Legibus* appeared in 1612 and there is reason to believe that Grotius read it with interest and was influenced by its seminal ideas.[230]

The predominant power of the Muslim civilization spanning between the seventh and sixteenth centuries in the Mediterranean region presupposes a strong possibility that the West must have in one way or another borrowed and learned from the Islamic practice of international relations. The important role played by Spain and Sicily in the introduction of the Islamic civilization to Europe cannot be discarded if one is really keen about unraveling the reason why the initiative of permanent legation was taken up by the commercial towns of Italy. Not only did Spain and Sicily serve as vital points of contact between Islam and Europe, but they also became a point from which Islamic intellectual and social influence spread across the entire Iberian Peninsula.[231] In recognition of the Islamic legal concept of freedom of the seas, the Islamic government in Spain allowed for the installation of foreign commercial agents, thereby

evolving for the first time European consulates right in the heart of the Islamic state.[232] The eventual perfection of this system in the form of a permanent legation in Italy following the Italian Renaissance of the fourteenth and fifteenth centuries cannot, as such, be attributable to mere chance.[233] After all, it is a fact known to history that not only did the Norman conquest of 1061–1089 abruptly terminate the Islamic governance in Spain and Sicily but it also brought about what Boisard has described as "the phenomenon of two superimposed civilisations"[234] through which the cultural treasure of the Islamic civilization along with its knowledge and techniques passed on to the West.[235]

Conclusion

This chapter has drawn our attention to how diplomatic practice, generally with particular reference to the inviolability and immunity of diplomatic envoys, appears to be historically universal among different civilizations of the world. This is evidenced from their long history of diplomatic relations. Moreover, the intercivilizational contacts that gave each civilization the opportunity to borrow from each other, which in today's diplomatic relations has the potential for building a cross-cultural understanding among states, contributed immensely to the development of international diplomatic law.

3

Sources of Islamic and International Diplomatic Law: Between Tension and Compatibility

Introduction

The question of compatibility between the principles of Islamic *siyar* and modern international law has exacerbated a cornucopia of controversies among scholars of Islamic jurisprudence and international law. Exponents of the exclusivist theoretical view have maintained that modern international law does not and cannot accommodate any rules or principles of Islamic international law due to the incompatibility between the two legal regimes. Ford, for example, is of the view that "[t]he *siyar* 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 the teachings of eminent publicists."[1] He further argues that any attempts at finding compatibility in the two jurisprudential systems will be tantamount to "merely whitewash[ing] genuine discrepancies between international norms and the principles grounding the *siyar*."[2] Bouzenita equally concludes that the fact that Islamic international law and modern international law originated from different historic and cultural developments with distinct sources, concepts, and objectives, will ultimately make the two legal systems incompatible.[3] However, Muslim scholars,[4] including some non-Muslim commentators,[5] have continually canvassed arguments in favor of a harmonious blend between the principles of Islamic international law and modern international law by expounding on all areas of compatibility between the two legal systems. Mahmassani is clear in his pursuit of this exposition when he states that "a sufficient explanation of the basic

principles of the international law of Islam is necessary in order to bring out their similarity with modern principles, and to demonstrate that such universal principles, being based on the unity of mankind, are part and parcel of the tradition of Islam."[6]

In view of the foregoing arguments, this chapter dwells on the following issues for discussion. The chapter consists of five sections, the first of which starts with introductory comments. The second section seeks to discuss the two primary sources of Islamic *siyar* (the Qur'an and the *Sunnah*), followed by *ijtihad*, which is the manifestation of the rational sources of Islamic international law in the third section. The section also seeks to examine how legal obligations can be extracted from these sources (the primary and rational sources) for the purpose of establishing Islamic *siyar*. The fourth section seeks to analyze the sources of international diplomatic law by examining Article 38 (1) (a)—(d) of the SICJ. The fifth section seeks to consider a theoretical comparative overview of the sources of both legal systems. And finally, the sixth section draws a conclusion as to whether there is compatibility in the outcome of the sources of Islamic *siyar* and international law.

Sources of Islamic International Law

It must be made clear that Islamic diplomatic law, being an integral part of Islamic *siyar*, shares the same sources with it. Moreover, Islamic *siyar* has always been an inseparable component of Islamic law.[7] Khadduri has correctly stated this position thus: "[t]he *siyar*, if taken to mean the Islamic law of nations, is but a chapter in the Islamic *corpus juris*, binding upon all who believed in Islam as well as upon those who sought to protect their interest in accordance with Islamic justice."[8] Before delving into the different sources of Islamic law, it is important to first understand the terms *Shari'ah* and *fiqh* within the context of Islamic law and the definitional connotation of the sources in Islamic law.

Distinction between Shari'ah and Fiqh (Jurisprudence)

The usage of the words *shari'ah* and *fiqh* as synonyms for Islamic law has generated some controversy in both the theoretical and practical understanding of Islamic law.[9] Both words are of different technical meanings, although they complement each other for a pragmatic perception of Islamic legal system. The word *shari'ah* literally means "a path to a watering place" or a "clear path to be followed," and it emanates from the verb *shara'a*, which means "to introduce," "to enact," or "to

prescribe."[10] In its general usage, it connotes commands, prohibitions, and principles that are meant to regulate the conduct of humanity as contained in the Qur'an and Prophet Muhammad's example (*Sunnah*), which are binding on all believers.[11] The term *shari'ah* is also traceable to the Qur'an 45:18, which says, "Then we put you, [O Muhammad], on an ordained way concerning the matter [of religion] [*shari'atin minal-amr*]: so follow it and do not follow the inclinations of those who do not know." *Fiqh*, in contrast, literally means intelligence or knowledge, while technically it covers the whole of Islamic jurisprudence.[12] *Fiqh* can, thus, be defined as "knowledge of the practical rules of the *Shari'ah* which are deducible from the Qur'an and *Sunnah* by direct contact with them."[13] It is a system that forms the basis for normative interpretation of the revelation, the application of its principles and commands to the field of human acts.[14] In a nutshell, it is the science of the *shari'ah*.

Baderin has carefully classified the usage of *shari'ah* in relation to Islamic law into three different contexts. First, there is the usage of *shari'ah* in the generic religious context, meaning Muslims' way of life generally.[15] *Shari'ah* is perceived as covering strictly legal and nonlegal matters. Second, *shari'ah* could also be applied in a general legal context.[16] That is, *shari'ah* is considered as a distinct legal system "with its own sources, methods, principles and procedures," which are completely different from all other legal systems. The fear associated with this context, according to Baderin, is that the whole of the Islamic legal system might be considered to be "completely divine and thereby . . . (mis) represent[s] the whole system as inflexible and unchangeable."[17]

Third, *shari'ah* can be seen from a specific context that is distinct from *fiqh* (jurisprudence).[18] In analyzing this context, Baderin distinguishes the usage of *sharia'h* restrictively to mean "only the divine sources of Islamic law, namely the *Qur'an* and *Sunnah* of the Prophet Muhammad"[19] from *fiqh*, which represents the "human jurisprudential aspect of Islamic law."[20] This therefore means that *shari'ah*, in a strict sense, will constantly remain immutable. But the *fiqh*, which is "a human product, the intellectual systematic endeavour to interpret and apply the principles of *shari'ah*'[21] will always maintain its variability subject to time and circumstances, particularly with respect to *mu'aamalaat* (inter-human relations).[22] This distinction becomes particularly important as Abd Al-Ati concludes that "[m]uch of this confusion can probably be avoided if the analytical distinction between *shari'ah* and *fiqh* is borne in mind and if it is realized that Islamic law is held by Muslims to encompass two basic elements: the divine which is unequivocally commanded by God or His Messenger and is designated as *shari'ah* in the strict sense

of the word; and the human, which is based upon and aimed at interpretation and/or application of *shari'ah* and is designated as *fiqh* or applied *shari'ah*."[23] Without this distinction, Islamic law will be erroneously depicted as a completely divine legal system.

Definitional Connotation of "Sources" in Islamic Law

The terms *daleel* and *asl* have often been used, though interchangeably, by scholars of Islamic jurisprudence as synonyms of the word "source." The word *daleel* (pl. *adillah*) literally means "proof, indication or evidence."[24] It is, however, ascribed a technical meaning when it serves as an indication of a source from which a rule of *shari'ah* is deducible; hence, the usage of the phraseology *adillat al-Shar'iyyah*[25] (sources of Islamic law). The term *asl* (pl. *usuul*), in contrast, ordinarily means "something from which another thing originates."[26] Nyazee's meaning of the term *asl* accords with Hamidullah's understanding of *usuul* being a synonym of the words "roots" and "sources."[27] In appreciation of the common usage of the two terms (*daleel* and *asl*), Kamali was quite explicit in his explanation that "*Dalil* in this sense is synonymous with *asl*, hence the sources of *Shari'ah* are known both as *adillah* and *usul*."[28]

Traditionally, the rules—*ahkaam* (sing. *hukmu*)—of Islamic law are said to be derived from four different sources, namely, the Qur'an, *Sunnah* (prophetic tradition), *ijmaa'* (consensus of legal opinion), and *qiyaas* (analogical deduction).[29] The practices of Islamic rulers and caliphs, which include their official instructions to their commanders and statesmen, have also been added as a supplementary source of Islamic international law.[30] But following the pattern of discussion in the foregoing section, there appear to be three basic elements constituting the Islamic legal system. They are sources, methods, and principles. The sources are the Qur'an and the *Sunnah* of Prophet Muhammad (pbuh), which are basically divine and immutable. The *ijmaa'* and *qiyaas* constitute the methods of Islamic law, while the principles are made up of *istihsaan* (juristic preference), *maslahah-mursalah* (jurisprudential interest), *saddudh-dharii'ah* (blocking lawful means to an unlawful end), *istishaabul-haal* (presumption of continuity of a rule), *'urf* (custom),[31] and many more that have been formulated into legal maxims.[32] Aside from the Qur'an and the *Sunnah*, which have been identified as forming the divine sources (*adillah*) of Islamic law, all the other sources aforementioned are manifestations of the human jurisprudential elements of Islamic law, otherwise known as *ijtihad*.[33] The acceptability of these additional methods and principles of Islamic law has provoked considerable contention

among the various *madhaahib* (plural of *madhhab*)—schools of Islamic jurisprudence.[34] The sources, methods, and principles of Islamic law will now be considered in *seriatim*.

The Qur'an

The Qur'an is unanimously considered by Muslims as a book containing the words of Allah which were revealed to Prophet Muhammad (pbuh) through the angel Gabriel, not as a whole, but in piecemeal, spanning a period of about 23 years.[35] It remains the most authoritative source (*daleel*) of Islamic law owing to the concordant view of Muslim jurists on the incontrovertibility of its divinity and form.[36] The fact that the Qur'an is rated the most reliable source of *shari'ah* does not necessarily make it a legal instrument, *stricto sensu,* since the legal verses (*ayaatul-ahkam*) contained therein only constitute a small proportion of the more than 6,000 verses of the Qur'an.[37] The verses dealing with legal matters (such as crimes and public, private, and international law) fall within the range of between 350 and 600 verses, most of which were revealed as answers to both empirical questions and anticipatory situations.[38] The absence of unanimity among the Muslim juris-consults (*fuqahaa'*) on the numbers of legal enactments in the Qur'an is not unconnected with the differences in individual scholar's understanding of and interpretation ascribed to a particular provision of the Qur'an. A learned scholar, for instance, can deduce a rule of law from a parable or the historical contents of the Qur'an and then consider it as one of the *ayaatul-ahkaam*. Meanwhile, this deduction may not be acceptable to another scholar.[39]

It has also been observed that some Western commentators, particularly adherents of the legal positivist theory, remain averse to the assertion that the legal-specific verses of the Qur'an consist of up to or more than 350 verses. Coulson, for instance, in his estimation of the legal-specific verses of the Qur'an, concludes that "no more than approximately eighty verses deal with legal topics in the strict sense of the term."[40] To these scholars, no legal ruling can possibly be deduced from a Qur'anic text or stipulation ingrained in morality.[41] The degree of primacy unanimously accorded the Qur'an as a source of Islamic law by the generality of Muslim jurists and Muslim states is a confirmation that every other source of Islamic law owes its legal cogency to it.[42]

The derivation of rules from the provisions of the Qur'an will require that one first turns to the Qur'an itself for a clearer interpretation, then to the explanation of Prophet Muhammad (pbuh), and last to the interpretation of the companions of the Prophet.[43] Considering the status

of Prophet Muhammad (pbuh) as the person to whom the Qur'an was revealed, the task of proffering supplementary elaboration and explicit interpretation to make for a proper application of the Qur'anic stipulations formed an integral part of his missions.[44] Some of the Qur'anic stipulations on constitutional matters and international relations, for instance, are usually in the form of general principles, the details of which are left within the complementary and elaborative domain of the prophetic *Sunnah*. An example can be found in Qur'an 60: 8–9, which contains the general principle upon which the interrelations between Muslims and non-Muslims are premised:

> Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes—from being righteous toward them and acting justly toward them. Indeed Allah loves those who act justly. Allah only forbids you from those who fight you because of religion and expel you from your homes and aid in your expulsion—[forbids] that you make allies of them. And whoever makes allies of them, then it is those who are the wrongdoers.

This additional part of Prophet Muhammad's mission as reflected in his deeds, utterances, and tacit approvals, which culminated in what is known as his *Sunnah*, became the second cardinal source of Islamic *siyar*.

The Sunnah

This is the second fundamental source of Islamic law, which is also classified as a divine source of law just like the Qur'an. The *Sunnah*, being an embodiment of the life and traditions of Prophet Muhammad (pbuh), encompasses his sayings (*qawl*), deeds (*fi'l*), or tacit approvals (*taqrir*). The validity of the *Sunnah* as one of the primary sources of Islamic law is derived from the Qur'an. One of such validating verses of the Qur'an reads thus: "O you who have believed, obey Allah and obey the Messanger . . . And if you disagree over anything, refer it to Allah and the Messenger."[45]

The "book and a candle" similitude advanced by Weeramantry in stressing the complementary role of the *Sunnah* to the Qur'an as a cardinal tool of the Islamic legal mechanism—"[t]he life and work of the Prophet provided the candle by the light of which the book is to be read. The book without the candle or the candle without the book would not achieve its purpose"[46]—is instructively revealing. Even though the Qur'an has been rated as transcending the *Sunnah* in hierarchy, it has, however, been observed that a substantial number of rules having direct relevance

to Islamic international law are established by the prophetic *Sunnah*.[47] The Treaty of Hudaybiyyah (628 AD) is a typical example of such a prophetic *Sunnah*, which up until today has remained an irresistible reference point when discussing the concept of diplomatic relations and immunity and the validity of international treaties under Islamic *siyar*.

The *Sunnah* has, however, not enjoyed unassailable accuracy and authenticity as does the Qur'an which may also account for why it cannot be placed on an equal hierarchical pedestal with the Qur'an despite its status of divinity. The internal political discord that threatened, if not totally debilitated the Muslims' fraternity shortly after the demise of Prophet Muhammad has been identified as a major channel through which fabrications crept into some traditions that were ascribed to Prophet Muhammad (pbuh).[48] If the *Sunnah* were to retain its relevance as a source of Islamic law, the authenticity of its texts could not be compromised. Consequently, sometime between the second and third centuries of Islam, Muslim jurists came up with ways of ascertaining the genuineness of *hadith*, which later became another sphere of knowledge, otherwise known as the science of *hadith* (*'ilm-al-hadith*). The outcome of this authenticating technique gave birth to the famous and widely acknowledged six *Sunni* collections of authentic traditions, namely, Sahih al-Bukhaari,[49] Sahih Muslim,[50] Sunan Abu Daawud,[51] Sunan at-Trimidhi,[52] Sunan an-Nasaa'I,[53] and Sunan Ibn Maajah.[54] It must also be mentioned that out of these six collections, the first two are ranked to be most reliable.

The fact that the prophetic *Sunnah* serves as a source of legal obligations for Islamic *siyar* can be seen in the treaties, especially the Treaty of Hudaybiyyah 628 AD, signed by Prophet Muhammad (pbuh); the various missions he dispatched to different kings and emperors; his verbal and written codes of conduct in warfare; and his exchange and respectful treatment of diplomatic envoys. The question as to whether a particular tradition is legal or nonlegal, or the ascertaining of the meaning of a text from the Qur'an or *Sunnah,* particularly when such stipulation is evidently speculative, falls within the preserve of legal reasoning (*ijtihad)*, which is discussed below.

Ijtihad: A Manifestation of Methods and Principles of Islamic Law

With the demise of Prophet Muhammad (pbuh) came an abrupt finality to the continuous flow of legal guidance from the Qur'an and the extension of legal principles and rules. This was preceded by the expansion

of the territorial stretch of the Islamic faith, which needed to contend with increasing novel matters. The fact that the law must necessarily evolve to reflect the inevitable changes in times and conditions of the society is not only rightly depicted in the Islamic legal maxim that "the fatwa changes with changing times" (*taghayyur al-fatwaa bi taghayyir al-azmaan*),[55] but has also captured the attention of the eleventh-century Muslim scholar al-Sam'aani, who made the remark that "*Fiqh* is an ongoing science continuing with the passage of centuries and changing with the change of circumstances and conditions of men, without end or interruption."[56] The above reasons, therefore, necessitated the need for a functional *ijtihad*.

Ijtihad, which literally means "the expending of maximum effort in the performance of an act,"[57] be it physical or mental, has been variously defined by scholars of Islamic law. According to Al-Alwani, *ijtihad* in its general context denotes the expenditure of mental and intellectual effort.[58] For such intellectual effort to be referred to as *ijtihad* in a strict legal sense, it should, in the words of Ramadan, be a "personal effort undertaken by the jurist in order to understand the source and deduce the rules or, in the absence of a clear textual guidance, formulate independent judgments."[59] What is clear from these definitions is that *ijtihad* is a process of human intellectual reasoning usually resorted to with a view to interpreting and giving meaning to inexplicit stipulations contained in the divine sources of Islamic law—the Qur'an and the *Sunnah,* while at the same time, relying on these sources.

The juridical position of the concept of *ijtihad* in Islamic jurisprudence remains unsettled among Islamic law scholars. To those who perceive the *shari'ah* as wholly divine, consisting of rules that are strictly immutable and uncompromisingly monolithic, *ijtihad* may not be worthy of any significant role within the realm of the Islamic juridical system since it is basically founded upon the mechanism of independent human reasoning.[60] Some scholars would rather see *ijtihad* not strictly as an independent source of law but also as a juristic tool that gave rise to some legal methods generally referred to as nondivine sources of Islamic law.[61] Other exponents of *ijtihad,* however, relying strongly on the authority of the famous hadith of Mu'aadh ibn Jabal,[62] see it as the third in the echelon of the sources of Islamic law.[63] This perspective, however, lends credibility to Kamali's remark that all other sources of Islamic law, aside from the Qur'an andthe *Sunnah*, such as consensus (*ijmaa'*), analogical reasoning (*qiyaas*), public interest (*maslahah*), equity or juristic preference (*istihsaan*), and custom (*'urf*), are manifestations of *ijtihad*.[64] I will now proceed to give brief discussion of these legal methods of Islamic law.

Ijmaa' (Consensus of Opinion)

The fact that *ijmaa'* is a product of *ijtihad* is clearly noticeable from the technical meaning most scholars give to it as "the agreement of independent scholars of Muhammad's (pbuh) community in a particular period upon a legal decision."[65] It can be deduced from this definition that *ijmaa'* is simply the plurality of individual juristic opinions of Muslim jurists belonging to a particular age on a specific legal question.

The concept of *ijmaa'* finds it validity both in the Qur'an and the *Sunnah* of Prophet Muhammad (pbuh). One of the often-quoted references from the Qur'an is the verse that enjoins obedience to God, His Messenger, and "those in authority among you."[66] The words "and those in authority among you" have been interpreted by some commentators of the Qur'an as meaning Muslim jurists. And the prophetic tradition that "[m]y community shall never agree on an error"[67] remains the most frequently cited authority from the *Sunnah*, which gives validity to *ijmaa'*.

Resorting to *ijmaa'* becomes necessary when a new legal question finds no specific solution either in the Qur'an or the *Sunnah*. The fact that a validly constituted *ijmaa'* is founded upon the unanimity of qualified Muslim jurists on a particular rule of law gives such a rule of law an automatic status that is synonymous in authority with the provision of the Qur'an or the *Sunnah*. It needs to be mentioned that an *ijmaa'* does not, like the Qur'an and the *Sunnah*, enjoy unqualified authority and observance since it can possibly be set aside, modified, or outright abrogated by another validly constituted *ijmaa'*.

The concept of *ijmaa'* received overwhelming approval from classical Muslim jurists, albeit, with varying conditions.[68] Yet, this legal method has been and is still being confronted with various theoretical questions touching on the practical feasibility of its universalistic connotation. The possibility and practicability of achieving actual unanimity among the qualified legal scholars (*mujtahidun*) of any given age, aside from the generation of the companions immediately preceding the death of Prophet Muhammad, remains an unresolved question.[69] Even where the unanimity is assumed to have been achieved, the question of ascertaining convincingly, that no dissenting opinion of at least a qualified jurist has been overlooked remains questionable.[70] With this, some writers have even gone so far as to ask whether *ijmaa'* is not a mere legal fiction devoid of practical feasibility. I must, however, admit that a broader analytical survey of these theoretical questions, which have ever been controversial among classical Muslim scholars, just as they are with modern writers, is beyond the purview of this chapter. Nonetheless, mention must be made of some scholars such as Shah Wali Allah Dihlawi (d. 1762), who are of

the view that the proper meaning of *ijmaa'* does not envisage a universal consensus of all the qualified Muslim jurists, but rather, it implies the consensus of learned scholars of different towns and localities.[71] If one truly considers the difficulty and the seeming impossibility surrounding the feasibility of the universalistic theory of *ijmaa'* on the one hand, and the significant role of *ijmaa'* in evolving the law to meet the unrelenting demands of our changing world on the other hand, one may want to agree with Dihlawi's contention.

Qiyaas (Analogical Deduction)

Qiyaas is another legal method emanating from the concept of *ijtihad*. *Qiyaas* in its ordinary meaning connotes "measurement." But technically it has been defined as the extension of the application of a certain legal rule (*hukm*) prescribed for a given case (*asl*) to a new case (*far'*) on the ground of common effective cause (*'illah*), which is identical in both cases.[72] From this definition, four essential conditions can be deduced for an effective application of the legal process of *qiyaas*: the original case (*asl*) as stipulated either in the Qur'an or the *Sunnah* forming the basis for the analogical deduction; a new case (*far'*) to be ruled upon for which there is no definite ruling in either of the two divine sources; a commonality of effective cause or *ratio legis* (*'illah*) between the original and new cases; and subject to the fulfillment of the foregoing conditions, the ruling (*hukm*) in the original case shall, by analogy, be extended to the new case.[73]

The need for the legal method of *qiyaas* will become unnecessary once there are rulings (*ahkaam*) either in the Qur'an, the *Sunnah* or *ijmaa'* capable of proffering solutions to the new cases at hand. The only identifiable human element in the application of analogical deduction is the task of identifying the commonality of the effective cause or *ratio legis* (*'illah*) between the original and the new cases.[74]

Classical Muslim scholars have devised certain legal principles that usually serve as guides whenever it becomes necessary to apply any of the divine sources and the legal methods discussed above. These legal principles, which form part of the juristic tools of *ijtihad*, have also been considered significant in discussions of the sources of Islamic jurisprudence. Some of these legal principles have been identified as playing interpretive roles for any of the sources.[75] These legal principles are briefly considered below.

Istihsaan (Juristic Preference)

Juristic preference, generally referred to as *istihsaan* in Islamic law, just like *ijmaa'* and *qiyaas*, is another product of *ijtihad*. The ordinary

meaning of the term *istihsaan*, being a derivative of the verb *hasan*, which means to deem (something) good, makes clearer the rationale behind the concept of *istihsaan* that the core objectives of the *shari'ah* (*maqaasid al-shari'ah*)[76] must not be compromised at the expense of a literal application of the rules of the *shari'ah*.[77] It is necessary to mention that this legal principle has not been legally defined or its juridical relevance given by Prophet Muhammad (pbuh). However, traces of its application have been noticed in some legal pronouncements and instructions made by some of the companions of Prophet Muhammad (pbuh). For instance, the letter of instruction written by 'Umar, the second Caliph, to Abu Musa al-Ash'ari, one of his appointed judges, which reads, "Research similar cases, and when you find similarities that affect the ruling, apply the method of *qiyas*. Using the results of *qiyas*, select the ruling that adheres to the Islamic principles and ensures that your conscience is satisfied that justice has been served"[78] attests to this assertion.

The application of *istihsaan* has given rise to serious theoretical questions that stem from the absence of unanimity among Islamic jurists on the legal meaning ascribable to *istihsaan*.[79] Proponents of this legal principle have generally equated it with the notion of equity, owing to its preference for simplicity and easing of difficulties that may occur as a result of strict adherence to established precedents in the previous rulings of *qiyaas*. This understanding can be deduced from the simple, but rich definition given by Jassas among others, that "istihsan is the departure from a ruling of qiyas in favor of another ruling which is considered preferable."[80] With the application of *istihsaan*, allowance is given for the adoption of "a more subtle—but ultimately more plausible—analogy,"[81] in which the preexisting ruling is capable of causing hardship. The idea of giving preference to a more plausible and equitable analogy appears to be in keeping with the spirit of the *Shari'ah* and the clear intention of the law giver (*Haakim*), as stipulated in the Qur'an that "Allah intends for you ease and does not intend for you hardship."[82] It can thus be argued, based on the application of *istihsaan,* that Muslim states can enter into international treaties with non-Muslim states for an indefinite period once the treaties facilitate ease for the Muslim community.

Maslahah (Public Interest)

When one considers the ever-increasing needs of modern times, vis-à-vis the exigency to preserve the fundamental objectives of *shari'ah* (*maqaasid al-shari'ah*), the importance of the legal principle of *maslahah* as another instrument of *ijtihad* will be well appreciated. Being a tool of interpretation rather than a material source of substantive law, its application

dictates that, when interpreting provisions of the Qur'an and the *Sunnah*, the jurist is required to give consideration to how best his interpretation will promote and preserve the public interest or human welfare.[83]

The application of *maslahah*, according to Muslim jurists, can come under any of these three categorizations—indispensables (*daruriyyaat*),[84] needed (*haajiyyaat*),[85] and complementary (*tahsiniyyaat*),[86] depending on the needs of the community. The significance of *maslahah* to the *juris corpus* of Islam as a legal instrument used for the preservation of human welfare and public interest has been rightly summed up by Ibn Ashur in the following words:

> the Shari'ah aims at preserving the order and regulating the conduct of human beings in it by preventing them from inflicting corruption and destruction upon one another. This objective can be achieved only by acquiring what is good and beneficial (*masalih*) and warding off what is evil and harmful (*mafasid*) as far as the meaning of *maslahah* and *mafsadah* can be understood.[87]

The application of *maslahah* has also been identified as capable of forming the juridical basis for signing international treaties and conventions, which are eventually made into domestic legislation with a view to ensuring a peaceful coexistence between the Muslim states and other nations.[88]

'Urf (Prevailing Local Custom)

Custom, technically referred to as *'urf,* is another legal mechanism the status of which within Islamic jurisprudence has become controversial among Muslim jurists. For instance, the failure of the Malikis to give much recognition to custom has been attributed to their strong affiliation to the customs of the people of Madinah, having elevated such customs to the status of the prophetic *Sunnah*.[89] This, perhaps, explains why some commentators conclude that custom has no binding effect in Islamic legal theory.[90] The fact that it is a reflection of human behavior, according to Libson, stands as a reason why some Muslim jurists, particularly of the preclassical period, fail to accord any recognition to it as one of the sources of Islamic law.[91] Contrary to this understanding, Muslim scholars belonging to the postclassical era have, however, acknowledged the relevance of custom in Islamic law.[92]

In spite of these varying amounts of relevance given to custom by the Muslim jurists, it is, however, still recognized as a law-formulating method, provided it does not in any manner run contrary to the clear

texts of the divine sources of Islamic law—the Qur'an and the prophetic tradition.[93] It is also of importance to note that the origin of a particular practice need not necessarily be associated with the periods of Prophet Muhammad (pbuh) or his companions to be validly pronounced as a custom under Islamic jurisprudence. All that matters is the conformity of such practice with the fundamental principles of Islam.[94]

The protection and inviolability of diplomatic personnel is an age-old practice among different nations of the world, and it has equally gained broad recognition and acceptance under Islamic international law. Prophet Muhammad (pbuh) made this categorically clear when confirming the inviolability of the two emissaries sent to him by Musaylimah (*al-kadhdhab*) in his statement that "if it were not the tradition that envoys could not be killed, I would have severed your heads."[95] From this statement, one can rightly infer that to kill envoys would not only run contrary to tradition but also desecrate the spirit and philosophy of Islamic law.

Consistent Practices of the Caliphs and Islamic Rulers

The practice of the caliphs, particularly those whom are often referred to as the rightly guided caliphs,[96] in their international dealings with other communities is so important that it cannot be ignored while discussing the sources of Islamic *siyar.* Aside from the conventional sources, methods, and principles of Islamic law that have been discussed above, the instructions issued by the caliphs for the guidance of their governors and military leaders, and the decisions that were made in the form of principles and rules incorporated into treaties with non-Muslims, also represent legal authority in discussing sources of Islamic international law.[97] The treaty that 'Umar ibn Khattab signed with the Patriarch of Jerusalem in 638 AD is one of the numerous examples of such treaties.[98]

The practice of other Islamic rulers may also be considered a legal authority in Islamic international law, provided the "practice has not been repudiated by the contemporary or later jurisconsults."[99] There are relevant precedents in the treaties and valuable decisions made by some of the Umayyad and Abbasid caliphs down to other Islamic rulers.[100] For instance, there are series of treaties reportedly concluded between the Abbasid caliphs and the Byzantine rulers for different reasons, such as putting a stop to the frequent violation of frontiers, the settlement of boundaries disputes between the Abbasid and Byzantines, and so forth.[101]

In a nutshell, these treaties, decisions, and instructions of the caliphs and other Islamic rulers will only become acceptable as legal authority

in Islamic international law provided they are not repugnant or contrary to the Qur'an or the *Sunnah* or to the practice of any of the rightly guided caliphs.

Sources of International Diplomatic Law

The historical and universal nature of diplomatic law brings it within the special ambit of customary international law, which now makes it an integral branch of contemporary international law, particularly with the famous codifications of diplomatic practice in 1961 and 1963.[102] This panoramic analysis of the sources of diplomatic law cannot be made in isolation of the sources of international law that are generally accepted as embodied in the provisions of Article 38 (1) of the SICJ. This explains why most writers on diplomatic law have not deemed it necessary to expound on the sources of diplomatic law, not because it has no sources, but perhaps because its sources are already embedded in the generally acclaimed sources of international law. It is important, at least, to bear in mind that diplomatic relations, just like any other branches of the humanities, cannot be left unregulated by law if its affairs are to be properly managed.[103]

There is an overwhelming consensus among scholars that diplomatic law is considerably sourced from the customary rules of international law.[104] However, one can still not lose sight of the invaluable significance of convention to diplomatic law, as the functionality of this body of law is only achievable when a state agrees to accept the personnel or representatives of the other state.[105] It must be borne in mind, however, that while discussing the sources of diplomatic law we are, invariably, talking about the sources of international law. This is acknowledged by Hardy, who, in discussing the sources of diplomatic law, says that "we must remember that we are referring to international law, a system of law unique in the discretion which it leaves to its subjects in the choice and applications of given legal rules."[106]

Although, it has been expressed by Bederman that "[t]he ICJ statute's articulation of sources thus may not be entirely authoritative or relevant today,"[107] a considerable number of international law scholars have adopted the provision of Article 38 (1) of the SICJ as containing "the most authoritative and complete statement as to the sources of international law."[108] As such, Article 38 has been generally applauded as having gathered its fame from "the enumeration and concise definitions of the sources of international law contained in para. 1,"[109] as long as we bear in mind that para. 1 (d) may not "be defined as a

source properly speaking."[110] Similarly, in the words of Mendelson, it also "authorizes and requires the Court, without much ado, at least to have recourse to the sources specified in paragraph 1"[111] of Article 38, which provides that

> [t]he 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.

The sources of international law identified in the provisions of Article 38 of the SICJ above will now be examined.

International Treaties

The significance of international treaties has become enormous as a source of international law. Treaties are generally believed to be binding among the states that are parties to them.[112] Treaties are thought to be the "plainest source of international law"[113] in that they are usually in the form of written agreements expressly and consciously made between sovereign states. The essence of a treaty has been clearly spelled out in the following words: "'treaty' means an international agreements 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."[114] The meaning of "treaty" has been further extended to accommodate treaties concluded between states and international organizations, or agreements between international organizations by the 1986 VCLT.[115] Therefore, the legal capacity to conclude international conventions by the combined effect of the 1969 VCLT and the 1986 VCLT between states and international organizations or between international organizations resides between the states and other subjects of international law.[116]

The binding effect of a treaty comes with consent. That is, states come together consciously with the intention of being legally bound by the terms of the agreement.[117] A treaty is not a merely gentlemen's agreement that only amounts to a political, rather than a juridical commitment.[118]

This in effect means that once the consenting states ratify or accept or give accession to the agreement, they are not only expected to discharge the obligations contained in the treaty but also that a breach of its terms is impermissible.[119] The exception, of course, will be where the state(s) has entered reservation to any or some of the terms of the convention, in which case, such terms of the convention will not be binding on it.[120] With the consent given, it means the states have expressed their good will to be bound by the rules stipulated in the treaty. It is a general rule as stipulated in *North Sea Continental Shelf*[121] that where a state does not give consent to or approve of a treaty, it is exonerated from any judicial commitments to it. It is of importance to stress, however, that where a treaty is a manifestation of customary law rules, then nonparty members may be bound by the rules, not because it is treaty, but because it is a reflection of rules of international customary law.[122] But where a state is not desirous of pursuing the contents of a treaty any more, it can invoke the opt-out stipulations or clauses in the treaty.

It must, however, be stated emphatically that a treaty significantly owes its importance and validity to international customary law as it derives its legal competence from it. The *pacta sunt servanda* is a rule that has its origin in customary international law but that is entrenched within the ambit of international convention that parties must obey their contractual treaty.[123] In some quarters, it is believed that international customary law surpasses an international treaty in the hierarchy of sources of law because, if not for international customary rules, a treaty would ultimately lose it binding force.[124]

Treaties have been known to be either bilateral or multilateral. Bilateral treaties are considered less cumbersome as a law-making instrument, but the question of efficiency in attaining uniformity and equality of treatment among the 193 members of the United Nations, when required to make an agreement on a single topic, remains problematic.[125] Moreover, in most cases, bilateral treaties are found to be in the form of "contract treaties," such as bilateral investment treaties and extradition treaties, which are viewed by some commentators as not competent enough to be a source of international law. Multilateral treaties, however, as the name suggests, involve more than two countries in the agreement-making process. Multilateral treaties are often seen as *law-making treaties*, which generally provide an authoritative source of international law. Law-making treaties, according to Shaw, "are intended to have effect *generally*, not restrictively, and they are to be contrasted with those treaties which merely regulate limited issues between a few states."[126] The new rules created by these law-making treaties will necessarily involve the

participation of a large number of states and thus bind those states that give their consent to it. Although most of treaties are usually concluded among a few states,[127] those that are concluded by an overwhelming majority of states end up formulating rules that will eventually become *general* international law.[128] A typical example is the VCDR, which has the consent and approval of about 187 member states of the United Nations and which, invariably, gives it universal support.[129]

International Customary Law

Within the international echelons, the source of international diplomatic law is known to have evolved largely from customary rules of international law,[130] although, more recently, these customary rules have been, in the main, codified into what is now known as the VCDR and the VCCR. This codification notwithstanding, the significance of international customary law as a source of international diplomatic law still stands as expressly stated in the fifth paragraph of the preamble to the VCDR that "affirming that rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention." However, there are arguments on the relevance of international customary law as a source of international law. Some commentators do not attach any value to international customary law for reason of it being "too clumsy and slow-moving"[131] as to accommodate fast-evolving international law questions.[132] Other scholars, however, maintain that because international customary law has universal application, it therefore stands as a dynamic process for creating law.[133]

The ICJ has, in the course of shedding more light on what international customary law is, said in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*[134] that

> [i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio jusris*[135] of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom or in deed in developing them.[136]

The two elements (actual practice and *opinio juris*), according to the pronouncement of the ICJ in the above statement, have been identified as the objective one of "a general practice" and a subjective one of "accepted as law."[137] Similarly, it has also been established in *Germany v. Italy: Greece intervening*[138] that it is imperative for the Court to determine the existence of international custom, as evidence of a general practice

accepted as law relying on the dictate of Article 38 (1) (b) of the SICJ. The two constituents of customary international law will now be considered with a view to understanding to what extent they need to be proved in establishing the existence of the rule of customary law and the controversies surrounding them.

The Objective Element of "a General Practice"

The general requirement of the SICJ, as mentioned above, does not demand that all the states or even the majority of states must have necessarily practiced a particular custom for its rules to be regarded as established.[139] According to J. L. Kunz, for the practice to be firmly established so as to form international customary law, it must be a continuous and repeated practice without interruption of continuity, albeit there are no clear indications in international law as to "how many times or for how long a time this practice must have been repeated."[140] It has been indicated by the Permanent Court of International Justice in the *Case of S. S. Wimbledon*[141] and *The S. S. Lotus*[142] that the rules of international customary law can be inferred from the practice of states even if they are repeated in fewer than a dozen.

The view that the principles of customary international law need to be based on the "broad participation" of states in order for a rule of international law to be created, has been strongly opposed by D'Amato, who gives precedential value to a single act between two or more states.[143] It has also been observed by Tunkin that the element of repetition may not occur in some cases, and yet the rule of conduct will appear, resulting from a singular precedent, even though such an occurrence could be rare.[144] Moreover, not all elements of repetition result in a juridical customary norm of international law. The norm that results could, according to Tunkin, merely be a norm of international ethics or a norm of international courtesy.[145] In international diplomatic law, for instance, the exemption of diplomatic baggage from customs inspection, including privileges accorded by all states for diplomats in third countries, are not international norms but norms of international courtesy.[146] But this does not conclusively settle the requirement. According to Guzman, the duration and consistency of the practice must be ascertained.[147] Even though it appears that one inconsistency in the act of a state may not take away outright the issue of consistency in state practice, one still has to determine the amount of the inconsistency for it to be deemed insufficient.[148]

In addition, it remains unclear what amounts to "state practice" for the purpose of establishing customary international law, particularly in a world that is made up of many independent states.[149] These are the

million dollar questions that need to be answered before establishing what international customary law is.

Although state practice does not necessarily have to be universal for the purpose of establishing international customary law, it is sufficient that a majority of states participate in the practice.[150] Actions by states are usually considered as part of state practice. D'Amato believes that physical actions, without statements of either diplomats or UN officials, should alone be taken as constituting state practice.[151] But the prevalent view is that statements and claims by states can also form an integral part of state practice. Utterances by a state that include treaties, domestic laws, UN Resolutions, and policy statements all constitute evidence of state practice.[152] In the words of Akehurst, state practice "covers any act or statement by a state from which view can be inferred about international law" in addition to omissions and silence.[153] The ICJ in the *Case Concerning Rights of Nationals of the United States of America in Morocco*[154] relied on and used diplomatic correspondence to evaluate a claim of state practice. Also, international customary law can either stem from a positive action of the state or manifest itself by abstaining from action. Abstinence from action has been found to be an action in itself as there is no denying that it is capable of establishing a customary norm of international law.

The Subjective Element of "Accepted as Law"

When a practice becomes acceptable and recognized as juridically binding by the states, in addition to it being general, then international customary law can be said to be established. This legal position has been supported by the ICJ, for example, when it says that "for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice,' but they must be accompanied by the *opinio juris sive necessitatis*."[155] Once a state engages in a practice based on legal obligation, then it possesses the psychological element for establishing a norm of international customary law.[156] This critical element of customary international law is known as *opinio juris sive necessitatis*. Brownlie sees it as "a necessary ingredient"[157] for customary international law since it is the reason why a nation acts in accordance with a behavioral regularity.[158]

It is not enough that the acting state has a sense of legal obligation, but that other states also have an equal belief that indeed, it has an unfettered legal commitment to act.[159] The state will then be bound to act in accordance with such belief "even if only once, then it is to be inferred that they have tacitly consented to the rule involved."[160] This assertion thus appears to be correct, considering that customary rules are generally

taken as *pacta tacita* (meaning tacit agreements among states) as states will generally be disallowed from disregarding rules of customary international law.[161] A challenge by other states to this belief or a declaration of the acceptance of it *ex gratia* can prevent the creation of a new norm of customary international law.[162]

However, the fact remains that classical international law considers state practice and *opinion juris* as vital elements of customary international law.[163] This was the position of diplomatic relations before 1961, when it was mainly customary international law because its rules "were the product of long-established state practice."[164] The customary rules are now codified in the VCDR and VCCR, although, one cannot say that these two conventions contain fully all the relevant customary rules regulating diplomatic and consular relations.[165] Nevertheless, the conventions do not take away outright the relevance of customary rules of international law when deciding on diplomatic related matters, particularly in cases in which the provisions of the VCDR or VCCR seem inadequate.[166] Perhaps this explanation falls within the observation of the ICJ in the *United States Diplomatic and Consular Staff in Tehran*[167] when it held that "the obligations of the Iranian Government here in question are not merely contractual… but also obligations under general international law."[168]

General Principles of Law

This is one of the sources of international law as embodied in Art. 38 (1) (c) of the SICJ, and it is "the general principles of law recognized by civilized nations." The provisions of Article 38 (1) (c), which empower the ICJ to apply "the general principles of law recognized by civilized nations," were, according to Lauterpacht, drafted in order to prevent the possibility of a *non liquet*.[169] The ICJ cannot give judgments of *non liquet* (finding that an existing law does not cover a particular situation) since Article 38 (1) (c) has empowered the international bench "through their principled application of legal reasoning"[170] to fill any legal lacunae. That is, the courts or the tribunals might find themselves in a legal dilemma, not being able to decide some of the cases brought before them for adjudication due to lack of guidance in the treaty and customary law. It must be pointed out that, for the courts or tribunals to apply the general principles of law in a particular case, they have to ensure that the said principle similarly exists in every system of civilized law.

The words "recognised by civilized nations" appear to be settled, as all the member states, following the creation of the UN, and most especially after the decolonization process, are presumed to bear the mark of

civilization.[171] The unsettled phrase is "general principles of law," which remains susceptible to multifarious meanings among international commentators and as such, has provoked diverse definitions.

A considerable number of legal authorities maintain that general principles of law fall within the categories of subsidiary sources, like judicial decisions and the writings of scholars. Dixon makes the following assertion in his analysis of general principles of law that it "may therefore, be purely *descriptive* of general doctrines or bundles of rights which form part of international law, but they are nothing to do with the law creating sources of international law."[172] But if one considers Art. 21 (1)(c) of the Statute of the International Criminal Court,[173] which further stresses the significance of general principles of law as a source, then one would see the flaw in viewing it as a subsidiary source.[174]

Also, a lot of ink has been spilled concerning whether general principles of law should be regarded in terms of rules accepted in the domestic law of all civilized states or principles about the nature of international law that are accepted by states. Brownlie has expressed acceptance of Oppenheim's view that "[t]he intention is to authorize the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of states."[175] It would, therefore, be wrong to assume that Article 38 (1) (c) of the SICJ refers to the principles of international law, as this interpretation was not contemplated.[176] It has been interpreted, in other instances, to mean the general principles of international law such as the concept of *pacta sunt servanda* (that promise should be kept) and the notion that international law is created by the consent of states.[177] One would rather agree with the conclusion of Malanczuk that "there is no reason why it should not mean both; 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."[178]

In applying the general principles of law, the ICJ at times, in its judgments and advisory opinions, employed the exact phraseology "general principles of law," while in other cases, it resorted to the usage of some other terms such as "established principles" and "general concepts of law."[179] However, these general principles are mainly common among the main legal systems of the international community, such as the common law system, the Islamic legal system, and the civilian legal system.[180] The ICJ and tribunals have been found, on several occasions, to have applied these general principles of law in one or more of these three classifications: domestic principles commonly present within major legal systems of the world, principles that are international in origin, and principles emanating from natural law.

First, some of these principles are well known within different domestic legal systems of the world and have been applied by judges of the ICJ while sitting as justices in their respective municipal courts. Among these principles are *res judicata*[181] (a case already adjudicated upon cannot be heard again for the second time), *estoppel*[182] (an established practice must not be discontinued), and *nemo judex in causa sua*[183] (one should not be a judge in his own case).

Second are the general principles of law that originate from the international domain, prominent among which is the concept of *pacta sunt servanda*.[184] So important is this principle that it gives inexorable support to the law of treaties that an international agreement must not only be observed but also remains binding among the respective parties. No wonder it occupies a considerable position in the preambles of the 1969 VCLT.[185] This is also the case with the principle of reparation[186] under international law.

And last, there is the principle of equity and humanity.[187] Equity has been used by the courts to ensure fairness and reasonableness in the dispensation of justice, particularly to prevent injustice that may arise due to a strict adherence to the law.[188] It should be noted, however, that equity, in a strict sense, cannot be compared with general principles in that it is a concept according to Wallace that "reflects values, which may be hard to define."[189] He further contends that, since equity does not contribute to substantive law, it therefore cannot be considered a source of law, "but it can, nevertheless, affect the way substantial law is administered and applied."[190]

Therefore, the ICJ may apply any of the general principles of law applicable internationally or within the realm of a particular civilized nation in any case brought before it, once there is a legal lacuna left unfilled by an international treaty and international customary law. For instance, there are some principles of law within the realm of Islamic jurisprudence in the judicial systems of many Muslim countries that would qualify as general principles of law that could be applied by the ICJ, if need be, in an international dispute.[191]

Judicial Decisions and Scholarly Writings

The ICJ and other international tribunals have the leverage of applying "judicial decisions…as subsidiary means for determination of rules of law," according to the provisions of Article 38 (1) (d) of the SICJ. However, the proviso that states that it is made "subject to the provisions of Article 59" would appear to have watered down the overall effect of the concept of stare decisis.[192] Article 59 of the SICJ provides that "the

decision of the Court has no binding force except between the parties and in respect of that particular case." This means that the ICJ is not bound to follow its previous decisions. That is to say, there is a universal consensus that international law does not accommodate what is known, in common law, as the rule of stare decisis. It should not be a surprise then that Bing Bing Jia came to the conclusion that precedents in the international courts could only serve as being "persuasive" to judges rather than having a "binding authority."[193] It has, however, being argued that, had the provision of Article 59 not been in place, the precedential effect of the principle of stare decisis mentioned in Article 38 (1)(d) would have remained in full application.[194]

Nonetheless, the ICJ does consider its previous decisions with the sole aim of seeking guidance in subsequent matters even though they are only expected, in the words of Wallace, "to apply the law and not to make the law."[195] Various judgments and advisory opinions of the international court remain today, a source of reference and provide a remarkable influence on the development of international jurisprudence. It could be said that judges are, in effect, creating new laws that are obviously innovative and command general acceptability. For instance, the *Genocide Case*,[196] in which reservations to treaties were considered; the *Reparation for Injuries Case*,[197] which reiterates the legal personality of the UN and international institutions; the *Nottenbohm Case*,[198] which establishes a genuine link between the individual and the claimant state; and the *Anglo-Norwegian Fisheries Case*,[199] which states the baselines from which the territorial sea may be drawn, all attest to this fact. It will thus remain uncertain whether the decisions of the court can still be regarded as "subsidiary" means of determining the law in the face of these classical decisions. This is because, according to Lauterpacht, "respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice."[200]

Another subsidiary means by which a dispute may be settled by the ICJ is the "teachings of the most highly qualified publicists of various nations." This point also forms part of Article 38 (1) (d) of SICJ. Truly, legal scholars do not create law; rather, they explain the law by shedding more light on existing laws through their legal writings, which have the potentiality of influencing decision makers in practice.[201] However, it may be difficult to determine who among scholars would be rated as one of "the most highly qualified publicists," particularly in a world consisting of many nations with divergent multicultural identitie+s. The determination of this will be subjective and may be, according to Boczek, "susceptible to bias."[202]

Over the years, there has been an intense reliance on the works of scholars such as Gentili, Grotius, Pufendorf, and Vattel, which, up until today, have continued, along with the work of many writers on international law of our century. The theoretical frameworks of legal scholars have greatly impacted most of the decisions of international tribunals but not so much the judgments of the ICJ.[203] The reason, perhaps, could be as a result of the increase in "the substantive law of international law" in state practice and customary international law, which has adversely affected the relevance of legal writers.[204] Nevertheless, one can still not underestimate the vibrant role played in the development of international law, especially in ascertaining and emphasizing the important areas in which international regulations should be introduced.

The Possibility of Compatibility in the Legal Sources of International Diplomatic Law and Islamic Diplomatic Law

The compatibility or tension theory between the legal sources of Islamic international law—*As-siyar* and conventional international law remains controversial among different commentators, even though the two legal regimes genuinely desire to find an indistinguishable universal justice.[205] Khadduri holds the view that the sources of Islamic *siyar* are similar to the sources of international law because "[t]he Qur'an represent the authoritative source of law; traditions are equivalent to custom; rules and principles expressed in treaties with non-Muslims fall in the categories of agreement; and the opinion of the caliphs and jurists, based on legal deduction and analogy, may be regarded as reason."[206] However, Ford, in his elucidation of the sources of international law and Islamic *siyar* cannot find any genuine compatibility between them. In his conclusion, he stresses that "[t]he *siyar* cannot be said to be genuinely compatible with modern international jurisprudence."[207]

In view of this apparent controversy, it becomes pertinent to consider whether there is indeed any compatibility in the principles inherent in the sources of international diplomatic law and Islamic diplomatic law. This section, therefore, looks at how and to what extent the sources of Islamic law are compatible with the sources of international diplomatic law.

The Analogy of International Treaty

The basic and fundamental principle behind every international treaty is that it must be respected and obeyed. Hence, the traditional Western

maxim in conventional international law, *"pacta sunt servanda"*—every pact must be fulfilled. Islamic international law also requires that once a Muslim state enters into a treaty arrangement with any other state, be it a Muslim or a non-Muslim state, it is legally required that all the terms of the treaty must be fulfilled. The basis of its fulfillment, just as with *pacta sunt servanda* in conventional international law, may be found in the old Arabic adage *Al-'aqd shari'at al-muta'aqideen*, meaning "the contract is the *Shari'ah* of the parties."[208]

The obligation to fulfill all contractual agreements when entered into is unequivocal in the Qur'anic provisions. For example, Qur'an 5:1 states, "O you who have believed, fulfil [all] contracts." Likewise, Qur'an 16:91 stipulates thus: "And fulfil the covenant of Allah when you have taken it, [O believers], and do not break oaths after their confirmation while you have made Allah, over you, a witness. Indeed, Allah knows what you do." Even for non-Muslims, Allah stresses that the terms of the treaty must be completed as long as they have not compromised their position by giving support to an adversary party: "Excepted are those with whom you made a treaty among the polytheists and then they have not been deficient toward you in anything or supported anyone against you; so complete for them their treaty until their term [has ended]. Indeed, Allah loves the righteous [who fear Him]."[209]

Allah states further, "So as long as they are upright toward you, be upright toward them. Indeed, Allah loves the righteous [who fear Him]."[210] The unequivocal statement of Prophet Muhammad (pbuh) to Abu Jandal ibn Suhayl when the latter became a Muslim and sought to defect from the Makkan camp to join the Muslims immediately after the Treaty of Hudaybiyyah was the following: "O Abu Jandal have patience and be disciplined; for God will soon provide for you and your other persecuted colleagues a way out of your suffering. We have entered with the Quraysh into a treaty of peace and we have exchanged with a solemn pledge that none will cheat the other."[211] Prophet Muhammad (pbuh) definitely understood the importance of fulfilling the terms of a treaty by stressing the implication of violating a treaty once it has been entered into.

The legal position of a treaty under Islamic law has been well articulated in the famous case of *Saudi Arabia v. ARAMCO*,[212] in which it was carefully stated that

> Muslim law does not distinguish between a treaty, a contract of public or administrative law and a contract of civil or commercial law. All these types are viewed by Muslim jurists as agreements or pacts which must be observed, since God is a witness to any contract entered into

> by individuals or collectivities; under Muslim law, any valid contract is obligatory, in accordance with the principles of Islam and the Law of God, as expressed in the Koran: "Be faithful to your pledge to God, when you enter into a pact."

An overwhelming majority of Muslim jurists are of the view that a Muslim state can validly enter into a binding treaty with a non-Muslim state for an indefinite period of time or for a specified period to be determined by the Islamic leader.[213] The view expressedby Khadduri that a peace treaty cannot be entered into for more than ten years with non-Muslims[214] has been said to represent the extreme views of al-Shafi'i.[215] There are authoritative views, according to Ibn Rushd (1198 AD), which are attributed to Abu Hanifah, Malik Ibn Anas, and Ibn Hanbal, that a peace treaty can be for an indefinite period as long as it serves the interests of the Muslim state.[216] The important thing is that such a treaty must subsist for the interests of Muslims.

It is to be noted, however, that a treaty that contains some terms that appear to be repugnant to Islam may still be executed under Islamic international law, although with some reservations and provided it is for the overall interests of Muslims.[217] The historical basis for this assertion can be found in the Treaty of Hudaybiyyah 628 AD, which Prophet Muhammad signed with the non-Muslims of Makkah, even though some of the terms of the treaty appeared unfavorable to the Muslims. But the Treaty of Hudaybiyyah later turned out, as expected by Prophet Muhammad, to be "a manifest victory" (*fathaan mubeenan*).[218] This may be the likely reason why almost all of the Muslim states are parties to the 1961 VCDR and 1963 VCCR, which regulate the immunity and activities of the diplomatic and consular personnel and which are to the benefit of the Muslim community (*ummah*) generally.

The Analogy of International Customary Law

International customary rule among nations will remain a source of international law provided it evidences a general practice that is accepted as law. In essence, customary international law must be a general practice, and such practice must be legally binding. However, according to Islamic law, once a customary practice does not derogate from the fundamental tenets of Islam, then it becomes a method of formulating law regardless of whether it originates from the era prior to Prophet Muhammad (pbuh) or not. That is why in interpreting contractual obligation, Islamic law gives allowance to the prevailing customary practice at the time and place of the contract.[219]

Most Muslim countries, as based on their legal systems, do consider customary practice in their judicial decisions.[220] The rule of reciprocity for instance, which forms the basis of the universal international order and which is deeply embedded in international customary law, also occupies an important position in Islamic diplomatic law.[221] It was embraced by the Islamic legal system to "make justice reign, establish standards of fairness and impartiality."[222] Muslims have, however, been discouraged from reciprocating where the fundamental moral principles would be breached, as the following is clearly stated in the Qur'an: "And if you punish, let your punishment be proportionate to the wrong that has been done to you; but if you show patience that is indeed the best (course) for those who are patience."[223] A typical example can be drawn from the provision in the Qur'an that state, "How can there be for the polytheists a treaty in the sight of Allah and with His Messenger, except for those with whom you made a treaty at al-Masjid al-Haram? So as long as they are upright toward you, be upright toward them. Indeed, Allah loves the righteous [who fear Him]."[224] At least every state would want to be treated in the same way it treats others,[225] that is, to reciprocate in the spirit of one good turn deserves another.

Meanwhile, Islam has been known to observe and continuously respect whatever customary norm has developed within the international arena, inasmuch as it is not in conflict with the basic principles of Islamic law.[226]

The Analogy of General Principles of Law

The general principles of Islamic law, as one of the major legal systems of the world, are capable of renewing the rules of international law, considering that these are principles of a legal system that have been "tested within the shelter of more mature and closely integrated legal systems."[227] The stipulation in Article 38 (1) (c) of the SICJ deliberately empowered the international bench to draw from generally acknowledged and highly refined legal principles belonging to various legal systems of the world when adjudicating. They are particularly expected to utilize and apply these general legal principles as "a tempting set of rules which these might be encouraged to adopt, as a last resort,"[228] rather than resort to judgments of *non liquet*.

The prerequisite for electing persons to the international judiciary, according to Art. 9 of the SICJ, is the possession of individual qualifications. It is further required "that in the body as a whole the representation of the main forms of civilizations and of the principal legal systems of the world should be assured." The fact that Islamic law was recognized as

constituting one of the main forms of civilization and as being one of the major legal systems of the world at the League of Nations in September 1939, and subsequently at the UN Conference in San Francisco in April 1945, which was eventually adopted as Art. 38 of the SICJ, demonstrates the relevance of its general principles.[229] It thus appears, referring to the statement of Lombardi, that "Article 38 (1)(c) opens a door through which the Court could walk if it wished to integrate into its jurisprudence the perspective of highly developed, non-European cultures, such as Islamic legal culture."[230]

Islamic jurisprudence has equally evolved time-honored principles of law thatcould be applied by the ICJ, whenever the need arises, to resolve international dispute, particularly those involving Muslim countries. Prominent among these general principles is the international law principle of *pacta sunt servanda*, which is also a fundamental tenet of Islamic law. The basic principle in Islamic law regarding any treaty, agreement, or contract is that once it has been concluded, it must be fulfilled. Also, the legal principle of *istihsaan* (juristic preference), which has been likened to the Western concept of equity due to its preference for simplicity and easement of difficulties, gives a lucid picture of one among the various principles of law that could be of use to the ICJ. One could, therefore, see reason in the international tribunal's decision in *Eritrea v. Yemen* that "in today's world, it remains true that the fundamental moralistic general principles of the Qur'an and the *Sunnah* may validly be invoked for the consolidation and support of positive international law rules in their progressive towards the goal of achieving justice and promoting the human dignity of mankind."[231]

Similarly, the juristic method of *maslahah* (public interest) is another principle of Islamic law that Muslim states have applied and still apply as one of the legal justifications for ratifying and signing international treaties with non-Muslim countries.[232] The juristic principle of *maslahah* allows for the existence of a mutual and peaceful relation between a Muslim state and a non-Muslim state inasmuch as there is no physical or ideological warfare between them. This appears as one of the reasons why most Muslim nations are signatories to all the diplomatic-related conventions—for instance, the 1961 VCDR, 1963 VCCR, 1969 VCLT, and 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, to mention but a few.

The above general principles of Islamic law can, if utilized, according to Kelsay and Johnson, "prove to be ones that readily harmonize with and accommodate modern international norms."[233]

Conclusion

In sum, we have analyzed the legal sources in the two jurisprudential systems, and most importantly, investigated them by bringing out the compatibility in the principles surrounding the sources of the two legal regimes. We have also indicated how Islamic *siyar* enjoins the Muslim state to strictly comply with the terms and conditions of any treaty once entered into; how it gives validity to international customs that have evolved among different nations; and how it has contributed, through its numerous legal principles, to the general principles of law, thereby rescuing international tribunals and the ICJ from falling into legal oblivion.

One can, therefore, see that the principles of Islamic international law are readily available to consolidate and expand the scope of contemporary international law. In addition, these Islamic law principles are also there to facilitate the overall protection of diplomatic institutions in the hope that this will "encourage the development of common ground between the different legal systems of the world to ensure global peaceful and harmonious international relations,"[234] in the words of Baderin.

4

A General Overview of Diplomatic Immunity in International Diplomatic Law and Islamic Law

Introduction

In the early period, just as it used to be the practice in Islam, envoys were assigned tasks abroad, and once these tasks have been accomplished, the envoys were to return home immediately.[1] The beginning of the sixteenth century marked the establishment of permanent diplomatic missions, particularly among European nations.[2] The necessity to formulate "suitable immunities and privileges"[3] with cogent legal justification for undertaking diplomatic activities became imperative. The rationale for the inviolability and jurisdictional immunity accorded foreign representatives, along with their diplomatic premises, can be traced back to three popular theoretical justifications of diplomatic immunity—exterritoriality,[4] representative character, and functional necessity.[5] Extensive scholarly discussions have been recorded on the theoretical justifications of diplomatic immunity. It is in light of the above that this chapter intends to examine these justifications with a view to extracting a common theoretical basis for diplomatic inviolability and in Islamic diplomatic law and international diplomatic law. This chapter also on the one hand examines the different forms of diplomatic privileges, immunity, and facilities at diplomatic missions and their various personnel as understood under international diplomatic law, and on the other hand considers whether under Islamic diplomatic law, the concept of diplomatic immunity exists, particularly from perspective of the making of the Treaty of Hudaybiyyah (628 AD). Moreover, if it does exist, is it compatible with the principles of diplomatic immunity as understood under modern diplomatic law? This

chapter further considers how Islamic *siyar* perceives the relationship between the concept of *Aman*— safe conduct and diplomatic immunity.

The Theoretical Justifications Underlying Diplomatic Inviolability and Immunity

Diplomatic Inviolability and Immunity under International Law

International law has set certain standards, "whether administrative, legislative or judicial,"[6] which the receiving state has to put in place before it hosts foreign representatives. These standards, which are made up of international and national laws, are known as diplomatic privileges and immunity. What makes a diplomat deserving of this immunity? In answering this question, scholars of international law have come up with three major theoretical considerations that form the bases for diplomatic privileges and immunity. They are personal representation, exterritoriality, and functional necessity, and each of them will be considered in *seriatim*.

Representative Character Theory

The representative character theory was propounded by classical writers between the eighteenth and nineteenth centuries.[7] This theory represented a generally accepted position among the various schools of law—the natural law school and the positivist law school—that maintained divergent views on the subject. Hugo Grotius, expressing the view of the natural law school, said, "it is natural to suppose, that nations have agreed, in the case of ambassadors, to dispense with that obedience, which every one, by general custom, owes to the laws of that foreign country, in which, at any time, he resides. The character which they sustain is not that of ordinary individual, but they represent the Majesty of the Sovereigns, by whom they are sent, whose power is limited to no local jurisdiction."[8] The approach of legal positivism is illustrated by Cornelius van Bynkershoek in the following words: "The sole reason why ambassadors are exempted from the power of those to whom they have been sent is that they should not, while performing the duty of their office, change their status and become subject to another while they are acting as the representatives of their prince who is generally a rival."[9]

With the diplomatic institution made permanent, the ambassador then required the kind of protection that befits the state organ he represented abroad. That brings us to the rudiments of the representative

theory, which "traces immunity to the sovereignty of the state which sends the agent."[10] Since the sending state does not owe any allegiance to the receiving state, it therefore follows that the diplomatic agent of the sending state will not be bound by the law of the receiving state.[11] That is, any wrong done to the diplomatic agent of a sovereign state will essentially be considered an affront to the foreign state.[12] The diplomat is thus considered as the alter ego of his sovereign.[13] The US Chief Justice Thurgood Marshall carefully delineated the rationale of the representative character theory in the US Supreme Court of Justice's case of *The Schooner Exchange v. M'Faddon*,[14] in which he said, in part, that

> [t]he assent of the sovereign to the very important and extensive exemptions from the territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the consideration that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad.

In the United Kingdom, the representative character theory was for long adopted in the Diplomatic Privileges Act of 1708.[15] It was a reaction to the arrest of Andrei Artemonovich Matveev, the Russian ambassador to England that necessitated the implementation of the Act.[16] It provided that no judicial proceedings could be brought against diplomats or their servants and that it was an offense to commence proceedings against them.[17] The Act endured up until the enactment of the Diplomatic Privileges Act, 1964.

In modern-day diplomatic practice, it is doubtful whether the personal representative theory is considered relevant any more in view of the criticisms leveled against it. With states now overwhelmingly embracing democracy, sovereignty seems to have moved from the hands of monarchies into the hands of the people and their elected officials.[18] In democracy, the power of sovereignty is said to be shared among the three arms of government: the executive, the legislature, and the judiciary. However, some critics see a difficulty in identifying those on whose behalf the diplomat is acting.[19] This can be counterargued by the fact that the so-called separation of power arrangement in democracy is an internal arrangement of each state. A representative abroad is naturally representing the interest of the state as a geopolitical entity. He is seen to be representing all three arms of government, even though he was appointed by the executive arm.[20]

Some other commentators also see the personal representation theory as being too broad and too fallacious for the business of conducting

international business.[21] However, this theory did not fade away outright with the emergence of modern-day politics. One can still trace, to some extent, the representative character in the VCDR, which states among other things, that the functions of diplomatic mission shall consist of "[r]epresenting the sending State in the receiving State."[22]

Exterritoriality Theory: A Fictional Justification of Immunity

This theory, though considered to be the oldest, had a relatively short run in the history of international law.[23] By this theoretical reasoning, a diplomat, his home, and his office are considered to be legally resident within the territory of the sending state, even though they are physically resident abroad.[24] This is why the French jurist, Pierre Ayrault, held the opinion that the diplomat "is held to be absent and to be present in his own country."[25] One should not be surprised that as far back as 1883, James Lorimer had declared in his treatise of international law that "an English ambassador, with his family and his suite, whilst abroad in the public service, is domiciled in England."[26] The theory of exterritoriality presupposes that agents of the receiving state may not enter the premises of the sending state due to want of personal jurisdiction, thus making it impossible to compel the diplomat to appear in the receiving state's court of law.[27] The New York Supreme Court in *Wilson v. Blanco*,[28] while giving judicial recognition to the theory, affirmed that the rule "derives support from the *legal fiction* that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin, and whose sovereign he represents, and within whose territory he is, in contemplation of the law, always abide" [italics are mine]. Similarly, an English Court in *The King v. Goerchy*[29] held that "an ambassador is not subject to the courts of the country to which he is sent but is believed, by legal fiction, to still be a resident of his own country."

Legal scholars and commentators, however, agree that the exterritoriality theory is nothing but an "explanatory fiction,"[30] which, by the assessment of Ogdon, "does not provide the actual reasons for determining rights and duties, [and] it is of little value as a guideline in determining the scope and limits of diplomatic privileges and immunities."[31] This explains why states failed to put it into practice despite the fact that the theory is acknowledged to form the rationale for diplomatic immunity.[32] In fact, the fictional element in the entire approach makes the acceptance of the theory to modern minds much more difficult.[33] Furthermore, the theory has an expansive and broad construction of diplomatic immunity in that it prevents states from restricting the privileges and immunity

of diplomats.[34] Finally, the presumed grant of unrestricted privileges and immunity that has the tendency to surpass the ordinary immunity granted to the diplomat could, in the words of Wilson, "result in dangerous consequences."[35] Since the theoretical analyses of both the representative character and exterritoriality failed at providing sufficient and pragmatic justification for diplomatic immunity, legal scholarship moved on to consider what is to be known as the "functional necessity theory."

Functional Necessity Theory: A Practical Justification for Immunity

Modern trends dictate that for a diplomatic envoy to carry out hisfunction efficiently, without any interference, intimidation, or fear of civil or criminal prosecution, he/she needs to be guaranteed all necessary privileges and immunity in the country of his/her accreditation. This is the functional necessity theory, which became generally popular among legal scholars in the early twentieth century. The basis of this theory is evidenced in the statement of de Vattel that a diplomat should be free from domestic jurisdiction and that "he be not liable to be diverted from his functions by any chicanery."[36] Likewise, Wills, J., in the case of *Parkinson v. Potter*,[37] was instructive when he declared that an extension of exemption from the jurisdiction of the courts was essential to the duties that an ambassador must perform. No wonder this is the case, as since the postwar period, international law jurists have generally taken "functional necessity" as the theoretical basis for granting privileges and immunity.[38]

Essentially, the theory of functional necessity derives its essence and popularity from the important functions performed by diplomats.[39] What is more, this theory makes considerable allowance for the restriction of the entire scope of diplomatic immunity.[40] Of course, it is necessary that diplomatic immunity should be in place for the smooth conducting of foreign activities, which are crucial for diplomatic process. Meanwhile, other activities that are not essential to the diplomatic process do not require immunity as they are not of functional necessity.[41]

The popularity gained by this theory is reflected in the preamble of the 1961 VCDR to the effect that "the purpose of such privileges and immunity is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states."[42] In other words, it can rightly be said that immunity and privileges are not granted specifically to diplomatic agents; rather, they are for the diplomatic tasks and functions they are to discharge.

Notwithstanding the general acceptance of functional necessity theory over and above the theory of exterritoriality, some commentators still attribute some shortcomings to it. The functional necessity theory is, though, "fashionable but somewhat question-begging."[43] It has been criticized for being "disturbingly vague"[44] in its failure to specify the limits of essential immunity to the accepted diplomatic practice.[45] Although the restrictions imposed on diplomatic immunity are supposed to be limited "to what he [the diplomat] needed to accomplish his mission"[46] in strict compliance with the functional approach, in practice, the private acts of diplomats equally enjoy absolute immunity.[47] This immunity enjoyed by the dplomats, according to Maginnis, could be as a result of the fact that "states are fearful that their diplomats could face unjust political prosecution or be rendered unduly cautious in carrying out their functions."[48] It has also been argued that, if breaking the laws of the receiving state is what the diplomat requires to efficiently conduct international relations, then the theoretical rationale of functional necessity stands betrayed.[49]

Justification for Diplomatic Immunity in Islamic International Law (Siyar)

It may be correct to say that Islamic history has not recorded any theoretical transformation of legal justifications regarding diplomatic immunity similar to that obtained under international law. However, what appears to be predominant as the legal rationale for the practice of diplomatic immunity under Islamic international law is the functional necessity theory. One of the Hanafi jurists, Sarakhsi, was quoted by the Federal Shariat Court of Pakistan in *Re: Islamisation of Laws Public Notice No. 3 of 1983*[50] as saying, "if somebody claim (sic) to be an envoy and has in his possession the necessary credentials he shall be granted immunity till the completion of his ambassadorial duty and till return."[51] This is predicated on the fact that "[w]ithout such immunity they cannot satisfactorily perform their functions."[52] This point was also emphasized by Zawati when he said that "[t]o enable them to exercise their duties and functions, diplomatic agents enjoy full personal immunity under Islamic international law."[53] It is also pertinent to state that the largest international Islamic organization, otherwise known as the OIC, confirms the functional justification of diplomatic immunity in Islamic international law. Article 13 of the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference states that "immunities and privileges are accorded to the representatives of Member States, not

for their personal benefit, but in order to safeguard the independent exercise of their functions in connection with the organization."[54]

One can still not completely rule out the importance of what seems like the representative character theory in Islamic international law. One of the renowned authors[55] on this subject gave the following remarks while advising the king on how ambassadors should be received, saying, "Whatever treatment is given to an ambassador, whether good or bad, it is as if it were done to the king who sent him, and kings have always shown the greatest respect to one another."[56] This therefore, gave an indication that since diplomatic envoys are representatives of their sovereigns in the receiving countries, it necessarily implies that diplomatic immunity should be accorded to them.

Codification of Diplomatic Immunity and the Protection of Diplomatic Personnel

Movement in the Direction of Uniform Codification

The notion of diplomatic immunity and privileges has gone through several phases in the history of its codification. Different states, particularly in the eighteenth century, developed their own kinds of diplomatic immunity and privileges. The United States and the United Kingdom, for instance, saw no reason why diplomatic envoys should not enjoy absolute diplomatic immunity.[57] States like Italy, however, have held the view since 1922 that absolute immunity has not only ended but has also become "one of the political doctrines that have been suspended" in the sense that acts outside the diplomatic business will not be accorded diplomatic immunity.[58] The divergence in states' position on this matter went as far as some states refused to grant diplomatic immunity to their citizens who happened to be diplomatic agents of another state, while some states refused to accord them any diplomatic recognition.[59] Yet, other states granted full diplomatic privileges and immunity to diplomats regardless of whether the ambassadors were their own or not. They also extended this diplomatic shield to cover those working with the diplomat—counselors, first secretaries, drivers, typists, clerks, and cleaners.[60]

Based on these variations and the precarious status of diplomatic privileges and immunity, several jurists and a considerable number of international lawyers mooted the idea of having a uniform protection for diplomatic personnel through having states sign a multilateral convention. This can be said to be one of the reasons for the establishment of the 1961 VCDR.

The Making of the 1961 Convention on Diplomatic Relations

In an effort toward realizing the uniform codification of diplomatic law, the American States, on February, 20, 1928, signed the Havana Convention on Diplomatic Officers.[61] Though regional in scope, the treaty contained the general functions and immunity of diplomatic agents. The Convention, through its preamble, embraces the functional necessity theory as forming the rationale for diplomatic immunity.[62] There was also an attempt by Harvard Law School to publish the Harvard Research Draft Convention on Diplomatic Privileges and Immunities in 1932, all in a bid to find a universal convention for international diplomacy.[63] In spite of this effort, which was of "great persuasive authority,"[64] however, various states still adhered to the provisions of their respective local laws on diplomatic relations.

The UN International Law Commission (ILC)[65] sprang into action, as a matter of priority, to consider the codification of diplomatic and consular relations and immunity during its first session in 1949.[66] The ILC was mandated in 1953 by General Assembly Resolution 685 to undertake the codification of diplomatic law.[67] By 1954, the ILC took up the task of considering a draft that was expected to become "a universal comprehensive law"[68] on diplomatic-related matters. In the preparation of the draft, all member states of the UN and parties to the Statute of the International Court of Justice, as well as members of the Specialised Agencies were present.[69] The final draft was eventually submitted in 1958 after much deliberation, for adoption not by the General Assembly, but by a specially convened conference in Vienna.[70]

Between March 2 and April 14, 1961, 81 states met at a Conference in Vienna to discuss and adopt the final draft of the Convention on Diplomatic Relations. The Convention, which is made up of 53 articles, along with two Optional Protocols on the acquisition of nationality and the obligatory settlement of disputes,[71] was ultimately adopted and ratified by 113 states on April 18, 1961.[72] With the Convention came an authority in the codification of diplomatic law particularly within the recondite domain of customary rule. Today, no fewer than 185 states are signatories to the 1961 VCDR, which confirms the general acceptability and in fact, the universality of diplomatic relations,[73] and of which 57 Muslim states are parties to the VCDR. This represents not less than one-third of the entire membership of the VCDR. Although one may say that the Vienna Convention "constitutes the modern law in regard to the privileges and immunities of diplomats,"[74] while the extent of the

application of its system of immunity among different states remains a matter of substantial divergence.[75] That is why the question of uniformity in the application of the provisions of the Vienna Convention appears unsettled. Nevertheless, it can still be rightly argued, in line with the submission of Eileen Denza in her authoritative treatise entitled *Diplomatic Law*,[76] that "the Vienna Convention on Diplomatic Relations is probably the most successful product so far of the United Nations 'legislative process.'" It was further stressed that "[t]he Vienna Convention is without doubt one of the surest and most widely based multilateral regimes in the field of international relations."[77]

The VCDR carefully sets out certain immunities to be enjoyed by the diplomatic agent so as to guarantee the fulfillment of his/her diplomatic functions without any hindrance or fear of intimidation. These immunities are examined in the following section.

Diplomatic Immunity According to the 1961 Vienna Convention

The 1961 VCDR consists of 53 articles, of which 12 deal directly with personal immunity. The Convention outlines different categories of immunities and inviolabilities given to various classes of diplomats.[78] The various categories of these diplomatic immunities and privileges as they apply to diplomatic personnel and their family members are discussed below.

Personal Inviolability

The inviolability of the diplomatic envoy is "the oldest established and the most fundamental rule of diplomatic law."[79] This principle has been associated with the concept that the diplomatic agent[80] is representing the sovereign, and as such, any injury brought against him embodies a corresponding affront to the sovereign.[81] The core essence of diplomatic inviolability is "to ensure the efficient performance of the functions of diplomatic missions,"[82] which is in conformity with the functional necessity theory. That explains the significance of Article 29 of the VCDR, which states that the diplomatic agent "shall not be liable to any form of arrest or detention."[83] In addition, Article 29 also requires that the receiving state should "take all appropriate steps to prevent any attack on his person, freedom or dignity."

Article 29 seeks to protect the diplomatic agent from all forms of hindrances and restrictions that may affect the smooth dispensation of his diplomatic duties in the receiving state, although the article contains no

express or implied concept or scope of inviolability.[84] It does, however, provide a double-pronged protection. First, the authorities of the receiving state are not allowed under any circumstances to detain or arrest a diplomatic agent. Second, the article makes it an obligation for the receiving state to protect the diplomatic agent.[85] Once a state has entered into a diplomatic relation with another state, it then becomes a must that the state take "all appropriate steps" toward the prevention of physical attack or violence against the dignity and freedom of its diplomatic personnel.[86] According to some scholars, it is uncommon to find a member of diplomatic personnel being arrested or detained for committing an offense, even though there seems to be a right to self-defense.[87] But where such offence thus occurs, reparation or an apology becomes necessary.[88] A public apology was, for instance, received when a Third Secretary of the American embassy was assaulted in Nanking by a Japanese soldier in January 26, 1938.[89]

Family members of diplomatic agents who are not nationals of the receiving State are equally granted immunity contained in Articles 29 to 36 of the VCDR.[90] The concept of inviolability is also extended to the members of administrative and technical staffs of a mission, including their respective family members. Immunity from civil and administrative jurisdiction is, however, subject to acts performed within the scope of their duties and obligations.[91] It is important to note that some Muslim states such as Iraq, Egypt, Morocco, Qatar, and Sudan have entered a reservation to the application of Article 37(2) of the VCDR,[92] either to the effect that members of the administrative and technical staffs of the mission do not have any diplomatic immunity[93] or that Article 37(2) shall only apply on the basis of reciprocity.[94] And finally, also immune for official functions only are members of service staff of a mission, which includes maintenance and domestic employees.[95] Also included in this category are their family members.

Inviolability of Mission Premises and Private Residence

In practice, there did not appear to be a clear-cut distinction between the "residence of the ambassador" and the "premises of the embassy" until very recently.[96] With the rate at which the numbers of diplomatic staff have increased in recent times, it has become almost impossible to accommodate the numerous diplomatic staff in the ambassador's residence.[97] It therefore became necessary to physically separate the private residence of the diplomatic personnel from the diplomatic mission premises that serve as the chancery building.[98] However, international law scholars

had always referred to the two premises (the mission and the residence of diplomats) as enjoying *franchise de l'hotel*.[99] This means that the premises of the mission were to be used solely for the purposes of the mission's functions as designated by the sending state. The VCDR gives the definition of the premises of the mission as including both "the buildings or parts of the buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission."[100]

However, the reasons for attributing inviolability to the premises of the mission and the residence of the diplomat are quite different. Regarding the premises of the mission, it is granted inviolability as a "form of State immunity attaching to a building used for government purposes."[101] Meanwhile, inviolability with respect to the diplomatic residence comes by virtue of diplomatic status. Still, the notion of inviolability thus appears to be applicable to both the premises of the mission and the residence of the envoy in equal degree.[102] The premises of the mission and the residence of the envoy have gained the universal recognition that they shall remain inviolable.[103]

The protection of the inviolability of the premises of a mission comes from Article 22 of the VCDR, which proscribes the agents of the receiving state from entering the premises of the sending state without the consent of the head of the mission. It was argued before the ILC that in the event of an emergency, such as the outbreak of a fire or a gunshot from inside the mission, it would amount to "outright foolishness, if…the local authorities were not able to go in and deal with the matter."[104] After all, for the purposes of averting and eliminating grievous harm to human life and property, it is only proper that "[i]n such emergencies, the authorization of the Ministry of Foreign Affairs must, if possible, be obtained."[105] Yet despite these arguments, according to Denza, the ILC maintained and concluded that "this would be inappropriate and unnecessary"[106] as "it would be dangerous to allow the receiving state to judge when "exceptional circumstances" existed."[107] Therefore, under no circumstances would the agent of the receiving state enter the premises of the mission without the express authorization of the head of the mission, not even to serve a writ of summons, for that would amount to an infringement of the respect due the mission.[108]

However, where the receiving state strongly "believes its essential security to be at risk,"[109] it may take the option of violating Article 22 of the VCDR. This happened in 1973, when the Iraqi ambassador was confronted with the illegal smuggling of arms by Pakistani authorities at his mission, and he refused to give consent to the Pakistanis to conduct

a search of his embassy when they requested to do so. The Pakistanis maintained that "their concerns for national security overrode all consideration of diplomatic immunity." In the presence of the ambassador, a raid was carried out by armed policemen, and large consignments of arms were found stored in crates. The Iraqi ambassador and an attaché were thus declared persona non grata by being expelled from Pakistan, and the Pakistanis recalled their ambassador from Iraq.[110] It thus appeared that the action of the government of Pakistan was justified ex post facto as an act of self-defense that was a reprisal for the breach of Article 41(3).[111]

The receiving state is "under a special duty to take all appropriate steps" toward the protection of the premises of the mission from being entered or damaged by any private person and the prevention of any injury to its dignity.[112] Although "a special duty" is not defined by the VCDR, the ILC's commentary on the 1958 draft suggests that "[t]he receiving state must, in order to fulfil this obligation, take special measures—over and above those it takes to discharge its general duty of ensuring order."[113] The receiving state owes a duty to protect the mission premises from attacks resulting from mob violence or demonstrations. On September 9, 2011, a group of about 30 protesters invaded the Israeli embassy in Cairo and threw documents belonging to the embassy out of the window.[114] Although Egyptian security forces eventually came in to bring order to the situation, the act of forcefully entry into the embassy, alone, signifies a violation of diplomatic relations. To this effect, the Israeli deputy ambassador remarked "[t]hat the government of Egypt ultimately acted to rescue our people is noteworthy and we are thankful…[b]ut what happened is a blow to the peaceful relations, and of course, a grave violation of accepted diplomatic behaviour between sovereign states."[115] It has also been stated in *United States v. Hand*[116] that an attack upon the house of an envoy is equivalent to an attack upon his person.

Inviolability of the Mission's Archives

Article 24 of the VCDR grants inviolability to diplomatic archives and documents of the mission at any time and wherever they may be. The article provides that "[t]he archives and documents of the mission shall be inviolable at any time and wherever they may be." That is, the receiving state shall have no power to seize, detain for examination, or compel the tendering in evidence any documents emanating from the missions' archives. It can also be construed from Article 24 of the VCDR that the sending state shall prevent others from unlawfully interfering with

the documents and archives of the diplomatic mission. This is because, without respect for the inviolability of these documents, in the words of Vattel, "the ambassador would be unable to perform his duties in security."[117]

The term "archives" was not defined in the 1961 VCDR; however, it has been argued that, considering "the diversity of modern methods of recording and storing information,"[118] an appropriately wider construction should be given to it. Nevertheless, the meaning of "consular archives" is given in the VCCR as including all the papers, documents, correspondence, books, films, tapes, and registry of the consular post, together with the ciphers and codes, the card indexes and any article of furniture intended for their protection or safekeeping.[119] The meaning provided in the VCCR may equally suffice in interpreting the word "archives" as used in the VCDR.

Freedom of Communication

The right to freedom and security of communication, from a functional perspective, is highly necessary for the diplomatic mission to effectively perform its primary duties. The right to a free flow of communication has been considered "probably the most important of all the privileges and immunities accorded under international law."[120] The importance of this right has been well stated by Vattel in his writing, as reported by Murty:

> The couriers whom ambassador sends or receives, his papers, his letters and despatches, are all so essentially connected with the embassy that they must be regarded as inviolable; for if they were not respected it would be impossible to attain the proper object of the embassy, nor could the ambassador fulfil the duties of his with due security.[121]

The general principle of freedom of communication is guaranteed in Article 27 of the VCDR, which provides that "[t]he receiving State shall permit and protect free communication on the part of the mission for all official purposes."[122] This article imposes dual obligations that the receiving state must discharge. First, the receiving state is expected to allow free and unhindered flow of official information in and out of the diplomatic mission. Second, it shall also ensure the inviolability of the communication. This communication, which must strictly be for official purposes, may take the form of couriers and messages in code or cipher to the government of the sending state and to its various diplomatic missions and consulates wherever they may be situated.[123] In addition, the freedom of communication with the nationals of the sending state

residing within the territory of the receiving state and with the international organizations must also be safeguarded.[124]

The question of diplomatic wireless transmitters became highly contentious at the Vienna Conference. The richer states were of the view that the installation of wireless transmitters on the missions' premises, which already were inviolable, implied that no consent of the receiving state is needed.[125] Meanwhile, other states that did not have the means of installing wireless transmitters feared that such devices might be used against their interests.[126] Eventually, it was resolved that there should be a provision that "the mission may install and use a wireless transmitter only with the consent of the receiving state"[127] and that it would be the responsibility of the sending state to observe international telecommunications regulations.[128] Once the consent to use a wireless transmitter is granted to a diplomatic mission, it then behooves the mission to respect the local laws of the receiving state in compliance with the provisions of Article 41 paragraphs 1 and 3.[129]

Protection of Diplomatic Bags and Couriers

The official correspondence of the diplomatic mission, whether carried by mail or through personal courier, is also declared inviolable as it forms part of the freedom of communication. It is also viewed that part of this freedom of communication "enables them [diplomatic missions] to receive instructions from their sending State and send home reports of what they have done, said, and observed."[130] If the sending state is to perform its diplomatic functions freely without any political interference or restrictions, there has to be a high degree of confidentiality in its official correspondence coupled with speedy dispatch. Therefore, once an official correspondence is designated as a diplomatic bag[131] or carries clear external marks of its character, whether accompanied or unaccompanied,[132] the receiving state has to, by the provisions of the 1961 VCDR, protect its inviolability by not opening or detaining it.[133] The inviolability of the official dispatches of the diplomatic mission must be respected while traversing the territories of third countries. The following Muslim states: Bahrain, Kuwait, Libya, Qatar, Saudi Arabia, and Yemen, for instance, believe that the protection given to a diplomatic bag is rather too absolute. Consequently, they have made reservations concerning the application of Article 27 to the effect that, if a diplomatic bag is believed to contain unauthorized articles, it can be opened in the presence of the representatives of the sending state; otherwise, the bag will have to be returned to its origin unopened.[134]

It is worth mentioning that the inviolability granted to the diplomatic bag has been, recently, grossly abused and is likely to be misused in the carrying out or sponsoring of a series of criminal acts against other states or their citizens.[135] There are cases in which diplomatic bags have been used to smuggle such things as drugs[136] and black market commodities.[137] Even human beings had also been disguised as a "diplomatic article." A typical example was when a former Nigerian minister of transportation, Alhaji Umaru Dikko, was kidnapped and dumped in a crate designated for the Ministry of External Affairs, Federal Republic of Nigeria, by the Nigerian High Commission, London. The kidnap attempt was, however, aborted by the quick intervention of the British government.[138] This instance gave credence to the assertion that "just as absolute power corrupts absolutely, so total diplomatic immunity can undermine totally the duties of foreign diplomats to 'respect the laws and regulations of a host country.'"[139]

Several suggestions by some countries to amend the VCDR in the belief that the absolute inviolability of the diplomatic bag should be limited, have been bluntly rejected for fear that it might "limit the bag's utility."[140] This is because, despite some instances of abuse, the inviolability of the diplomatic bag "needs to be preserved and safeguarded in the interest of all states."[141]

The 1961 VCDR also protects diplomatic couriers while they are discharging their duties. It provides that "[t]he diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving state in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention."[142] Similarly, a person can also be designated an ad hoc courier, which implies that his diplomatic immunity ceases after delivering the diplomatic bag.[143] Also, captains of commercial flights can take responsibility for a diplomatic bag, but they do not have diplomatic status.[144]

Immunity from Criminal and Civil Jurisdiction

It is generally accepted that the immunity of diplomats from the criminal and civil jurisdiction of the receiving state came much later after the rule of personal inviolability of diplomats.[145] This immunity is widely defined as "the freedom from local jurisdiction accorded under international law by the receiving state to [foreign diplomats and to] the families and servants of such officers."[146] Diplomatic immunity from criminal jurisdiction gets full support from the functional necessity theory in that it gives to the diplomatic agent uninterrupted relations among nations.[147]

Hence, Article 31 (1) of the VCDR clearly sets out, without any exception, the immunity of a diplomatic agent from the criminal jurisdiction of the receiving state.[148] The diplomatic agent needs to be protected by way of diplomatic immunity from the jurisdiction of the receiving state that penal proceedings are not commenced against him and members of his family, provided they are not residents or nationals of the receiving state.[149] The immunity granted to the diplomat and his immediate family members can be said to be absolute.

Moreover, this immunity applies to prohibiting the exercise of the criminal as well as the civil jurisdiction of the receiving state with respect to acts that the diplomat performed in his official capacity.[150] With regard to certain private acts, a diplomatic agent is, however, subject to local jurisdiction. This condition is contained in Article 31 (1) (a-c) of the 1961 VCDR, which stipulates exceptional cases in which a diplomatic agent will be subject to the civil jurisdiction of the receiving state provided they are acts performed in his private capacity. These are acts relating to 1) real property situated in the receiving state; 2) actions in which the diplomatic agent is involved privately as administrator, executor, heir, or legatee; and 3) actions relating to professional or commercial activity outside the official function of the diplomatic agent.[151]

The fact that a diplomatic agent cannot, under any circumstances, be tried or punished by the local criminal courts of the receiving state does not give him the license to flout, with impunity, the laws and regulations of the receiving state. Truly, he may be immune from criminal prosecution, but based on the famous decision of the court in *Empson v. Smith*,[152] which says "it is elementary law that diplomatic immunity is not immunity from legal liability," he can be prosecuted provided he submits to the jurisdiction of the receiving state or whenever his duties are terminated. In the case of *Dickinson v. Del Solar*, Lord Hewart CJ observed that "[e]ven if execution could not issue in this country while Mr. Del Solar remains a diplomatic agent, presumably it might issue if he ceases to be a privileged person, and the judgment might also be the foundation of proceedings against him in Peru at any time."[153] This perspective shows that criminal proceedings against a diplomatic agent do not necessarily become null and void merely because he holds diplomatic immunity; rather, it can be stayed until such a time when the diplomat loses his immunity.[154] Similarly, the diplomatic agent can be prosecuted and punished by the judicial authorities of his home state if he is found to have committed any crime, particularly the more serious offenses.[155] This is so because some nations empower their courts to prosecute and punish crimes committed by their citizens even if they were committed

abroad.[156] Once an offense, particularly a serious one, is committed by a diplomat, the receiving state may request that his home government recall him back home for the purpose of prosecuting him.[157]

The approach of the receiving state to offenses committed by diplomatic agents depends on the direct consequence of the offense on the state. For instance, where a diplomat commits the offense of espionage or terrorism, it is always the practice of states that such a diplomat will be declared persona non grata or expelled.[158] But in the case of other offenses such as drunken driving, sexual offenses, drug abuse, and speeding and parking violations, diplomats have been able to successfully claim diplomatic immunity.[159] However, the British government has the practice of informing heads of missions regarding any violation of its laws and in case of serious offences that they will usually request that the offender be recalled or his diplomatic immunity waived.[160]

While reiterating the international customary law practice, the ILC accepted[161] that the diplomatic agent is not under any obligation to appear as a witness in the court of law.[162] It should be stated, however, that the sending state may permit a diplomatic agent to give testimony in a case provided the case does not directly relate to his diplomatic duties. For instance, diplomats from the United Kingdom usually have to be expressly instructed before they can give evidence in local courts,[163] and such evidence, though not connected to their official functions, must be for the purpose of establishing justice.[164]

Freedom of Movement

The freedom of movement of a diplomatic agent is so vital to some of the functions of diplomatic relations that it cannot be overlooked. Prior to World War II, all members of the diplomatic community enjoyed unrestricted movement within the territory of the receiving states. But after the war, all the communist states of Eastern Europe, particularly the Soviet Union, imposed a travel restriction of 50 kilometers from their capital on members of diplomatic missions. China later did the same by imposing travel restrictions on diplomats within its territory. Diplomats posted in China had to receive express permission from the receiving state before traveling beyond these limits.[165] The United Kingdom, the United States, and other Western states reciprocated by imposing a similar travel restriction on diplomats from Eastern Europe.[166] This limited diplomatic freedom of movement has been established diplomatic practice between the West and the East, although with various changes.[167]

At the 1961 Vienna Conference, the Final Report of the ILC with regard to diplomatic freedom of movement was accepted without any

reservations. This result led to the unanimous adoption of the provisions contained in Article 26 of the 1961 VCDR, which provides that

> [s]ubject to its law and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

It thus appears unambiguous that, aside from the receiving state adopting specific regulations to the contrary on grounds of national security, diplomatic agents exercise and enjoy unrestricted freedom of movement in the territory of the receiving state. However, the Saudi Arabian representative at the 1961 Conference on Diplomatic Intercourse and Immunities did mention that, while accepting the provisions of Article 26 of the 1961 VCDR, the conference should accept that for the past 1,300 years, the cities of Mecca and Medina, being the birthplaces of Islam, had remained and still remain "accessible only to members of the Muslim faith."[168] This restriction, had not been imposed by the Saudi Arabian government, but had been historically and firmly established "over 1,300 years by all the governments, without exceptions."[169] It was thus unanimously accepted, though tacitly, by all diplomatic missions that the restriction does not constitute any hindrance to the freedom of movement of diplomatic personnel within the meaning of Article 26 of the 1961 VCDR.[170] Where a diplomatic agent goes beyond the permitted zone, ignoring the police request in that regard, the receiving state has the option to declare him persona non grata.[171]

Immunity from Taxation

Usually, states levy taxes on their citizens and even on aliens who are resident within their territorial jurisdictions, but these fiscal impositions do not generally extend to diplomatic missions and their personnel. This attitude is, of course, heavily linked to the functional necessity theory of diplomatic immunity. Diplomatic missions and their members enjoy diplomatic exemption from the payment of dues and taxes to public authorities, mainly to enable them carry out their diplomatic functions without any hindrance from the public authorities of the receiving state. As a diplomatic envoy, free from the territorial supremacy of the receiving state, an individual is also expected to be exempt from all direct personal taxes. The family members of diplomatic agents as well as members of administrative and technical staffs, including their families, provided they are not nationals or permanent residents of the receiving state, are

equally exempted from these fiscal charges. Article 34 of the VCDR provides general immunity from taxation, as stated in the following words: "A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal."[172] At the same time, this article also furnishes some exceptional cases in which the diplomat will not be entitled to tax exemption.

First, in cases in which taxes are indirectly imposed, that is, in which they "are normally incorporated in the price of goods or services,"[173] it is administratively impossible for an exemption or refund arrangements to be made. Such a case will usually involve excise duties, taxes on sales or purchases, and value added taxes, as well as airport taxes. The United Kingdom is, however, known to make refunds of value added taxes to diplomatic personnel in respect of three items, namely, cars, spirits (for heads of missions only), and fine furnishings, provided that these commodities are manufactured in the United Kingdom.[174] Second, the diplomat is expected to pay taxes and dues on private immovable property situated within the territorial jurisdiction of the receiving state "unless he holds it on behalf of the sending State for the purposes of the mission."[175] This clause rightly suggests that once the diplomatic mission premises are held in the name of a member of the mission, they become exempt from any fiscal imposition. Also, a diplomat is to pay inheritance tax in respect of a deceased's estate if he inherits such an estate.[176] The only exception is a case in which the estate belongs to a diplomat, or any of his family members, who dies within the tenure of his office in the receiving state.[177] The reason for this exception is that the receiving state has "territorial jurisdiction" in respect of all immovable properties, including matters of succession or inheritance of estates within its boundaries.[178] The third category of exception to diplomatic tax immunity consists of "dues and taxes on private income having its source in the receiving state and capital taxes on investments made in commercial undertakings in the receiving state."[179] These are privately earned income or capital within the territorial jurisdiction of the receiving state by the diplomatic agent that has no connection with his official functions. It is only reasonable that taxes are imposed on such income or profit privately earned by the diplomat, while salaries and emoluments that come to him from his home government as income for his official duties are excluded.[180]

Exemption from Customs Duties

Diplomatic missions enjoy exemption from custom duties as provided in the two Conventions (the VCDR and the VCCR).[181] The same condition

applies to items that are imported for personal use by the diplomat and his family members. However, those items will only be brought in customs duties-free, "subject to such laws and regulations as it (the receiving state) may adopt."[182] Even though there is no restriction on the frequency of their importation, the items must necessarily correspond to the needs of the mission.[183] Also, the items must not be passed on to a third party in the name of being gifts.[184]

It has been argued by Denza that the period preceding the emergence of the Vienna Convention witnessed "the grant of customs privileges to members of diplomatic missions" not as "a legal requirement of customary international law" but as "a matter of courtesy, comity or reciprocity only."[185] This argument does not appear convincing enough to Dembinski in the sense that "the exemption from paying customs duties is not a superfluous privilege granted to foreign envoys, but a logical consequence of the other immunities, important for the efficient functioning of the external mission."[186] He proffers two main reasons for the functional necessity implication of the diplomatic exemption from customs duties. By submitting the baggage of a diplomat to the authority of the receiving state, it would amount to the imposition of a restriction on his luggage and also constitute an unnecessary inhibition on the habits and traditions of the diplomat.[187]

Nevertheless, diplomatic missions have to consult the laws and regulations of the receiving state in order to ascertain the limits imposed on the importation of certain goods and also the procedure attached to their clearance. This information can always be obtained from the Ministry of Foreign Affairs or the Ministry of External Affairs.

The Treaty of Hudaybiyyah (628 AD) and the Concept of Diplomatic Immunity under the Islamic Siyar

In discussing the principles of Islamic diplomatic law, many scholars of Islamic jurisprudence are of the view that the Treaty of Hudaybiyyah (628 AD) establishes the legal basis for its application.[188] It is important to note, however, that prior to the Treaty of Hudaybiyyah, Islam recognized and acknowledged that the diplomatic envoy must be protected. This was the first treaty that confirmed the principles of diplomatic immunity and also established the legal validity of international agreements. Muslim scholars always refer to the Treaty of Hudaybiyyah as a classical model for Islamic diplomatic law. It is, therefore, necessary to evaluate

the events leading to the formation of the Treaty of Hudaybiyyah and its terms as they apply to Muslims (represented by Prophet Muhammad) on the one hand and Makkans (represented by Suhayl bin 'Amr) on the other. The diplomatic concepts of immunity under Islamic diplomatic law will then be discussed by looking at the various kinds of immunity that are guaranteed. It should be noted, that Muslim states, in recognition of the universal importance of guaranteeing protection for diplomatic personnel, have also codified these immunities and privileges, particularly in Articles 10, 11, 12, and 13 of the 1976 Convention of the Immunities and Privileges of the Organization of Islamic Conference. Likewise, the concept of *aman* (safe conduct) will also be considered in order to ascertain whether it grants diplomatic immunity to diplomatic personnel.

Events Leading to the Making of the Treaty of Hudaybiyyah

The Treaty of Hudaybiyyah, though not premeditated, came into being in 628 AD. This was the year in which Muslims, numbering about 1,500 under the leadership of Prophet Muhammad (pbuh), left Madinah for Makkah to perform the lesser pilgrimage ('*Umrah*).[189] Their camp was located at a place called *Al-Hudaybiyyah*, which was not far away from the city of Makkah. They evinced their peaceful intention by not carrying any weapons. All they had were 70 sacrificial animals that they wanted to use for pilgrimage rituals. Information reached Prophet Muhammad (pbuh) that the Makkans, who at that time were still pagans, had erected a barricade against the Muslims to prevent them from entering Makkah. They also sent out their forces to fight the Muslims. The reaction of Prophet Muhammad (pbuh) to the Makkans illustrates the peaceful relations established by Islam against the antagonistic attitude of the Makkans, as expressed in the following words:

> Shame on the Quraysh! War has corrupted them. What good would it do them if they cleared the way between me and the other Arabs. If they kill me, then this is what they wanted. And if Allah grants me victory over them, they will enter into Islam in large numbers. And if they do not, they will fight as long as they have strength. So what do the Quraysh think?[190]

In addition to the verbal commitment to peace, Prophet Muhammad (pbuh) sent Khirash ibn Umayyah as an envoy to the Makkans to explain the peaceful mission of the Muslims, which was worship.[191] Khirash's visit failed after an attempt was made on his life, despite the fact that he was an emissary who was expected to be protected from molestation or

from being killed.[192] Again, Prophet Muhammad (pbuh) was going to dispatch 'Umar Ibn Khattab as an envoy to Makkah to negotiate further on behalf of the Muslim community, but 'Umar politely refused. He pleaded with Prophet Muhammad (pbuh) that none of his clansmen, the Banu 'Adiyy ibn Ka'b, were left in Makkah, and moreover, the Quraysh might use that opportunity to descend heavily on him in revenge for his numerous confrontations against them.[193] Consequently, 'Uthman ibn 'Affan was otherwise chosen and charged with the diplomatic task of conveying the peaceful mission of the Muslims to the Makkans. The imprisonment of 'Uthman by the Makkans, who was later rumored to have been killed, was met with great rage for vengeance. The Muslims pledged to storm Makkah in revenge for the death of 'Uthman, even though they initially did not have the intention of fighting.[194] However, 'Uthman eventually returned unhurt, and the need for war was therefore averted. Although the diplomatic mission on which he had been sent, was unsuccessful, he was able to meet with some Muslims residing in Makkah by giving them assurance of the impending victory and moral support.[195]

The Making of the Treaty of Hudaybiyyah

After a multiple exchange of emissaries between the Makkans and Prophet Muhammad, the Makkans eventually sent Suhayl ibn 'Amr to arrange and execute a treaty, which became known as the Treaty of Hudaybiyyah, with Prophet Muhammad (pbuh). This treaty was to become, in the eyes of Muslim scholars, a model of Islamic diplomatic law and a paradigm of subsequent treaties (both domestic and international treaties) under Islamic law.[196] With the refusal of Suhayl to accept and give in to any concessions, coupled with the acquiescence and leniency exhibited by Prophet Muhammad (pbuh) particularly in the face of Suhayl's insulting posture,[197] the peaceful negotiations still went ahead uninterrupted.[198] The Muslims' understanding and acceptance of the principle of diplomatic inviolability would not allow for any unpleasant reaction toward a rude diplomatic envoy.[199]

The treaty stipulated that peace was to be maintained for ten years between the Muslims and the Makkans and that anyone from among the Quraysh who moved into the Muslims' camp without the permission of his guardian would be returned by the Muslims. However, if a Muslim emigrated from the Muslim camp to Makkah, he would not be returned. It was also agreed that the Muslims should return to Madinah without having to perform the *'Umrah* that year, but could come as pilgrims the following year, and that they would be allowed to stay in Makkah for

only three days. Also indicated in the pact was the freedom of any tribe to seek alliance with either the Makkans or the Muslims without any inhibition or intimidation.[200]

The Muslims were at first dissatisfied with the entire treaty for having given too much to the Makkans in utter disregard for the yearnings of the Muslims. This position was carefully chronicled by Hamidullah: "There were some . . . provisions [in the treaty] which were apparently humiliating and seemed to be disadvantageous for the Muslims. But the Prophet (peace be upon him) accepted them."[201] However, they submitted to the command and farsightedness of Prophet Muhammad (pbuh), which eventually paid off, as seen in the words of Haykal: "Indeed, the treaty even made it possible two months later for Muhammad to begin to address himself to the kings and chiefs of foreign states and invite them to join Islam."[202]

This was the position between the Muslims and the Makkans until two years later, when the treaty was violated by the Quraysh when they attacked the Muslims' ally, the Banu Khuza'.[203] This action was considered to be a fundamental breach of the Treaty of Hudaybiyyah on the part of the Makkans that eventually led to the conquest of Makkah in 630 AD, described by Haykal as "the greatest victory of Islamic history"[204] devoid of any violence or bloodshed.

The diplomatic ingenuity displayed by Prophet Muhammad (pbuh) throughout the making of the Treaty of Hudaybiyyah, combined with the exemplary patience exhibited by his companions, culminated into an indelible success. The favorable outcome of the treaty confirms the importance of diplomacy in Islam. It further establishes the precedential value of the international treaty. The exchange of diplomatic emissaries between the Makkans and Prophet Muhammad was prominent in the making of the Treaty of Hudaybiyyah, particularly the mission of Suhayl ibn 'Amr, which was sent to conclude the treaty. He was treated with utmost respect and held as an inviolable ambassador throughout the formation of the Treaty of Hudaybiyyah. One could rightly say that the Treaty of Hudaybiyyah and its negotiating history, in the words of Bassiouni, "demonstrate the sanctity of emissaries, that a violation of an ambassador's is a *casus belli*, and that no ambassador may be detained or harmed."[205]

Legal Authority of Islamic Diplomatic Immunity

Islamic diplomatic immunity derives its legal authority, first, from the Qur'an, which happens to be the prime source of Islamic jurisprudence.

The Prophetic traditions, otherwise known as the *Sunnah*, also establish the validity of diplomatic immunity in Islamic law, as indicated by several statements of Prophet Muhammad (pbuh). In the same vein, the practices of Muslim caliphs, starting from the period of the first four caliphs and extending up to the present Muslim countries, also confirms the legitimacy of diplomatic protection. For the purpose of clarity, each of these legal sources will be briefly considered below.

Text from the Qur'an

The communication between Bilqees bint Sharahil, the Queen of Saba'[206] and Prophet Sulaiman (992–952 BC), as reported in Quran 27:23–24, confirms the significance of diplomatic immunity in Islam according to Bassiouni.[207] The incident occurred when Bilqees, in response to the letter of Prophet Sulayman, sent emissaries with gifts to be presented to Prophet Sulayman. The Qur'an recounts this incident, when Bilqees said, "But indeed, I will send to them a gift and see with what [reply] the messengers will return."[208]

While declining the gifts, which were considered as a sort of bribery, Prophet Sulayman restrained himself from visiting his annoyance or anger on the envoys, because he understood the importance of their personal inviolability. He appreciated the essence of "diplomatic communication between Muslim and non Muslim heads of state."[209] He eventually sent the envoys back with the gifts they brought, saying,

> Do you provide me with wealth? But what Allah has given me is better than what He has given you.... Return to them, for we will surely come to them with soldiers that they will be powerless to encounter, and we will surely expel them therefrom in humiliation, and they will be debased.[210]

The Sunnah (the Prophetic Tradition)

The *Sunnah* has numerously established the fundamental principles of privileges and immunity that are granted to diplomatic envoys under Islamic *siyar*. According to the historical record, Prophet Muhammad (pbuh) sent different emissaries to various places, including Makkah, Byzantium, Egypt, Persia, and Ethiopia, either for religious or political reasons. He equally warmly received delegations and embassies in his mosque at a place designated as *Ustuwanaat al-Wufuud* (the pillar of embassies).[211] He so much held the respect and inviolability accorded foreign ambassadors in high esteem that, while he was on his death bed, he was reported to have instructed his companions to award gifts to envoys as he himself used to do during his lifetime.[212] Moreover, Prophet

Muhammad (pbuh) was known to generously honor his guests and also instructed Muslims to do the same, saying, "Whoever believes in Allah and the Last Day should be hospitable with his or her guests,"[213] meaning that as a Muslim, one is required to be hospitable to one's guest, even if he or she is a non-Muslim.

Apparently, diplomatic interactions exist between countries, usually on the basis of and international agreement duly signed or given accession to by the representatives of the countries. The validity of this international agreement in Islamic *Siyar* also has its origin in the various treaties entered into by Prophet Muhammad (pbuh), followed by his statements, such as that made to Abu Jandal: "We have entered with the Quraysh into a treaty of peace and we have exchanged with a solemn pledge that none will cheat the other."[214] In other words, once a treaty has been concluded, it is legally required that it must be fulfilled.

Consistent Practice of Muslim Rulers

Flowing from the two divine sources, the generality of Muslim rulers (the caliphs, sultans, and the current heads of the Muslim countries) also acknowledge and establish diplomatic protection and immunity in their respective international transactions. The clear instruction of Abu-Bakr (632–634 AD), the first caliph after Prophet Muhammad (pbuh), to Yazid ibn Abi Sufyan that, "in case envoys of the adversary come to you, treat them with hospitality."[215] indicates the extent of the Prophet's companions' understanding of diplomatic privileges.[216] The rule has been established throughout the caliphates that foreign emissaries can enter Muslim States and have access to diplomatic protection and privileges provided "they abstained from doing acts injurious to the Muslim states such as spying or buying weapons for shipment to Dar al Harb."[217]

It is no surprise, therefore, that the generality of Muslim states under the auspices of the OIC came together to recognize the inviolability and immunity of the diplomatic personnel of individual state members.[218] This was done in addition to their being signatories to the two famous diplomatic and consular conventions, the 1961 VCDR and 1963 VCCR. Thus, Islamic law recognizes and observes certain immunities and privileges when dealing with diplomatic envoys. These immunities are discussed below.

Diplomatic Immunities under the Islamic Siyar

Personal Inviolability

The inviolability of emissaries was a premodern universal concept, although with varying degrees of recognition attached to it. Perhaps

Bassiouni was right when he said that the "inviolability of envoys was ill recognized in Arabia Peninsula"[219] before the emergence of Prophet Muhammad (pbuh). However, the coming of Islam not only widened the scope of diplomatic intercourse but it also accorded diplomatic personnel and their family full personal inviolability.[220] Personal inviolability requires that diplomats are not to be killed or maltreated,[221] but should be respected. Prophet Muhammad (pbuh) was reported to have granted this immunity to the two ambassadors of Musaylimah—Ibn Al-Nawwaaha and Ibn Aathaal—regardless of their impertinent manner, saying, "By God, if it were not the tradition that envoys could not be killed, I would have severed your heads."[222] Likewise, Wahshi's mission as the ambassador of the people of Ta'if was generously received by Prophet Muhammad (pbuh) despite the fact that Wahshi killed Hamzah, the uncle of the Prophet, at the battle of Uhud.[223] This generous reception led to Wahshi's acceptance of Islam.[224] In the words of Saif, "[t]he Prophet, stressing the diplomatic immunity of ambassadors, did not hold their earlier antagonism against them,"[225] but instead he cheerfully received and welcomed them into the newly founded faith of Islam. The Federal Shariat Court of Pakistan was correct when it held that Prophet Muhammad never permitted any [diplomatic] representatives to be maltreated; "rather[,] he showed them greatest honor and respect and granted immunities to them *inter alia* from imprisonment and death, however, hostile was their behavior and threatening their language."[226]

The rule that a diplomatic envoy must not be detained was expressly canvassed in the case of Abu Raafi', the Makkan emissary who was sent to Prophet Muhammad (pbuh) in Madinah soon after the battle of Badr in 624 AD. He eventually became a Muslim and did not want to return to Makkah. The Prophet (pbuh) discouraged his refusal to return to Makkah by saying, "I do not break a covenant or imprison envoys [you are an ambassador], but return, and if you feel the same as you do just now, come back."[227] It was reported that Abu Raafi' later returned to Madinah not as an envoy, but as a Muslim emigrant. It is in recognition of the above principle that it has been adopted as Muslim state practice, which also was in accordance with Article 10 (a) of the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference, which provides that representatives of member states shall be guaranteed "immunity from personal arrest or detention."

The inviolability of a diplomatic envoy was deemed so important that its violation either by way of detention or arrest could result in a casus belli. A vivid example was the case of 'Uthman ibn Affan (who later

became the third caliph), who was sent as an emissary to the Quraysh during the Hudaybiyyah episode. Prophet Muhammad (pbuh) was so much convinced about the sanctity of the diplomatic envoy that he found it difficult to believe that 'Uthman could be killed, harmed, or detained by the Quraysh. However, when the news got to the Muslims that 'Uthman had been killed, it was not only deemed casus belli, for which the Muslims were fully prepared to go to war, but also led to the detention of the Makkans' envoy who had been sent to Prophet Muhammad (pbuh).[228] This incident confirms the statement of Tabari (838–923 AD) that "only under extraordinary circumstance may envoys be detained and imprisoned, and that would be in the form of specific reprisals in kind."[229] The news was later confirmed to be mere rumor, and when the safety of 'Uthman was ascertained, the Muslims wasted no time in releasing the detained Makkan envoy.[230]

Another limitation to personal inviolability of diplomatic personnel occurs when an envoy acquires, through the act of spying, military intelligence that could be inimical to the interests of the Muslim army. Then it may become necessary to detain him until he reveals that information.[231] Even then, this action by a diplomatic envoy may not warrant maltreatment, imprisonment, or death.[232]

Immunity from the Court's Jurisdiction

Islamic law also exempts the diplomatic envoy from the jurisdiction of its court, which means that an emissary is not answerable to the court of his host for an offense he may have committed during his ambassadorial responsibility. The case of the two emissaries sent to Prophet Muhammad (pbuh) by Musaylimah is relevant in this circumstance. After reading the content of Musaylimah's letter to Prophet Muhammad (pbuh), they were asked by the Prophet, "Do you also say what he (Musaylimah) has said"? They replied, "We say exactly what he (Musaylimah) said."[233] However, these words, which could be taken as a direct expression of contempt for Prophet Muhammad (pbuh), did not bother him as they (the two emissaries) were considered as ordinary means of diplomatic communication, if one bears in mind that they possessed diplomatic immunity.

Thus, it remains very clear that under the Islamic *siyar*, in which a non-Muslim who claims to be an emissary enters the territory of Islam and commits an offense, is automatically covered by diplomatic immunity once he is able to produce a genuine letter of credence from his ruler confirming his status.[234] In a situation in which the non-Muslim is unable to produce a letter of credence from his ruler, the state will take both him

and his belongings as *Fay'* (proceeds of the state from enemy property other than war booty).[235]

In this regard, Abu Hanifah (699–767 AD), the eponym of the Hanafi Law School of Islamic jurisprudence, further maintains that a *musta'min* (a non-Muslim having security and safety passage within an Islamic state) who commits one of the *huduud*[236] offenses cannot be held liable or punishable under the *huduud* laws.[237] But in the case of theft, he will be liable to return the stolen property, and if he has consumed or misplaced it, then he is liable to pay compensation up to the value of the stolen property.[238] The court will not impose the *hadd* punishment of amputation on them.[239] In support of this view was Abu Yusuf (d. 798 AD), one of the famous students of Abu Hanifah, who argues that, considering that a *musta'min* does not acknowledge the supremacy of Islamic law in the first instance, it is therefore be inappropriate to subject him to punishment under the *hudud* laws.[240] To further buttress the argument that an envoy who commits an offense in the receiving state is immune from the criminal jurisdiction of the receiving state, Hamidullah says that "even if the envoy, or any of his company, is a criminal of the state to which he is sent, he may not be treated otherwise than as an envoy."[241] No doubt, diplomatic immunity should not be taken as a license of impunity whereby diplomats will be free to commit offense at will just because they are immune from the criminal jurisdiction of their host. The opinion expressed by Munir that "diplomats are immune from criminal jurisdiction in the receiving state but this immunity is not absolute as the Quranic verse 5:45[242] does not exempt any one even a diplomat"[243] may appear convincing, but one wonders if it is strong enough to overturn the long-established rule of Islamic diplomatic immunity. The rule is "By God, if it were not the tradition that envoys could not be killed, I would have severed your heads."[244] Prophet Muhammad (pbuh) exercised restraint in enforcing the death penalty against the two envoys of Musaylimah for committing a serious offense just because of their diplomatic status.

Freedom of Religion

Generally, the Qur'an prohibits the imposition of Islam or any of its dictates on a non-Muslim.[245] Respect for the rights of the non-Muslims, which include their religious beliefs, happens to be one of the highly respected rights established under the Islamic legal system. This is particularly more important where the non-Muslim is under the protection of the Muslim state.[246] The Muslim state owes a duty not to harass or wrong a non-Muslim who is under the protection of diplomatic

commitment on the basis of his religious belief. This duty derives its validity from the prophetic tradition, which says, "Surely, a person who wrongs one protected under a treaty or belittles him, overworks him or takes something from against his will, I will be opponent on the day of resurrection."[247]

Those who belong to other religions must be protected under Muslim states since Islamic law does not impose any kind of religious restrictions on their freedom to practice in accordance with their respective religious persuasions. They have the freedom to exercise and fulfill their religious obligations without restrictions.[248] Consequently, freedom to pray and be involved in other religious practices are granted to diplomatic personnel under Islamic diplomatic law. History has it that when the Christians of Najran visited Prophet Muhammad in Madinah, they were allowed to observe their religious services right in the mosque of Prophet Muhammad (pbuh).[249] It was even recorded that these Christians faced toward the East while praying.[250] The fact that they belong to a different faith does not take away their diplomatic privileges and immunity.

Exemption from Taxation

The properties of foreign diplomats are exempt from custom duties and all other forms of taxation once they are within the Muslim state, provided that Muslim envoys are accorded the same exemption while they are in the foreign state by way of reciprocity.[251] The issue of reciprocation has, however, been usefully illustrated by Shaybani, who says that, "if the foreign States exempt Muslim envoys from custom duties and other taxes, the envoys of such states will enjoy the same privileges in the Muslim territory; otherwise they may, if the Muslim state so desire, be required to pay ordinary dues like foreign visitors."[252] This, in effect, means that diplomats will only be exempted from taxation once it has been agreed upon by the two countries. Generally, the Qur'an requires that good or positive conduct should be rewarded with a good action too.[253]

It is also important to stress that, any item brought into Muslim territory by a diplomatic envoy to qualify for tax exemption, must not be for commercial purposes. According to the author of *Kitab al-Kharaj*,[254] once the item is commercialized, one-tenth of the tax becomes payable after the sale of the commodity.[255] This exception was clearly echoed in Article 10 (g) of the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference, which provides that "except that they shall have no right to claim exemptions from custom and excise duties on articles imported other than their personal baggage." This type

of exception appears to be directly compatible with the provisions of Article 34 (d) of the VCDR, which stipulates that "dues and taxes on private income having its source in the receiving state and capital taxes on investments made in commercial undertakings in the receiving State" do not form part of the exemption from taxation.

Other Privileges Are Guaranteed

The other principles of diplomatic immunity[256] are equally guaranteed under Islamic *siyar* based on jurisprudential principles. These diplomatic principles, such as freedom of movement, freedom of communication, and the protection of diplomatic bags and couriers, based on the Islamic jurisprudential principle of permissibility are considered as protected under Islamic law. The reason for this is that it is a basic rule in Islamic jurisprudence that every act is considered permitted, meaning that there is no impermissible act, except those that are specifically prohibited by the Qur'an or the tradition (*Sunnah*) in a sound and explicit *nass*[257] from Allah.[258] It thus appears that Allah bases the legalization and forbidding of an act on logical consideration and the benefit that may accrue to mankind. It goes without saying that all things or objects that also include "all human actions and behaviour not related to related to acts of worship, which may be termed living habits or day-to-day affairs"[259] that are not specifically or explicitly forbidden either in the Quran or the *Sunnah* automatically come under the general principle of permissibility and, therefore, come within the gamut of Allah's favor.[260] Prophet Muhammad was reported to have said in this regard that

> [w]hat Allah has made lawful in His Book is halal and what He has prohibited is haram, and that concerning which He is silent is allowed as His favour. So accept from Allah His favour, for Allah is not forgetful of anything.[261]

Qardawi gave a further explanation of the significance of the principle of natural usability and the permissibility of things that are generally "allowed without restriction, with the exception of a small number of things which are definitely prohibited by the Law-Giver, Allah, Who says, "*He (Allah) has explained to you what He has made haram for you*," including both objects and actions."[262]

Therefore, once these diplomatic principles are required for the effective transaction of diplomatic matters, which are protected under the public interest—*maslahah*—and provided that they are not prohibited by the *shari'ah*, they are definitely be allowed by Islamic law.

Complementary Role of Aman (Safe-Conduct) to Diplomatic Immunity

Islamic *siyar* has a temporary pledge of protection that is available for the benefit of the non-Muslim, otherwise known as *must'amin*, allowing him to stay within the Muslim territory. This pledge of protection, which guarantees security of life and property, is known as *aman* (safe conduct).[263] It is supported by the authority of the Qur'an and the *Sunnah*. In the Qur'an, Allah says,

> And if any one of the polytheists seeks your protection, then grant him protection so that he may hear the words of Allah [i.e., the Qur'an]. Then deliver him to his place of safety.[264]

Prophet Muhammad (pbuh) gave his approval to the *aman* granted by some Muslim women to polytheists. He categorically gave his authority to Umm Hani' Bint Abi Talib's grant of *aman* to the two polytheists at the conquest of Makkah, when Ali Ibn Abi Talib[265] threatened to have the polytheists killed, when Prophet said, "We have given security to those to whom you have given it."[266] In fact, on several occasions the companions of the Prophet came seeking clarification concerning the status of a non-Muslim within Muslim territory. Prophet Muhammad (pbuh) never wavered in encouraging his companions that it was permissible to grant the *aman* to the non-Muslim within Muslim territory if he applied for it.[267]

There are two identifiable ways by which *aman* can be put into use, according to Muslim jurists. There is the individual *aman*, otherwise known as unofficial *aman*, which can be granted by any sane and mature Muslim, male or female, including the blind. There are divergent views among Muslim jurists concerning the eligibility of a Muslim to grant *aman*. The majority of Muslim jurists, consisting of Maliki, Shafi'i, and Hanbali jurists, are of the view that a Muslim slave can validly grant *aman*. However, Abu Hanifah and Abu Yusuf allow a slave the authority to grant *aman* only if he is permitted to partake in war by his master.[268] The *aman* granted by a minor or a person of unsound mind is also disregarded by Muslim jurists.[269] But where there is evidence that the *aman* is given by a discerning minor, according to Malik Ibn Anas, Ahmad Ibn Hanbal, and Muhammad Ibn al-Hasan, such an *aman* will be held valid. In contrast, Abu Hanifah, Abu Yusuf, and al-Shafi'i still consider such an *aman* to be invalid since it is granted by a minor.[270] Once a valid *aman* is given to a non-Muslim within Muslim territory, it becomes enforceable by and binding on the entire Muslim state.[271]

There is also the collective *aman*, otherwise known as the official *aman*. It is mainly granted by the head of state or his representatives to a non-Muslim state, usually based on a treaty of peace (*muwaada'a* or *muhaadana*).[272] Once granted, it opens up the facilitation of peaceful negotiations by visiting emissaries between Muslim and non-Muslim countries,[273] and gives allowance to both "Muslims and non-Muslims to cross frontiers and travel in each other's countries on the basis of reciprocity."[274] Furthermore, as stated by Boisard, the "very liberal Muslim legislation facilitated the passage of foreigners across the Muslim world and that of Muslims to the outside."[275]

The stay of a *musta'min* (the beneficiary of *aman*) within Muslim territory is for a limited period of time. It is the opinion of the Maliki and Shafi'i jurists, based on the provisions of Qur'an 9:2,[276] that the length of an *aman* should not, as a rule, exceed four months. But the Hanafi jurists are of the view that an *aman* should not go beyond the period of one lunar year; otherwise, the *musta'min* will be treated as a *dhimmi* (a non-Muslim living under Islamic rule), and hence, he would be liable for paying *jizya* (annual poll tax).[277] However, Hanbali jurists opine that the *musta'min* should not be subjected to the payment of *jizya* even in cases in which he stays beyond the period of one lunar year.[278] There is no specific formality for the acceptance of a request for an *aman*. One can draw an inference of *aman* from any means of assent, including nonverbal.[279] Meanwhile, a *musta'min* can have his grant revoked if he violates any of the terms of the *aman* or commits crimes[280]

It ought to be noted that the principle of *aman*, though, viewed as a factor that fosters a peaceful relationship between the Muslim and non-Muslim states, is generally distinct from diplomatic immunity. This distinction stems from the limitations imposed by Islamic jurisprudence on what the beneficiary of *Aman* (*musta'min*) can and cannot do.[281] The *musta'min* may be subject to the criminal jurisdiction of the Muslim state in which he is found to have committed any offense, since the granting of an *aman* is not synonymous with diplomatic immunity.[282] The Islamic concept of diplomatic immunity, unlike the principle of *aman*, is considered to be absolute from the point of view of the Qur'an and the *Sunnah*.[283] Nevertheless, the significance of *aman* to the Islamic concept of diplomatic immunity cannot be overemphasized. It was remarkably stressed by Lambton that

> [a]mbassadors and diplomatic envoys automatically enjoyed the status of a *musta'min*, but from the end of the 6th/12th century onwards the institution of *aman* tended to be superseded by the treaties beginning to be made

> between Islamic and Christian powers, which gave greater security and more rights than the institution of *aman*.[284]

Also, Bassiouni gave a clear and valuable description of the complementary nature of *aman* to the principle of diplomatic immunity in the following words:

> The diplomat is the beneficiary of *Aman*, a legally binding privilege that obligates the state to protect the beneficiary until his departure from its territory. The state may revoke the *Aman* and expel the beneficiary, but may not violate it. The beneficiary who violates its terms may be prosecuted, but not if he is a diplomat, who in addition to benefitting from the *Aman*, is also the beneficiary of other forms of legal protection and privileges.[285]

In addition, Istanbuli gave an insight into how the concept of *aman* benefits the ambassador within an Islamic territory when he says that

> [t]he ambassadors were granted immunities and certain privileges. They benefitted from the principle of Aman, accorded to any foreigner who sought safety entry into a Muslim country, and from the traditional immunity granted to foreign envoys.[286]

It could therefore be right to say, in this regard, that *aman* is now a component of the privileges granted within an Islamic diplomatic setting. It is no longer a privately arranged or granted privilege as between a citizen of an Islamic state and a non-Muslim immigrant.

Conclusion

It can be gleaned from the above discussion that Islamic *siyar* recognizes the functional necessity and representative character theories as the prevailing justifications for diplomatic immunity, just as they are equally recognized by international diplomatic law. One can conclude that there is compatibility concerning the rationale for diplomatic immunity in the two legal systems (Islamic *siyar* and international law). Moreover, as it has been established in the legal instruments applicable to the two legal systems—the 1961 VCDR and the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference—that diplomatic immunity is not granted for the personal benefit of diplomatic personnel but rather for their professional benefit in representing their country abroad, and particularly to make allowance for the efficient discharge of their diplomatic responsibilities.

It has also been shown that all the principles of diplomatic immunity that are highlighted in the 1961 VCDR and the 1963 VCCR are similarly acknowledged by Islamic *siyar*. This, in essence, signifies the compatibility in the principles of diplomatic immunity as contained in international diplomatic law and Islamic *siyar*. The fact that some of the principles of Islamic diplomatic immunity discussed in this chapter have been codified by the provisions of the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference, just as they were reduced to laws in the VCDR and the VCCR, confirms the compatibility between Islamic diplomatic law and international diplomatic law.

Moreover, one may also draw an analogical conclusion that, since the entire provisions of the VCDR and VCCR are not, in anyway, repugnant or contradictory to any principles and main objectives of Islamic law, this therefore means that the codification of the VCDR and VCCR in international diplomatic law can, as well, be considered a codification in Islamic diplomatic law. In essence, it may not amount to an overstatement to say that diplomatic immunity has also been codified in Islamic law. This conclusion, however, coincides with the assertion made by Lewis that "the rights and immunities of envoys, including those from hostile rulers, were recognized from the start, and enshrined in the *Shari'ah*."[287]

5

Diplomatic Immunity in Muslim States: Islamic Law Perspective on Muslim State Practice

Introduction

Muslim states in general[1] have signed and ratified the two globally recognized diplomatic and consular legal frameworks: the 1961 VCDR and the 1963 VCCR. Most Muslim states, particularly those that have adopted the Islamic legal system, are expected to observe diplomatic immunity as enshrined under Islamic *siyar*, in addition to the various international diplomatic and consular treaties they have entered into. Muslim states are, of course, required by Islamic law to observe the terms and conditions of treaties once entered into with other states. Needless to say, diplomatic immunity guaranteed under Islamic *siyar* and particularly as entrenched in the two Vienna Conventions has been grossly abused by diplomats themselves. An alarming number of these abuses of diplomatic immunity definitely call for serious attention.

In light of this observation, this chapter discusses diplomatic practices in some Muslim states, with particular attention on the Islamic Republic of Pakistan, the Islamic Republic of Iran, and Libya.[2] This book focuses mainly on these three Muslim states due to the peculiar nature of the various diplomatic crises that unfolded in these states in recent times. First, the discussion focuses on the application of diplomatic law in Pakistan by considering the criminal act perpetrated by Raymond Davis, an American, in 2011, all in the name of so-called diplomatic immunity. During that crisis, the US government maintained that Davis had diplomatic immunity as a diplomatic staff member of the US Embassy. The Pakistani authorities, however, denied that Davis had any diplomatic or

consular immunity. Second, the discussion moves to an examination of the implications of Islamic law regarding the 1979 seizure of the embassy of the United States and the 2011 attacks on the British High Commission both of which took place in Iran. The purpose is to ascertain the illegality of the failure of the Iranian authority to provide adequate protection for diplomatic missions and personnel in accordance with Islamic *siyar*. Third, this chapter again considers the 1983 shoot-out at the Libyan People's Bureau, which led to the death of a British woman police officer, Yvonne Fletcher, with a view to examining the extent of the abuse of diplomatic immunity also under Islamic *siyar*.

Diplomatic and Consular Immunity under Pakistani Law

Legal Efficacy of Diplomatic Immunity in Pakistan

The provisions of the VCDR and VCCR were statutorily recognized and locally enacted in Pakistan by the Diplomatic and Consular Privileges Act, 1972[3] (DCP Act), which gave them legal efficacy under the Pakistan legal system. Section 2(1) of the DCP Act particularly enforces the two Conventions by stating that

> [n]otwithstanding anything to the contrary in any other law for the time being in force, the provisions of the Vienna Convention on Diplomatic Relations, 1961, set out in the First Schedule and the Vienna Convention on Consular Relations, 1963, set out in the Second Schedule shall, subject to the other provisions of this Act, have the force of law in Pakistan.

It is, however, interesting to note that Pakistan endorsed these two treaties without any reservation or objection. In recognition of the general principles of diplomatic immunity, once a certificate confirming the diplomatic status of a person is issued or authorized to be issued by the government of Pakistan, it thus becomes conclusive evidence of fact.[4] This was further reiterated by the Supreme Court of Pakistan in *Ghulam v. United States Agency for International Development (USAID) Mission, Islamabad*,[5] in which it was stated that "the certificate issued by or under the authority of the Federal Government, in respect of diplomatic status of the Agency for International Development is conclusive evidence of the facts stated therein. The said certificate…cannot, therefore, be allowed to be disproved."[6] In other words, it is usually not sufficient to claim diplomatic immunity either by asserting diplomatic status or by producing

a diplomatic passport in a court of law. What is legally required in order for a diplomat to validly make a plea of diplomatic immunity before a Pakistani court is for the diplomat to produce a certificate confirming his diplomatic status, which is normally issued or authorized to be issued by the Pakistani government. In *Sher Zaman v. The State*,[7] the accused in this case successfully pleaded diplomatic immunity on the grounds that he was a member of the German embassy in Pakistan. In admitting his petition, the Lahore High Court held that

> [t]he record of the case reveals that there is a certificate to show that Sher Zaman was an employee of the German Embassy for the last nine years since the issue of the certificate. In view of the above…the petitioner…would be in his right to claim immunity against his trial by the Courts in Pakistan.[8]

It is worth mentioning that it is not binding on the government of Pakistan to issue or authorize the issuance of this certificate, as Section 4 of the DCP Act is not a mandatory provision, but an enabling one.[9]

The VCDR makes it abundantly clear that "without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State."[10] This, in essence, means that diplomatic immunity should not and cannot be taken as a license to violate the laws of the receiving state. Diplomatic agents are expected to be under a legal obligation to respect the local laws of the host state, A\although, diplomats have been, arguably, said to enjoy absolute immunity,[11] unlike consular officers.[12] However, this absolute immunity can be curtailed, particularly when a diplomat is involved in a serious crime, such as murder, criminal conspiracy, terrorism, espionage, and so on,[13] in which case, the receiving state may have to approach the diplomat's home country for a waiver of diplomatic immunity so that the diplomat can be prosecuted in accordance with the laws of the receiving state.[14] In the event that the sending state refuses to waive diplomatic immunity for a diplomat who is involved in any of these serious offenses, the least action that can be taken by the receiving state is to declare the particular diplomat as persona non grata under Article 9 of the VCDR.

Diplomatic Implication of Raymond Davis' Case

There was an incident that almost led to a major diplomatic uproar between Pakistan and the United States. It had to do with the shooting of two Pakistanis by an American, Raymond Davis, from the US consulate

in Lahore on January 27, 2011. The argument of Davis was that the shooting of the two men was in self-defense as they were attempting to rob him.[15] Davis was immediately arrested and kept in police custody pending his appearance in court. On January 28, 2011, he was charged with the offense of *qatl-i-amd* (intentional murder) under section 302 of the Pakistani Penal Code (PPC).[16]

The arrest of Davis led to a serious controversy between the governments of Pakistan and the United States concerning his diplomatic status. This episode almost plunged Pakistan-United States diplomatic relations into a state of turmoil. In fact, the incident snowballed into public criticism and resentment that took the form of public demonstrations across Pakistan against the United States, which added fuel to the already inflamed anti-American sentiment in Pakistan. The United States vigorously argued in favor of diplomatic immunity for Davis by stressing in a press release dated January 29, 2011, that "[t]he diplomat, assigned to the U.S. Embassy in Islamabad, has a U.S. diplomatic passport and Pakistani visa valid until June 2012," and as such, the Embassy called "for the immediate release of a U.S. diplomat [Raymond Davis] unlawfully detained by authorities in Lahore."[17] Philip Crowley, who is US assistant secretary of state, emphatically maintained that "[Raymond Davis] is a US diplomat. He was assigned to the Embassy in Islamabad. He has immunity. And we again call for his release."[18] The president of the United States, Barack Obama, in stressing the importance of the principles of the VCDR, said that "if our diplomats are in another country, then they are not subject to that country's local prosecution. We expect Pakistan, that's a signatory and recognizes Mr. Davis as a diplomat, to abide by the same convention."[19] The US House of Representatives by a resolution presented to the Committee on Foreign Affairs, threatened to freeze all monetary assistance meant for Pakistan if Davis was not released on the basis of his diplomatic status and in accordance with international standards of diplomatic practice.[20]

The Pakistani government was, however, reluctant to take a decisive stance regarding the diplomatic status of Davis, perhaps, due to political repercussions and possibly, public backlash.[21] Most political parties in Pakistan had warned that if Davis was not brought to justice, they would not hesitate to storm the US consulate in Lahore and the US Embassy in Islamabad.[22] But the Pakistani government remained noncommitted to making any pronouncement on the diplomatic status of Davis, which cause them leave the entire matter, which was then *sub judice* ("before the court"),[23] to be resolved by judicial pronouncement.[24]

As expected, the court would have been confronted with the question of determining the diplomatic or consular status of Davis vis-à-vis the offense of murder committed by him. It is also possible that the court would have been given the opportunity to scrutinize the different positions maintained by the United States and Pakistan in view of their respective diplomatic and consular practices, including applicable laws. The court would have also called for evidence of the credentials appointing Davis as either a diplomatic or consular officer from the United States, and a certificate issued or authorized by the Pakistani authorities confirming the appointment of Davis as a diplomatic or consular staff member of the United States. Meanwhile, the Pakistan Foreign Office chose not to issue the diplomatic certificate in favor of Davis in spite of the concerted pressure mounted by US authorities. Then, assuming the court concluded that Davis was protected from prosecution under diplomatic or consular immunity as a result of his diplomatic or consular status, it is very much doubtful whether that would have finally exonerated Davis from the criminal jurisdiction of a Pakistani court. After all, it is generally accepted that "immunity is not a license to break the law or a get-out-of-jail-free card."[25] Moreover, it is a common diplomatic practice among several nations that diplomatic immunity should not be a license to commit a criminal offense or to kill, as in this present case.[26]

The Pakistani authority would have been acting within the confines of the law if it were to call upon the United States government to waive immunity for Davis so as to legally commence criminal prosecution against him. This step would be in accordance with Article 32 (1) of the VCDR.[27] It must be noted, however, that the United States may well have decided not to waive immunity with respect to the accused diplomat since the provision of a waiver was not mandatory. But the Pakistani government would have been making a good case by invoking the application of the principle of reciprocity, which generally operates among nations with regard to diplomatic and consular relations. First, the Pakistani DCP Act provides that

> [i]f it appears to the Federal Government that the privileges and immunities, accorded to the mission or a consular post of Pakistan in the territory of any State, or to persons connected with that mission or consular post, are less than those conferred by this Act on the mission or consular post of that State or on persons connected with that mission or consular post, the Federal Government may, by notification in the official State or, as the case may be, from all or any of the consular posts of that State, or from such persons connected therewith as it may deem fit.[28]

This provision requires the government of Pakistan to extend equal treatment to diplomatic missions or consular posts of other states within its territory in accordance with the spirit of the two Vienna Conventions. Second, and most importantly, the Pakistani government may have advanced the argument that the United States has clearly marked out procedures for dealing with the waiver of immunity with respect to any diplomatic agents, administrative and technical staff of any embassies, and consular officers who are involved in criminal offenses within the United States. The guide, known as Diplomatic and Consular Immunity—Guidance for Law Enforcement and Judicial Authorities, provides that

> [t]he U.S. Department of State will, in all incidents involving persons with immunity from criminal jurisdiction, request a waiver of that immunity from the sending country if the prosecutor advises that but for such immunity he or she would prosecute or otherwise pursue the criminal charge.[29]

This procedural guidance has been implemented several times by the United States on issues of diplomatic concern. The US State Department was very quick to request a waiver of immunity when, in January 1997, an intoxicated Georgian diplomat, Gueorgui Makharadze, killed a 16-year-old girl in New York in a drunk-driving accident. The Georgian authorities unhesitatingly waived the diplomat's immunity, which legally allowed the United States to prosecute him.[30] At the end of the prosecution, he was sentenced to seven years' imprisonment for manslaughter.[31]

In a more recent incident happened in January 2003, when the US State Department asked the Pakistani government to withdraw diplomatic immunity with respect to its permanent representative to the UN, Munir Akram. Misdemeanor assault charges were to be brought against him for having allegedly assaulted and injured his girlfriend, Marjiana Mihic, after an argument.[32] The Pakistani government wasted no time in waiving diplomatic immunity as requested by the United States, even though the incident was resolved after the girlfriend withdrew the charges against the diplomat in court.[33]

It can, thus, be argued that the US insistence on blanket immunity for Davis, even though his immunity was unlikely to be ascertained, was legally and morally unjustifiable. Meanwhile, diplomatic relations dictate a give-and-take situation between nations. In the words of Khurram Baig, "[i]f the U.S. can ask for a waiver of immunity when it feels inclined to do so, and invokes it when it suits itself,"[34] what stops other nations from doing the same thing whenever the situation so demands? The policies and procedures regarding the granting of diplomatic or consular

immunity for criminal offenses laid down by the United States can be emulated by the Pakistani authorities in the spirit of reciprocity, which is also firmly established in Pakistani law.[35]

Intervention of Islamic Law

This legal discourse is just a theoretical analysis of Davis' case, which was suddenly finalized by the Islamic legal principle of *badl-i-sulh*, which has been defined under Pakistan law as "the mutually agreed compensation according to the *Shari'ah* to be paid or given by the offender to a *wali* in cash or in kind or in the form of moveable or immoveable property."[36] It was, indeed, a timeous intervention. It is worth mentioning that the court did not determine the issue concerning Davis' diplomatic immunity, even though Davis was later reported to be a Central Intelligence Agency (CIA) contractor responsible for providing security for CIA spies traveling in Pakistan.[37]

While waiting for the court to play its legal role in deciding whether Davis could claim diplomatic immunity, which did not happen, the Prime Minister of Pakistan at the time, Yusaf Raza Gilani, suggested the possibility of resolving this diplomatically sensitive matter under Islamic law by Davis offering to pay compensation to the families of the two men who were killed.[38] It was also reported that the families of the dead men had been under intense pressure from some religious parties not to accept a payment of financial compensation, otherwise known as *diyat*[39] from the accused person.[40] Nevertheless, on Wednesday, March 16, 2011, family members of the two men who were killed, Faizan Haider and Fahim Shamshad, announced to the court that they had pardoned Davis by accepting financial compensation from him.[41]

Ordinarily, if the relatives of the victims had not compromisedtheir rights of retaliation (*qisaas*)[42] by accepting the *diyat* under Islamic law, the murder charge brought against Davis would have ended differently. That is to say, if at the end of the trial, Davis were to be found guilty of the offense of *qatl-i-amd* (intentional murder), he would have been sentenced to death or life imprisonment under *qisaas* by virtue of Section 302 of the PPC. The PPC allows the *wali*[43] to voluntarily and without duress waive the right of *qisaas*, provided that action is to the satisfaction of the court.[44] That was exactly what the relatives who stood in as the *wali* of the victims, in this case, did in exercising their right, which is sanctioned "by Sharia [Islamic law] and Pakistan law, and neither you nor I nor the court can snatch this right from them. They used their right, and the court released him."[45] With the payment of $2.3 million to the

relatives of the victims as "blood money" (*diyat*), which was unequivocally acknowledged by them,[46] the court made an order of acquittal in favor of Davis, pursuant to Section 345 of the Pakistan Code of Criminal Procedure,[47] read in conjunction with Section 310 of the PPC.

One may want to consider the relevance of the provisions of Section 311 of the PPC to the determination of Davis' case. Section 311 of the PPC provides that

> [n]otwithstanding anything contained in Section 309 or Section 310, where all the wali do not waive or compound the right of qisas, or [if] the principle of fasad-fil-arz the Court may, having regard to the facts and circumstances of the case, punish an offender against whom the right of qisas has been waived or compounded with [death or imprisonment for life or] imprisonment of either description for a term of which may extend to fourteen years as ta'zir.

The question that quickly comes to mind is, why did the court not apply the provisions of Section 311 of the PPC in determining the case of Davis? First, we have to understand that the two *wali* in Davis' case unanimously compounded the right of *qisas*, and this would definitely take the case out of the contemplation of Section 311 of the PPC. The second condition that has to be considered was whether the offense committed by Davis amounted to *fasad-fil-arz* as envisaged by Section 311 of the PPC. The interpretation of the meaning of *fasad-fil-arz* has included anyone of the following points: i) the past conduct of the offender; or ii) whether he has any previous convictions; or iii) the brutal or shocking manner in which the offense has been committed, which is outrageous to the public conscience; or iv) whether the offender is considered a potential danger to the community; or v) whether the offense has been committed in the name or on the pretext of honor.[48] It thus appears, considering the facts of Davis' case, that points i, ii, iv, and v listed above may not be applicable to his case. Point iii seems to be relevant to the offense committed by Davis, particularly when one considers the extent of public indignation it caused. One would have expected the court to move a step further in deciding whether the offense committed by Davis amounted to *fasad-fil-arz*.

The court was, at least, expected to "regard to the facts and circumstances of the case" of Davis before arriving at its decision. Although the application of Section 311 appears to be discretionary, nevertheless, such discretion must be seen to be exercised judiciously. For instance, in *Abdul Ghafoor v. State*,[49] the Lahore High Court went ahead in sentencing the accused person to ten year' imprisonment under Section 311 of the

PPC despite the fact that the legal heirs of the deceased and the accused had reached a compromise in accordance with Section 310 of the PPC. The punishment was awarded on the basis that the offense in question amounted to *fasad-fil-arz*. The case of *Abdul Ghafoor* appears to be distinguishable from that of Davis, which would have worked against an automatic acquittal for Davis.

Thus, this discussion has shown how the court, in applying a segment of Islamic criminal law, based upon the application by the *wali*, succeeded in bringing a case that would have otherwise led to a diplomatic impasse between Pakistan and the United States to an abrupt conclusion. Even if the court had found in favor of Davis that he was, indeed, a diplomatic or consular agent of the United States at the time he committed the offense, and if his home country, the United States, had also agreed to waive his diplomatic immunity under the principle of reciprocity, the matter would have probably ended in the same way. The fact that he had, for the sake of argument, diplomatic immunity should not be taken as license to kill or commit a criminal offense. Moreover, the way this case ended shows how Islamic law may be used in resolving a diplomatic crisis between two states. In other words, it shows the relationship that could possibly result between Islamic law and international diplomatic law in resolving what could have led to international imbroglio. Hassan was actually correct when he said in his concluding remarks that "[t]he matter has thus been settled judicially through the application of Islamic law principles without having to deal with politically sensitive and legally contentious issues involved in the determination of diplomatic status and immunity."[50]

Revisiting the 1979 Iranian Hostage Case under Islamic International Law[51]

More than three decades ago, precisely, on November 4, 1979, some Iranian militant students, otherwise known as the Muslim Student Followers of the Imam's Policy, invaded the US embassy in Tehran and held 52 of its personnel hostage for 444 days. It was said that the decision of the United States in October 1979 to admit the former shah of Iran, Mohammed Reza Pahlavi, into the United States for life-saving medical treatment contributed conspicuously to this incident.[52] As soon as the news about the shah was publicized, it became apparent, according to Daugherty,[53] that the seizure of the US embassy "would jeopardize the safety and security of all Americans in Iran."[54] Aside from the 13 female and the African American hostages who were released within the first

month,[55] and later another hostage who was released due to illness, the remaining members of the diplomatic and consular staff of the United States were not released until January 20, 1981.

After considering "innumerable pleas, resolutions, declarations, special missions and even sanctions"[56] to secure the release of the hostages without success, the United States also turned to the judicial arm of the UN, the ICJ, on November 29, 1979, for a judicial pronouncement. The ICJ, by its unanimous decision of December 15, 1979, gave an interim order directing that the US embassy be restored to the US government and that the hostages be released and given full diplomatic protection with freedom and facilities to leave Iran.[57] Also, on May 24, 1980, the Court finally gave judgment on the merits with respect to the case, in which Iran was found to be in contravention of its obligations under international conventions and that under long-established rules of general international law, as such, it was under an obligation to make reparation to the United States.[58] Iran, however, chose to defy both the interim order[59] and judgment of the ICJ.

It is important to mention that throughout the entire trial, the United States hinged its legal arguments mainly on well-acknowledged principles of diplomatic immunity that are viewed and understood from the Western legal perspective. The fact that Iran is an Islamic Republic would have necessitated an additional argument from the viewpoint of Islamic law on the side of the United States. It was, in fact, argued by Weeramantry that Islamic international law, which is equally "rich in principles relating to the treatment of foreign embassies and personnel"[60] would have, possibly, had a threefold effect on Iran if the United States had availed itself of the opportunity of canvassing it before the justices of the ICJ. These threefold effects, according to Weeramantry, are as follows:

> [I]ts persuasive value would have been immensely greater; it would have shown an appreciation and understanding of Islamic culture; and it would have induced a greater readiness on the Iranian side to negotiate from a base of common understanding.[61]

We must not forget the general references made by two of the judges of the ICJ (Waldock and Tarazi) to the contribution of the Islamic jurisprudence to the body of diplomatic immunity and inviolability. The ICJ, as per Justice Waldock, in the lead judgment, did not mince words when it said that

> the principle of the inviolability of the persons of diplomatic agent and the premises of diplomatic missions is one of the very foundations of

> long-established regime, to the evolution of which the traditions of Islam made a substantial contribution.[62]

Likewise, Tarazi, in delivering a dissenting opinion,[63] cited with approval, a 1957 lecture delivered by Professor Ahmed Rechid of the Istanbul law faculty confirming the respect conferred on diplomatic personnel under Islamic law, as follows:

> In Arabia, the person of the Ambassador has always been regarded as sacred. Muhammad consecrated this inviolability. Never were Ambassadors to Muhammad or to his successors molested.[64]

It is then of paramount interest to examine the framework of basic Islamic legal structures and principles of international law concerning the invasion and detention of the United States diplomatic mission and personnel in Tehran. Considering that not much has been written concerning how Islamic *siyar* views the Iranian invasion of the United States embassy, this section, therefore, surveys the facts surrounding the i) seizure of the embassy and the hostage taking crisis; ii) the applicable international conventions between Iran and the United States and their legal implications under Islamic *siyar*; iii) the rationale for taking members of the US diplomatic and consular staff as hostages; and iv) the jurisprudential justification of the rationale, if any, under Islamic *siyar*.

Seizure of the Embassy

It was on November 4, 1979, that some Iranian student demonstrators stormed the US embassy in Tehran, the Iranian capital, and likewise the US consulates in Tabriz and Shiraz, which led to the detention of 52 members of the American diplomatic and consular staff. Two of the hostages did not possess either diplomatic or consular status, but they were nationals of the United States. These students, who described themselves as the Muslim Student Followers of the Imam's Policy,[65] were said to be agitated by the resolve of the United States to admit the former shah of Iran, Mohammed Reza Pahlavi, into the United States.[66] Consequently, the hostage takers threatened that, unless the shah was extradited along with his wealth, they would not hesitate to put the hostages on trial for the offense of espionage.[67] It was, however, obvious that the United States would not extradite the shah due to the absence of any extradition treaty between the two countries.[68]

Iranian Government Endorses Students' Action

The Iranian authority, particularly, the late Imam Ayatollah Khomeini (1902–1989),[69] has been severally alleged to have backed and directly endorsed the entire actions of the students regarding the seizure of the US embassy.[70] It has been argued that not only did the Iranian government cooperate with the student demonstrators by not preventing them from entering the embassy but it also gave a mark of approval to and showered encomium on the US embassy hostage takers.[71] The Iranian Foreign Ministry, for example, was recalled as saying that "[t]oday's move by a group of our compatriots is a natural reaction to the U.S. Government's indifference to the hurt feelings of the Iranian people about the presence of the deposed Shah, who is in the United States under the pretext of illness."[72] He went on further to say that "[if] the U.S. authorities respected the feelings of the Iranian people and understood the depth of the Iranian revolution, they should have at least not allowed the deposed Shah into the country and should have returned his property."[73] In a pronouncement attributed to the Iranian then-foreign minister, Ibrahim Yazdi, that the students' action "enjoys the endorsement and support of the government, because America herself is responsible for this incident"[74] was also regarded as a general ratification to the entire hostage incident.

The president of the United States, Jimmy Carter, decided to explore the possibility of resolving the imbroglio through a diplomatic process by instructing his attorney general, Ramsey Clark, accompanied by the chief counsel for the Senate Select Committee on Intelligence, William Miller, to travel to Iran and deliver a message to Ayatollah Khomeini requesting the release of the hostages.[75] Khomeini and members of the Revolutionary Council refused to meet with the emissaries sent by the United States. It was related that while Clark was en route, the Tehran Radio broadcast the speech made by Ayatollah Khomeini on November 7, 1979, forbidding any member of the Revolutionary Council from holding any discussion with a representative of the United States, while also maintaining that "the US embassy in Iran is our enemies' centre of espionage against our sacred Islamic movement…Should the United States hand over to Iran the deposed shah…and give up espionage against our movement, the way to talks would be opened on the issue of certain relations which are in the interest of the nation."[76] The final seal of the Iranian government's approval to the taking of the US embassy was given when Khomeini decreed that "those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect."[77] His declaration that "[t]he noble Iranian nation will not give

permission for the release of the rest of them (the hostages). Therefore, the rest of them (the hostages) will be under arrest until the American Government acts according to the wish of the nation"[78] depicted, in an obvious fashion, the lucid intent of the State of Iran in ratifying the acts perpetrated by the Iranian students.

The possible legal implication one could deduce from these official statements is that the hostage takers had hence become agents of the Iranian government. One may not, as it appears, require any further proof to draw an inference of collusion between the Iranian authorities and the hostage takers, particularly, as there is ample evidence confirming the complicity of the Iranian government. It would seem difficult for the Iranian government, if it did so, to claim a lack of responsibility just because it did not officially carry out or direct the seizure of the US embassy and the detention of its personnel. The Iranian authorities can at best be described according to the remark of Rafat as "wholehearted participants in the violation of international law that had occurred."[79] In Islamic law, an act may be deemed validly constituted by an unauthorized agent, provided such act is eventually ratified by the principal,[80] following the principle that says "subsequent ratification has the same effect as a previous authorization to act as an agent."[81] Therefore, the Iranian government should be held accountable for the acts perpetrated by the Iranian student demonstrators.

The Iranian Violation of International Treaties

The Iranian government and the United States have entered into international obligations specifically relating to the protection of diplomatic and consular premises and personnel. These international obligations are variously contained in the VCDR,[82] VCCR,[83] 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[84] and 1955 Treaty of Amity, Economic Relations and Consular Rights[85] between the United States and Iran. Sovereign nations have been able to interact peacefully and maintain a regular connection among themselves due to the age-old international community's legal method in the form of treaties and covenants. It has been alleged, according to the application filed by the United States before the ICJ in November 29, 1979, that the Islamic Republic of Iran had grossly violated their international obligations stipulated in these treaties to ensure the safety and inviolability of the US diplomatic mission and personnel in Iran.[86]

The Islamic Republic of Iran had, by all legal implications, under contemporary conventional international law, likewise under Islamic *siyar*,

covenanted with the United States to respect and discharge the following obligations:

a. protect the inviolability of the diplomatic premises and the correspondence and archives;[87]
b. safeguard the inviolability of diplomats and protect them from arrest and detention;[88]
c. guarantee the diplomatic and consular immunity from criminal prosecution;[89]
d. ensure immunity from criminal prosecution of the administrative and technical personnel of the mission;[90]
e. guarantee the freedom of movement of the diplomatic and consular staff;[91]
f. cooperate in the prevention of crimes against the internationally protected person;[92] and
g. give the most constant protection and security to the nationals of the United States and their consular representatives within the territory of the Islamic Republic of Iran.[93]

Iran, being a state that proclaims to be Islamic based on its constitution and its governing system,[94] cannot claim to be oblivious to the fundamental importance of covenants in the Islamic legal system. Even though, Iran predominantly belongs to the Shia Imamiyyah sect of Islam,[95] the fact still remains that both the Sunni[96] and Shia schools of law hold the the legal maxim "Al Muslimun 'inda shurutihim" (Muslims are bound by their stipulations) in high esteem. In fact, the maxim is generally accepted as a traditional rule by all the *madhaahib* (Muslim schools of law).[97]

The contractual principles of Islamic law are carefully and clearly stated in the international arbitral proceedings of *Saudi Arabia v. Arabian American Oil Company*[98] thus:

> Moslem law does not distinguish between a treaty, a contract of public or administrative law and a contract of civil or commercial law. All these types are viewed by Moslem jurists as agreements or pacts which must be observed, since God is a witness to any contract entered into by individuals or by collectives. Under Moslem law, any contract is obligatory in accordance with the principles of Islam and the Law of God.[99]

Regardless of whether it is an agreement between an individual Muslim and a Muslim state or between a Muslim state and a non-Muslim state, it remains sacrosanct. The imam of a Muslim state is particularly under a duty to discharge his covenants to Muslims and non-Muslims alike. Islamic law encourages a Muslim ruler or any of his representatives not

to hesitate in concluding an agreement as long as such an agreement neither negates Islamic teachings nor is inimical to the general interests of Muslims.[100] According to the tradition of Prophet Muhammad (pbuh), as stated by the Hanbali jurist Ibn Taymiyyah (d.1328), "[f]or everyone who has committed a breach of faith there shall be a flag [of disgrace]. On the day of judgment it will be hoisted. It height will be in proportion to the enormity of his breach of faith. No breacher of faith is more unjust than an *amir* [prince] who breaks his covenants."[101] In fact, a Muslim state is expected to be a model for its citizens in fulfilling and discharging all the contractual obligations it has lawfully granted to any foreign country.[102] The legal sanctity and authority of covenants in Islamic law are firmly rooted in the two prime sources of the Islamic jurisprudence, and therefore receive unanimous approval from Muslim schools of law in general. According to a classic expression attributed to Ibn Taymiyyah (d. 1328), "[i]f proper fulfilment of obligations and due respect for covenants are prescribed by the Lawgiver, it follows that the general rule is that contracts are lawful…since the Lawgiver recognizes the legality of their objectives."[103]

When the Qur'an says, "O you who have believed, fulfil [all] contracts,"[104] it is generally understood that it incorporates all forms of obligations, contracts, and covenants that are made between man and man, and "spiritual covenants between man and God."[105] It is mandatory that all obligations must be discharged once they are agreed upon. Particularly relevant to this discussion is the verse of the Qur'an that categorically forbids any violation of the treaties entered into between Muslims and non-Muslims. The Qur'an says, "Excepted are those with whom you made a treaty among the polytheists and then they have not been deficient toward you in anything or supported anyone against you; so complete for them their treaty until their term [has ended]. Indeed, Allah loves the righteous [who fear Him]."[106] This means that if non-Muslims remain faithful and do not breach their covenants, then Muslims are duty bound to respect the terms of the agreements until their expiration. In fact, Allah describes those who violate covenants as those who are faithless.[107]

As discussed, Prophet Muhammad (pbuh) entered into a treaty with the non-Muslims of Makkah, which was known as the Treaty of Hudaybiyyah (628 AD), and he tenaciously observed the terms of the treaty to the letter. That treaty, according to Muslim jurists, later became a paradigm that authenticates the validity of all forms of legal instruments between Muslim and non-Muslim states.[108] In the same vein, there are numerous statements of Prophet Muhammad (pbuh) giving authority to the validity of covenants and treaties in Islamic law, and more so if

such treaties do not contain any unlawful objects known to the *shari'ah*. Prophet Muhammad (pbuh) is reported to have said that "[t]he Muslims are bound by their obligations, except an obligation that renders the lawful unlawful and the unlawful lawful."[109] It is considered sacrilegious for a Muslim to violate a treaty or a term in a treaty once it has been agreed upon, regardless of whether or not the other party is a non-Muslim. Prophet Muhammad (pbuh) was also very blunt in informing Abu Jandal that "[w]e have entered with the Quraysh into a treaty of peace and we have exchanged with a solemn pledge that none will cheat the other"[110] when he was requested to join the Muslims in Madinah immediately after signing of the Treaty of Hudaybiyyah.

Similarly, the third caliph in Islam, Uthman ibn 'Affan (579–656 AD), was said to have entered into a treaty with the people of Nubia promising not to wage war or prepare to wage war against them or attack them on the basis of a treaty that bound the two of them.[111]

It is, of course, a proven fact that the state of Iran is a signatory to all these treaties, which, by implication, means that all the terms of the treaties deserve to and must be observed.[112] It is also rightly assumed that the objects and terms of these treaties are not, in any way, contradictory to the core objectives of the *shari'ah* (*maqaasid al-shari'ah)*. In other words, these treaties, both under conventional international law and Islamic international law, must be observed to the letter since they have become applicable in themselves.[113] The failure of the Iranian government to provide adequate security to the US embassy, especially on November 4, 1979, when it was desperately needed to protect the US mission and its numerous personnel from the students' incursion, definitely constituted a breach of these international treaties, both under the Islamic *siyar* and international law.

It is worthwhile to mention that, assuming the Iranian government was right in its allegation of espionage against the United States, it would have justifiably refused to observe the terms of the diplomatic treaties it had with the United States. The Iranian government's refusal to fulfill the terms of such treaties would have been well supported by the Qur'anic verse that says, "If you [have reason to] fear from a people betrayal, throw [their treaty] back to them, [putting you] on equal terms. Indeed, Allah does not like traitors."[114] In addition, such a refusal would have also received legal justification from Article 60 (2) (b) of the VCLT, which provides that "[a] material breach of a multilateral treaty by one of the parties entitles:…a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State." The Islamic

Republic of Iran could only be justified in its action following the provisions of the foregoing verse of the Qur'an and the VCLT if it had formally informed the government of the United States of its intention to withdraw all the diplomatic commitments it had with United States due to the espionage activities of the United States within the Islamic Republic of Iran. This position received approval from the pronouncement of Prophet Muhammad when he said that "[h]e who has entered a treaty must not alter it until the period has expired, or he should let the other side know of the annulment so that he and they would be on equal footing."

It thus appears that the Iranian government did not expressly declare its intention to severe diplomatic ties with the United States due to the espionage activities of the United States, which they found to be a gross violation of Article 41 of the VCDR.[115] There was no evidence that such step was taken by the Islamic Republic of Iran. Having said this, the Iranian government cannot be justified in its action toward the United States, and as such, would be held liable to the United States under Islamic law and international law for invading the US embassy and detaining its diplomatic personnel.

Violation of Diplomatic Immunity

The protection of diplomatic envoys has been known and practiced from ancient times up until the present-day modern times.[116] We cannot also doubt that there have been series of cases involving the violation of diplomatic inviolability ranging from kidnapping, arrest, and detention to even the killing of diplomatic personnel. It is, however, doubtful whether there is any violation of diplomatic immunity that can be likened to the taking and eventual detention of the US embassy and its personnel by Iran on November 4, 1979, so far. It is not surprising when Barker makes an unequivocal submission that "[u]ndoubtedly, the most significant failure to protect diplomats in history concerned the seizure and subsequent occupation of the US Embassy in Tehran, Iran in 1979."[117] The occupation of the US embassy by the Iranian students demonstrators was described by Adib-Moghaddam as "the most explicit rejection of international 'norms of appropriate behaviour,' and here specifically the institutions of international law."[118] Richard Falk also made a similar submission in 1980 when he said that "Ayatollah Khomeinrefusal to honor the rules of international law relating to diplomatic immunity is among the most serious charges brought against his leadership. Even Hitler, it is alleged, never violated the diplomatic immunity of his enemies."[119]

It seems clear that the seizure of the US embassy in Iran could not have been condoned or in any way made permissible under the Islamic

legal system. If one is to properly place the Iranian acts of forceful entry into the US embassy; the acts of detaining personnel of the US embassy; the acts of seizing and searching the documents and archives of the US embassy; and the acts of restriction imposed on the freedom of movement of the US diplomatic personnel on the platform of Islamic law, being a legal system officially proclaimed to be adopted by the Islamic Republic of Iran, it would not be a surprise that Iran would have been held liable were they to be prosecuted under the Islamic legal system. The reason, of course, is obvious. It has been rightly suggested by Bsoul that "Muslim jurists agreed that the envoys and ambassadors enjoyed the right of immunity, regardless of their views and the nature of the message they were delivering. Their immunity continued for as long as they were in the Islamic empire."[120] It is apparent that under Islamic *siyar*, diplomatic envoys must not only be respected but also must actually be protected from all forms of molestation or maltreatment. This principle of Islamic *siyar* was further buttressed by Hamidullah, who said that "[diplomatic] envoys, along with those who are in their company, enjoy full personal immunity: they must never be killed, nor be in any way molested or maltreated."[121] Coincidentally, this remark represents the general position of how diplomatic personnel should be treated according to the *Shiite* school of Islamic jurisprudence.[122] Before discussing the implications of the Iranian acts under Islamic law, it is necessary to consider the legal authority of the principles of diplomatic immunity in Islamic jurisprudence.

There are, of course, authorities in the two primary sources (the Qur'an and the *Sunnah*) of Islamic law that confirm kind treatment and protection for diplomatic envoys. The Islamic principles of diplomatic immunity and inviolability, which have been examined in much detail in chapters 2 and 4, may not be out of place in again being mentioned a bit as supporting evidence for diplomatic protection.

According to the Qur'an, the decision of Prophet Sulayman to send the emissaries of Bilqees (the Queen of Sheba) back along with their gifts, which were considered as bribery and an insult to him personally, exhibited the kind of respect he had for foreign messengers.[123] He did not hold them responsible for offering him a bribe, but rather, he sent them out of his domain, which could be said to be another way of declaring them as persona non grata. Hence, the Qur'anic narration, according to Bassiouni, signifies that "the emissaries were immune from the wrath of the host state and were not held responsible for the acts or messages sent by their head of state."[124] He further concludes that "expulsion is the only sanction to be taken against them."[125] Therefore, it is required, as

it is imperative, according to the Qur'an, for all Islamic states to ensure and guarantee "the personal safety and well-being of diplomats and their family" within their territories.[126]

The Prophetic traditions further elaborated the Qur'anic injunctions regarding ways and how the diplomatic envoys should be treated. An incident that comes to mind is the case of the two emissaries sent to Prophet Muhammad (pbuh) by Musaylimah, who also claimed to be a prophet of God. In spite of the message these two diplomats brought to Prophet Muhammad (pbuh), which could have led to their incarceration or even extermination, Prophet Muhammad said to them, "By God, if it were not the tradition that envoys could not be killed, I would have severed your heads."[127] Also there was the case of Wahshi, who murdered Hamzah, the uncle of Prophet Muhammad (pbuh), in the battle of Uhud. He was accorded diplomatic immunity when he visited Prophet Muhammad (pbuh) as an ambassador of the people of Taif. It was further said that he embraced Islam on that account.[128] The detention of a foreign envoy was specifically discouraged by Prophet Muhammad (pbuh). It was narrated by Abu Raafi', who was designated as the Makkans' envoy to Prophet Muhammad (pbuh) in Madinah, immediately after the battle of Badr (624 AD), and upon seeing Prophet Muhammad (pbuh), Islam was cast into his heart straightaway to the extent that he requested never to return to Makkah. The Prophet blatantly rejected his request, saying, "I do not break a covenant or imprison messengers, but return, and if you feel the same as you do just now, come back."[129] The request of Abu Raafi' was rejected by Prophet Muhammad (pbuh) on the basis of diplomatic inviolability as he was, then, an ambassador of the Makkans, and he deserved not to be detained in Madinah. It was reported that Abu Raafi' later came back, not as diplomatic envoy, but as a Muslim immigrant.[130]

It is precisely clear from the foregoing authorities of the Qur'an and the Prophetic traditions that diplomatic envoys must be respected and particularly protected throughout the duration of their stay within any Muslim state. The Islamic Republic of Iran, which was not an exception, owes a duty to safeguard and protect the inviolability of all diplomatic missions and their personnel within its territorial sovereignty. Moreover, since the Islamic Republic of Iran has the duty of "framing the foreign policy of the country on the basis of Islamic criteria" as specified in its constitution,[131] it is also expected that Iran be totally committed to the principles of diplomatic immunity as contained under Islamic international law. Islamic international law imposed as a duty on the Islamic Republic of Iran to provide adequate protection against the invasion and seizure of the US embassy.

Comparing the Recent Attack on the British Embassy in Tehran with the 1979 Invasion of the American Embassy

The attack on the British embassy in Tehran on Tuesday, November 29, 2011, by some angry demonstrators can be distinguished from the 1979 invasion of the US embassy. The protesters, mostly Iranian students, went into the British embassy, shattering windows, ransacking offices, setting ablaze an embassy vehicle, looting and damaging embassy property, and removing and replacing the British flag with the Iranian flag.[132] The demonstration was initially meant to commemorate the first anniversary of the assassination of a senior Iranian nuclear scientist, Majid Shahriari, an incident that had led to protesters eventually storming the British embassy mainly to protest the UK government's decision to cut off all dealings with the Iranian Central Bank as a result of the Iranian nuclear program.[133]

The Iranian government quickly condemned the attack by saying that "[t]he foreign ministry regrets the protests that led to some unacceptable behavior… We respect and we are committed to international regulations on the immunity and safety of diplomats and diplomatic places."[134] But then, one would have expected the Iranian government to provide adequate and special measures to protect the embassy and its personnel before the attacks took place. Had the Iranians done that, Iran would have been vindicated and seen by the international community as having complied with the terms embedded in the 1961 and 1963 Vienna Conventions, as well as upholding the principles of diplomatic immunity entrenched in Islamic international law. Moreover, it is a fundamental precept in Islamic law that individual and state are strictly bound by the terms of the treaties they have made to other individuals and states, be they Muslims or non-Muslims.[135] Allowing the demonstrators to gain access to the premises of the embassy, in the words of the British Foreign Secretary, William Hague, would amount "to a grave breach of the Vienna Convention which requires the protection of diplomats and diplomatic premises under all circumstances."[136]

Does Iran Have Any Legal Justification for Invading the American Embassy under Islamic International Law?

However, the Iranian government claimed justification for the demonstrating students' invasion of the US Embassy on November 4, 1979. But then, there is a need to critically evaluate the justification of the Iranian

government under Islamic law. It is also noteworthy that the Iranian government neither entered appearance nor filed any CounterMemorial before the ICJ.[137] Iran never participated in the entire judicial proceedings, but rather, it sent the two letters dated December 9, 1979, and March 16, 1980, which emanated from the minister for foreign affairs of Iran to the ICJ. These letters were almost similar in contents and contained the reasons why the Iranian government felt that "the Court cannot and should not take cognizance of the case"[138] brought by the United States.

The letter of December 9, 1979, drew the attention of the Court to the "deep-rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters, the examination of whose numerous repercussions is essentially and directly a matter within the national sovereignty of Iran."[139] As far as the Islamic Republic of Iran is concerned, the entire question before the ICJ

> [o]nly represents a marginal and secondary aspect of an over-all problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.[140]

It was further mentioned in the letter that the dispute between the governments of Iran and the United States was not predicated on "the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements."[141] Therefore, according to Iran, it would be improper for the ICJ to "examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years."[142]

In addition, the spiritual leader of the Islamic Republic of Iran at the time, Imam Ayatollah Khomeini, issued a decree on November 17, 1979, which may be considered as approval of and justification for taking over the US embassy by saying that

> [the US embassy] was a "centre of espionage and conspiracy" and that "those who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respects."[143]

It can as well be inferred from the above statement that since the US embassy had been used as a place in which to spy on and conspire against the Islamic Republic of Iran, it would then be justified in detaining its diplomatic and consular staff, and therefore, in seizing the entire embassy. In a nutshell, one could say that the Iranian government relied on the following justifications as the basis for its action:

a. a continual interference by the United States in the affairs of Iran and the numerous crimes committed against the Iranian people for more than 25 years, and
b. the use of the US embassy as a "centre of espionage and conspiracy" against the Islamic Republic of Iran.

Regarding the first justification, there are impressive examples in the Qur'an and the *Sunnah* of Prophet Muhammad (pbuh) that make it abundantly clear that it would amount to violating the immunity of diplomatic envoys if diplomats were subjected to punishment or detention by a host country for any offense they might have allegedly committed.[144] Moreover, the Iranian government never brought any criminal charges alleging the commission of espionage or any other offenses against any of the US diplomats. Rather, the diplomats should be seen as an ordinary means of facilitating diplomatic interactions between the Islamic Republic of Iran and the United States.[145]

The second justification by the Iranian government was that the US government was using its embassy in Iran as a spy nest, which, according to the Iranian government, automatically took away the United States' enjoyment of international diplomatic respect.[146] Truly, according to Islamic law on crime, espionage is an offense, but it does not go to the extent of stripping diplomatic and consular staff of their immunity. One has to understand that espionage as an offense belongs to the *ta'azir*[147] (discretionary) category of crimes as it is not considered *haraam* (prohibited) under the Islamic criminal law.[148] It does not fall under the categories of *huduud*[149] (determined) and *qisaas*[150] (retaliation) offenses. As for the *huduud* and *qisaas* offenses, there are fixed penalties for them in the Qur'an and the *Sunnah* of Prophet Muhammad (pbuh).[151]

However, it is trite to say that in Islamic law *ta'azir* offenses, being discretionary in nature, can generally be waived, particularly, by diplomatic immunity.[152] In other words, since espionage is classified as a *ta'azir* offense, it therefore follows that any detention or arrest of an internationally protected person for the commission of espionage will be rendered nugatory. The Iranian government would have contravened

Islamic international law for the detaining of the American diplomats for allegedly committing the offense of espionage. Even if the American diplomats were involved in the act of spying in Iran, the most appropriate action to be taken by the Iranian regime, according to Islamic international law, would have been to expel them from Iran. This action is, however, compatible with the provisions of Article 9 (1) of the VCDR, which provides that

> [t]he receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

The purported justifications put forward by the Islamic Republic of Iran can, at best, be described, according to Rehman, as "national, political and economic grievances,"[153] which may not constitute an arguable legal defense under Islamic *siyar* and conventional international law. For instance, imam Ayatollah Khomeini lamented, "What kind of law is this? It permits the US Government to exploit and colonize peoples all over the world for decade. But it does not allow the extradition of an individual who has staged great massacres. Can you call it law?"[154] This criticism, while it appears to be morally and politically defensible, fell short of the legal principles of diplomatic immunity under Islamic *siyar* and modern international law. Rehman further stresses that, although "there was a sense of unfairness, injustice and exploitation perpetuated by successive United States governments,"[155] the relevance of the Iranian claims to Islamic international law remains very much doubtful. Meanwhile, the justifications canvassed by the Iranian Government, though not legally viable, surely indict international law for its "arbitrariness and one-sidedness," which call for critical attention.

The 1984 Libyan Bureau Shoot-Out: An Abuse of Diplomatic Immunity in Islamic International Law?

Among the reasons for maintaining strong diplomatic relations with nations is mainly the purpose of implementing the foreign policy of the

sending state within the territory of the receiving state.[156] Meanwhile, diplomatic law has put in place diplomatic immunity for the personnel of foreign states to ensure and guarantee the smooth and efficient dispensation of their diplomatic transactions.[157] However, it is common knowledge that some Muslim states have also contributed, in no small way, to the flagrant abuse of diplomatic privilege and immunity.[158] The statement of Javaid Rehman that "a number of cases [i.e., abuses of diplomatic immunity] have emerged from the Islamic world" is very much instructive.[159] These abuses happened regardless of the unambiguous provisions of the VCDR that diplomatic immunity does not operate as a license to disregard or flout the local laws of the receiving state.[160]

The abuses of diplomatic protection, according to Farahmand, mostly occur in three different dimensions, namely, "1) the commission of violent crimes by diplomats; 2) the illegal use of diplomatic bag; and 3) the promotion of state terrorism by foreign governments through the involvement of their embassy in the receiving state."[161] It may also be necessary to include the commission of traffic offenses by some diplomats, particularly in countries like the United States, which hosts the United Nations and some specialized agencies in the state of New York.[162] This section, however, focuses mainly on violent crimes committed by diplomats, with specific reference to the infamous 1984 Libyan People's Bureau shoot-out.

It is now more than three decades ago that a woman police constable, Yvonne Fletcher, was killed by gunshots from what was then the Libyan People's Bureau, which is now known as the Libyan embassy, London,[163] in one of the most publicized abuses of diplomatic immunity. On April 17, 1984, a peaceful demonstration was organized by about 70 Libyans in London who were protesting against the government of Colonel Muammar Gaddafi for ordering the hanging of two Libyan students from Tripoli University.[164] The demonstration was staged on the pavement in St. James's Square, London, facing the Libyan People's Bureau.[165] Also demonstrating on that day was a group of Gaddafi's supporters.[166] The British police were present as well to avert any public disorder. In addition, it must be mentioned that a day before the incident, the British ambassador in Tripoli and the Foreign Office in London were both advised by the Libyan regime that Libya "would not be responsible for its consequences" should the demonstration be allowed to take place.[167] Surprisingly, gunshots were heard and believed to have come from inside the Libyan People's Bureau and directed toward a crowd of demonstrators. The shots killed a British policewoman, Constable Yvonne Fletcher, who was on duty in the square. Several people, running to almost a dozen, were also seriously wounded.[168]

Immediately after this sad incident, the British authorities sent word to the Libyan government requesting that permission be given to the police to enter the Libyan Bureau for the purpose of questioning the occupants and searching for evidence. This request was never granted by the Libyan authorities.[169] The British government, apparently, severed diplomatic relations with the Libyan regime and consequently, gave the Libyan diplomats seven days within which to leave the United Kingdom.[170] The Libyan diplomatic personnel were thus declared persona non grata in accordance with Article 9 of the VCDR. It was said that, upon the departure of the Libyan diplomats, the British police entered the Libyan Bureau and, in the presence of a representative from Saudi Arabian embassy, carried out a search that led to the discovery of spent cartridges from a submachine gun and seven handguns.[171] It needs to be mentioned also that when the Libyan diplomats were leaving the United Kingdom, their bags and couriers were given due protection.[172]

In fact, Britain's display of maturity and exercise of adequate respect for diplomatic immunity in the face of this unfortunate provocation perpetrated by the Libyan People's Bureau cannot but be acknowledged. Of course, Islamic *siyar* guarantees immunities and privileges to diplomats and diplomatic missions, as discussed in detail in the preceding chapter.[173] However, these immunities and privileges, based on the functional theoretical justification under conventional diplomatic law and Islamic diplomatic law, are intended for the purpose of individuals discharging their diplomatic duties efficiently without any intimidation or unnecessary distraction. Also, Libya, as an active member of the OIC, had signed and ratified the provisions of the 1973 Convention of the Immunities and Privileges of the OIC,[174] and the provisions of the Convention mainly applied to member states, of which Britain was not a member. However, the fact that Article 13 of the 1973 Convention of the Immunities and Privileges of the OIC provides that "immunities and privileges are accorded to the representatives of Member States, not for their personal benefit, but in order to safeguard the independent exercise of their functions in connection with the organization," implies a general justification for the exercise of diplomatic immunity under Islamic international law. How can the killing of Fletcher by the Libyan People's Bureau be justified as safeguarding the independent exercise of their diplomatic functions? Or how would they connect their diplomatic functions with the shooting of peaceful demonstrators? Clearly, these justifications are not comparable as they are not, in any way, connected.

Moreover, Libya has equally, on behalf of its diplomatic personnel, covenanted to "respect the laws and regulations" of the United Kingdom.[175]

It further covenanted that its diplomatic mission would not be used "in any manner incompatible with the functions of the mission as laid down in the Convention or by other rules of general international law."[176] Islamic law requires Libya, as a Muslim state, to comply with these legal commitments as Libya is bound to perform the terms and conditions of the treaties it has signed in good faith. After all, Muslims, according to Weeramantry, "were obliged to honour their treaties even with non-believers "to the end of their term" . . . and "not to break oaths after making them" . . . *Pacta sunt servanda* was the underlying doctrine."[177] As such, Libya cannot be said to have acted in compliance with the principles of diplomatic immunity as stipulated in Islamic international law and international diplomatic law.

Conclusion

In summary, we have seen how some Muslim states practices (the Islamic Republic of Iran and Libya, for instance), in their diplomatic relations with other states, as we have mentioned above, may appear not to be compatible with the principles of diplomatic immunity as stipulated in the two Vienna conventions—1961 VCDR and 1963 VCCR. It must be emphasized also that such practices have equally been found to contravene the laid-down principles of diplomatic immunity according to Islamic *siyar*. What we need to note is that Islamic *siyar* frowns on any action taken on the part of diplomatic personnel that could lead or amount to an abuse of diplomatic immunity and similarly, condemns any contravention of its principles. The Pakistani case of Raymond Davis has shown clearly the possible relationship that could exist between Islamic law and diplomatic law in resolving what initially appeared to be a diplomatic conflict.

We must acknowledge that there are many Muslim states that are up to task in defending the principles of diplomatic immunity[178] mainly because of their commitments to various diplomatic treaties and, probably, due to their conviction about the unassailable compatibility between Islamic diplomatic law and international diplomatic law.

6

Terrorist Attacks on Diplomatic Institutions: Jihad and Islamic Law Viewpoints

Introduction

Terrorist attacks on modern diplomatic missions have been on the increase in recent years.[1] Diplomats and diplomatic facilities have been soft targets for terrorist attacks, possibly because they are on the front line of the so-called "worldwide war" often perpetrated by nonstate actors against various states.[2] International diplomatic relations have been greatly disturbed by the incessant terrorist crimes, usually perpetrated in the form of murder, arson, kidnapping, and even detention, that are often committed against diplomatic agents of foreign countries. In fact, since the attack on the World Trade Center on September 11, 2001,[3] terrorism has gradually but sophisticatedly become a global catastrophe requiring a global challenge.[4] A recent statistical survey, for instance, indicates that between 1969 and 2009, there were approximately 38,345 terrorist incidents around the world, with 7.8 percent (2,981) of these attacks directed against the United States.[5] Out of these terrorist attacks targeting the United States, 28.4 percent were directly against US diplomatic offices.[6] More recently, statistics show that in 2012, various diplomatic institutions were attacked 95 times, of which more than one-third of such attacks targeted UN personnel or facilities, with the remaining two-thirds spread across the African Union, the European Union, the World Bank, and the World Health Organization, and including consulates, embassies, and diplomatic personnel representing Bulgaria, Canada, China, Egypt, Germany, Great Britain, India, Indonesia, Iran, Israel, Italy, Japan, Saudi Arabia, Syria, Tunisia, Turkey, and the United States.[7]

With the recent spate of terrorist activities within Muslim states, and mostly perpetrated by Muslims, one may be inclined to agree with the submission of Esposito that "the most widespread examples of religious terrorism have occurred in the Muslim world."[8] However, this must not be construed as if terrorism had originated among Muslims.[9] The truth is that terrorism can be said to be as old as human history.[10] Surprisingly, the perpetrators of these attacks often claim inspiration from the Islamic jihad.[11] The perspective of this chapter is that, even in a war situation between a Muslim state[12] and a non-Muslim state, there are some established principles according to the Islamic law of war that must necessarily be complied with. For instance, Islamic law requires that during peace- and wartime situations, diplomatic envoys must not be molested, imprisoned, or killed; rather, they and their missions should be safely protected throughout their stay within a particular Muslim state. However, the incessant attacks on diplomatic personnel and facilities have generally provoked some questions that form the body of discussion in this chapter: (a) What is the relationship between the concept of jihad and terrorism? (b) Is it legal for nonstate actors to declare jihad? (c) Can diplomatic envoys and diplomatic missions be targeted for attacks even during a lawfully declared jihad? (d) Can the maiming or killing of unarmed civilians be justified according to the principles of jihad? (e) What is the relevance of *dār al-harb* (the abode of war) *and dār al- Islām* (the abode of Islam) to the concept of jihad (f) What are the responses of Muslim states to these terrorist attacks, and how do they treat such violations of the principles of international diplomatic law based on the criminal justice system of Islamic law? These are the questions that this chapter carefully considers from an Islamic legal perspective. These issues analyzed by relying on directives from the Qur'an, the prophetic instructions and advice from the caliphs to their military commanders as expounded in the Islamic *siyar.* Before discussing these issues, we first must look at the definition of terrorism in contradistinction with the meaning of the Islamic concept of jihad.

Terrorism and Its Definitional Problem

The ability to comprehend and explain the concept of terrorism is often impeded by the lack of a single and accepted universal definition. As such, there are divergent definitions of terrorism among policy makers, international lawyers, academics, national legislators, regional organizations, and even the United Nations.[13] Perhaps, this definitional ambiguity may not be unconnected with the general aphorism that "one man's terrorist

is another man's freedom fighter."[14] This may be one of the reasons why the international community has not been able to fashion a binding and an acceptable definition of terrorism. Yet, it is very important that a clear-cut definition of terrorism be given, as noted by Cassese, who says that "however imperfect and incomplete, a common working definition is necessary so that all states concerned may agree on the target of their repressive action: how can states work together for the arrest, detention or extradition of alleged terrorists, if they do not move from the same notion?"[15] One begins to wonder whether it is sufficient to generalize the definition of terrorism to cover "[w]hat looks, smells and kills like terrorism is terrorism."[16] Definitely not, for such a generalization would be too far reaching. The fact remains that once an act is not terrorism, it can never be terrorism.

Multiple attempts were made to come up with a universal definition of terrorism from 1937,[17] with the adoption of the Geneva Convention for the Prevention and Punishment of Terrorism,[18] to 2002,[19] following the infamous attack on the World Trade Center in September 11, 2001, and yet a definition still appears to be elusive. A working group set up by the UN General Assembly, for instance, came to define terrorism as an act

> intended to cause death or serious bodily injury to any person; or serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility…when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing an act.[20]

This definition, though, tends to proscribe a wide range of criminal acts. Nevertheless, it is said to be inconclusive,[21] as Malaysia, on behalf of the OIC, proposed an exemption that "[p]eople's struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime."[22] The aim of the proposal was to exclude the activities of national liberation forces from the reach of the convention by relying on Article 2 (a) of the 1999 Convention of the OIC on Combating International Terrorism.[23] The proposal by the 57 members of the OIC was rejected outright by majority of Western nation, including Israel,[24] on the grounds that "a terrorist activity remained a terrorist activity whether or not it was carried out in the exercise of the right of self-determination."[25]

Any attempt to disregardthe idea of proffering a universally accepted definition and purpose for this enigmatic concept called terrorism before engaging in ways of combating it, may only amount to an exercise in futility. UN General Assembly Resolution 42/159 of December 7, 1987, confirms this argument, as it states that "the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism." It is quite important to note that for a definition of terrorism to be generally accepted as such, it should encapsulate all forms of acts regardless of the actor, perpetrator, target, place or time.[26] In other words, the definition should be devoid of double standards, irrespective of whether the terrorist activities are perpetrated by state or nonstate actors.

In international law, terrorism may be perceived as a crime that precipitates serious violations of individual and collective rights.[27] Such activities as armed assault on civilians, indiscriminate bombings, kidnapping, focused assassination, hostage taking, and hijacking have been generally considered by the international community as illegal and criminal in nature.[28] It is beyond doubt that defining terrorism in international law remains problematic and very complicated. This complication does occur usually when it comes to the question of differentiating a terrorist from a freedom fighter.[29] Labeling someone or a particular group as a terrorist or terrorist organization appears to depend on "political persuasion and nationalistic sentiments."[30] No wonder, Nobel Peace Prize laureates Menachem Begin (d. 1992), Yasser Arafat (d. 2004), and Nelson Mandela (d. 2013) were, at different stages of their lives, famously labeled as terrorists.[31]

Most African states, including Muslim states, have strongly held the view that the meaning of terrorism does not include those struggling against armed occupation and foreign aggression.[32] In contrast, the majority of Western states, including the United States and Israel, contend that "state terrorism" cannot be included in the definition of terrorism.[33] Many scholars have, in their quest for a universal definition of terrorism, come to the conclusion that, since states and regional organizations cannot be unanimous on the definition of terrorism, it would then be difficult to have or invoke a universal criminal jurisdiction over it.[34] In a 1997 article, Higgins concludes that

> Terrorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.[35]

If Higgins' statement is anything to go by, it therefore means that different countries have to adopt different definitions of terrorism depending on how they perceive terrorism. It may be inevitable that there may be a lack of unanimous acceptance from the international community for a universal definition of terrorism.[36]

However, for the purpose of this discussion, which focuses on whether the principles of jihad sanction acts of terrorism, particularly against internationally protected persons, we may not have to belabor the issue concerning the universal definition of terrorism. Rather, we may want to agree with the argument expressed by the US government that "convening a conference to consider this question (i.e., the universal definition of terrorism) once again would likely result in a nonproductive debate and would divert the United Nations attention and resources from efforts to develop effective, concrete measures against terrorism."[37] It suffices to say, at least, that categories of acts that are identified and condemned by the international community as forming acts of terrorism are domestically criminalized with the intent to prosecute or extradite the perpetrators in cooperation and with the understanding of other states.

Meaning and Legal Implication of Jihad in Islamic Law

The fact that the word jihad has suffered great misconception remains incontrovertible. The statement of John Esposito that "[t]o equate Islam and Islamic fundamentalism uncritically with extremism is to judge Islam only by those who wreak havoc"[38] may not be far from the truth. The correctness of this statement becomes relevant in view of the prevailing misunderstanding surrounding the usage of the word "jihad" in a way that makes it appear as a synonym of terrorism.[39] That is why it may be correct to assume that in Islam, the concept of jihad appears to be the most misinterpreted, misused, misunderstood word, and one that is often quoted out of context. As one Western author writes, though erroneously, "By now most Westerners know that jihad is associated with violence and is synonymous with terrorism…it is a powerful religious concept and dictate and is used as justification for terrorism."[40] It is quite important to mention, however, that this view does not portray the general opinion of commentators from the West, not even after the attacks of September 11, 2001, when the Western press and the public appeared to put the blame at the doorstep of Islam and Muslims.[41] Otherwise,

it may amount to making sweeping generalizations about what terrorism and jihad connote without availing oneself of the benefit of a profound research. In addition, the concept of jihad in the Islamic legal system has been variously depicted as meaning "holy war" to the extent that, according to Mushkat,

> Islamic law enjoins Moslems to maintain a state of permanent belligerence with all non-believers, collectively encompassed in the *dar al-harb*, the domain of war.... The Moslems are, therefore, under a legal obligation to reduce non-Islamic communities to Islamic rule in order to achieve Islam's ultimate objective, namely the enforcement of God's law (the *Shari'a*) over the entire world. The instrument by which the Islamic state is to carry out that objective is called the *jihad* (popularly known as the "holy war") and is always just, if waged against the infidels and the enemies of the faith.[42]

The compatibility of Islamic law with the modern norm of international law has been a subject of deep controversy, partly due to the skepticism surrounding the acceptance of the concept of jihad owing to the pejorative connotations it has acquired, particularly in the minds of most Westerners. A lot has been written on the concept of jihad by classic and modern scholars of Islamic jurisprudence.[43] Meanwhile, there is the need to mention that the term "jihad" is not in any way identical with the phrase "holy war" or analogous to the concept of crusade as understood in the Western Christendom.[44] This, perhaps, explains why Peters was swift in rebutting the allegation of Khadduri that "the jihad was equivalent to the Christian concept of the crusade"[45] when he asserted that "'Holy War' is thus, strictly speaking, a wrong translation of *jihad,* and the reason why it is nevertheless used here is that the term has become current in Western literature."[46] Moreover, "*Harb al-Muqaddasah*," which is the Arabic equivalent of the English term "Holy War," is not mentioned anywhere in the Qur'an or the authentic traditions of Prophet Muhammad (pbuh).[47] Jihad, in a literal sense, is an Arabic expression derived from the verb *jahada*, which means to strive or exert oneself in doing things to the best of one's ability.[48] The word shares a similar origin with the term *ijtihaad*, which refers "to the exertion of intellectual effort in order to develop an informed opinion on a new issue or problem."[49] Basically, the concept of jihad signifies self-exertion and peaceful persuasion for the sake of God in contradistinction to violence or aggression,[50] while in the legal context, it means to "struggle for the cause of God by all means, including speech, life and property."[51] According to al-Kaasaani, "jihad is used in expending ability and power in struggling in the path of

Allah by means of life, property, words and more,"[52] just as it has been expressly stated in the Qur'an that

> O you who have believed, shall I guide you to a transaction that will save you from a painful punishment? [It is that] you believe in Allah and His Messenger and strive in the cause of Allah with your wealth and your lives. That is best for you, if you only knew.[53]

In a more general context, jihad has been further defined by Esposito

> the obligation incumbent on all Muslims, individuals, and the community to follow and realize God's will: to lead a virtuous life and to spread Islam through preaching, education, example, and writing. Jihad also includes the right, indeed the obligation, to defend Islam and the Muslim community from aggression.[54]

Shah, in his explanation of the kinds of jihad, indicates that it could be viewed from two main perspectives: the internal jihad and the external jihad. He stresses that the internal jihad, which is a process of self-purification, "is a search for self-satisfaction by winning the pleasure and blessing of God."[55] While, in contrast, he considers external jihad as a "search for self-protection in several ways, including self-defense, self-determination, and the search for how to remove obstructions hindering self-protection."[56] In essence, jihad can be seen as a search for self-satisfaction and self-protection.[57]

According to Khaddduri, there are four ways by which a *jihad* obligation may be fulfilled by a Muslim, namely by his heart, his tongue, his hands, and by the sword.[58] Also, the outward and inward aspects of jihad, according to Ahmed,[59] have been illustrated with reference to a statement attributed to Prophet Muhammad (pbuh), when his companions were returning from a military campaign: "We have returned from the lesser jihad (*al-jihaad al asghar*; the physical fight against injustice) to the greater jihad (*al-jihaad al akbar*; the struggle against evil with oneself)." When asked, "What is the great jihad?" He [Prophet Muhammad] replied, "The jihad against the soul."[60] The authenticity of this statement is, however, subject to vigorous debate, particularly among Sunni scholars.[61] Jihad, therefore, came to be seen from three different perspectives: a) personal jihad, which is also known as *jihaadun-nafs*—to strive toward emancipating oneself from all kinds of evil plots; b) verbal jihad—to stand firmly and speak the truth in the face of injustice, as Prophet Muhammad (pbuh) was reported to have said that "the best

form of jihad is to speak the truth in the face of an oppressive ruler;"[62] and c) physical jihad—to engage in physical force against oppression and transgression.[63]

Thus, the use of force, or what has been termed "physical force," only forms an aspect of what is called jihad, meaning that jihad as a whole cannot be a synonym for violence. But then, can one really say whether this aspect of jihad, in other words, the use of force, is purposely enjoined on Muslims in self-defense against persecution and aggression or for the purpose of launching offensive wars against non-Muslims in the name of proselytization? In answering this question, we may have to consider whether jihad is indeed a defensive or an offensive war.

Jihad as a Defensive War

Islamic law enjoins Muslims to only embark on the use of force as self-defense when it becomes compelling to utilize it to repel all forms of aggression and oppression against the Muslim community. This assertion is supported by array of Qur'anic verses coupled with historical facts. It may be argued that, in Islam, the general rule is to maintain and spread peace, while war, which is an aberration, will only be resorted to under exceptional and unavoidable conditions.[64] This argument comports with the ideological rationale behind the concept of jihad, which is, as stated by Ibn Taymiyyah (1263–1328), "to defend Muslims against real or anticipated attacks; to guarantee and extend freedom of belief; and to defend the mission of Islam."[65] In other words, war, according to Islamic law, will only be allowed if the sole objective is to protect the Islamic faith and to preserve the lives of the Muslims.

There are some early Quranic verses that were revealed to Prophet Muhammad (pbuh) shortly after his immigration (*hijrah*)[66] to Madinah that emphasized the conditions under which jihad could be fought.[67] At that time, Madinah, as the first Islamic community to be established, was persistently under the fear of invasion from non-Muslims.[68] These Qur'anic verses marked the genesis of armed struggle in Islam, "with the express purpose to defend the religious belief of the Muslims and to avoid extermination at the hands of the then dominant group [the idolatrous Arabs]."[69] It was revealed to Prophet Muhammad (pbuh) that

> Permission [to fight] has been given to those who are being fought, because they were wronged. And indeed, Allah is competent to give them victory. [They are] those who have been evicted from their homes without right—only because they say, "Our Lord is Allah." And were it not that Allah checks the people, some by means of others, there would have been

> demolished monasteries, churches, synagogues, and mosques in which the name of Allah is much mentioned. And Allah will surely support those who support Him. Indeed, Allah is Powerful and Exalted in Might.[70]

The verses clearly indicate that for one to engage in jihad, either individually or collectively, it must be for the purpose of redressing a wrong and in defense of the community.[71] Notable defensive jihad, in more recent times, has included the Afghan resistance against the Russian invasion in 1979 and the Palestinian struggle against Israel.[72] The defensive nature of jihad is further contextualized in another verse of the Qur'an which says, "Fight in the way of Allah those who fight you but do not transgress. Indeed. Allah does not like transgressors."[73]

According to the Qur'anic commentary of Ibn Katheer (d. 1373),[74] these verses, that is Qur'an 22:39–40 and 2:190 are the first Qur'anic injunction authorizing the use of physical force against the unbelievers.[75] The instruction to "fight in the way of Allah" is not based on the nonacceptance of Islam, as "there shall be no compulsion in [acceptance of] the religion,"[76] but rather it is purely based on the continuation of aggression and oppression. According to Badawi, there is "[n]o single verse in the Qur'an, when placed in its proper textual and historical context, that permits fighting others on the basis of their faith, ethnicity or nationality. To do so, contravenes several established values and principles"[77] in Islamic jurisprudence. Once enemies desist from their hostile and aggressive pursuit, and opt for peace, Muslims are also expected to immediately bring their jihad to an end and embrace peace.[78] As stated in the Qur'an, "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."[79] This verse and other similar verses confirm the peaceful relationship that can and does exist between Muslims and non-Muslims, contrary to the view of some scholars who argue that "in theory *dar al-Islam* was in state of war [permanently] with the *dar al-harb*."[80] One may want to doubt the exactitude of this statement in view of the Qur'anic verse that states that

> Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes—from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly.[81]

Can Jihad Be Offensive?

There are some Islamic scholars who are of the view that the message of Islam should be spread peacefully, but that, if there are any impediments

against peaceful propagation, then it is acceptable to resort to the use of force.[82] They tend to provide justification for offensive jihad in Islam. In expressing their argument, they often refer to some verses of the Koran that are known as the "sword verses," claiming that these verses have abrogated the earlier Koranic verses (Qur'an 22:39–40 and 2:190), known as the "peace verses," which establish the defensive nature of the Islamic jihad.[83] As such, they allege that the "sword verses" legitimize absolute offensive war against the unbelievers. For instance, Quran 9:5 says,

> And when the inviolable months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush.[84]

This verse should not and cannot be read in isolation. In fact, it should be read together with the previous and subsequent verses, that is 9:1–15, in order to fully understand the textual and historical context inherent in the verse. Those verses, including Qur'an 9:5, were revealed as a result of the Makkans' breach of the Treaty of Hudaybiyyah, when the Banu Bakr, a tribe that was an ally of the Makkans, attacked the Banu Khuza', a tribe that was in alliance with the Muslims.[85] Surprisingly, the Makkans had to surrender to the Muslims without fighting, thereby rendering the application of these verses unnecessary. Moreover, if one thoroughly considers the "sword verses" and the "peace verses," one can see that the "sword verses" appears to be absolute (*mutlaq*), while the "peace verses" are qualified (*muqayyad*).[86] The "peace verses" are qualified in the sense that they provide specific reasons for declaring jihad against polytheists, while the sword verses do not provide any reason for waging war. Since the "peace verses" and the "sword verses" convey the same ruling, which is the declaration of war, and the same subjects, according to Muslim jurists, the conditions in the "peace verses" automatically apply to the "sword verses."[87] This then takes away the question of the "sword verses" abrogating the "peace verses."

Moreover, the contention of Abdur-Rahman bin Zayd bin Aslam that Qur'an 9:5 has abrogated the peace verses was considered "not plausible" by Ibn Katheer,[88] because Allah has specifically instructed Muslims to "fight against the disbelievers collectively as they fight against you collectively."[89] This means that, in the words of Ibn Katheer, "[y]our [the Muslims] energy should be spent on fighting them [the polytheists], just as their energy is spent on fighting you, and on expelling them from the areas from which they have expelled you, as

a law of equality in punishment."[90] Esposito made a similar remark when explaining the essence of Qur'an 9:5, which is that "[a]lthough this verse has been used to justify offensive jihad, it has traditionally be read as a call for peaceful relations unless there is interference with the freedom of Muslims."[91]

In the same vein, Sayyid Qutb (d. 1966),[92] an Egyptian scholar, was very clear in his condemnation of those who erroneously interpret Qur'an 9:5 to mean an outright extermination of the unbelievers, when he says that "[s]ome people may feel differently, taking the order to mean that when the truce was over, the Muslims were meant to kill all unbelievers. They may quote in support of their view the next verse which states: 'When these months of grace are over, slay the idolators wherever you find them.' (Verse 5) But this view is wrong."[93] Obviously, the reasons for enmity between Muslims and polytheists were not as a result of their different beliefs, but rather due to the Makkans' hostility, persecution' and aggression toward the Muslims.[94]

Those who argue in support of the offensive jihad theory also refer to Qur'an 9:29 to buttress their argument:

> Fight against those who do not believe in Allah or in the Last Day and who do not consider unlawful what Allah and His Messenger have made unlawful and who do not adopt the religion of truth [i.e., Islam] from those who were given the Scripture.[95]

The understanding of some Muslim scholars about this verse is that it has outrightly abrogated all the peace verses in the Qur'an, and as such, it marks the final stage of Muslim-non-Muslim relations.[96] They have interpreted the verse in a way that envisages a permanent and universal warfare to extinguish, through the use of offensive force, if possible, all forces of immorality and unbelief.[97] Apparently, the reasons for the revelation of Qur'an 9:29 were not, in any way, obscure. In the summer of 630 AD, Muslims received information that the Byzantine Empire, which was predominantly Christian, was preparing to launch an offensive attack on them. As expected, Prophet Muhammad (pbuh) set out with about 30 men with the intention of stopping, in a defensive approach, the Roman soldiers from reaching Madinah.[98] On reaching Tabuk, when it was discovered that the Christian forces had already withdrawn, the Muslim forces, rather than going after them, had to retreat to Madinah, as the expedition was not an offensive battle.[99] From the Qur'anic context, war or the use of force is only permissible in Islam for the purpose of self-defense. It would be wrong to take Qur'an 9:29 out of its specific

historical context as if it had general application under Islamic law.[100] Shah rightly concludes that

> [f]or Muslims, it is irrelevant whether these hostile groups were Christians, Jews, or Pagans. The Prophet Muhammad fought his own tribe, Quraish, as it threatened and attempted, during the battle of Badr, to conquer Madina where Prophet Muhammad had migrated. Keeping in view the Koranic and historic contexts, the most probable interpretation is that verse 9:29 addresses those unbelievers who either were aggressors or there was a well founded fear that they would attack Muslims.[101]

In discussions of the "sword verses," which command Muslims to fight against non-Muslims, it has been argued that such verses cannot be interpreted to mean an indiscriminate military jihad against all non-Muslims. Rather, the "sword verses" are meant for non-Muslims who have attacked or threatened to attack a Muslim community since "wars of aggression in general, and terrorism in particular, are diametrically opposed to the very idea of the Qur'an."[102] This statement has been echoed by Sachedina, who said that "it is not unbelievers as such who are the object of force, but unbelievers who demonstrate their hostility to Islam by, for example, persecution of the Muslims."[103] In addition, the Qur'an states that

> Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes—from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly.[104]

The jihad, according to Sunni jurists, is generally considered as a collective duty (*fard Kifaaya*), which, if carried out by a sufficient number of Muslims, for which the remaining Muslims who do not participate in it will not be held accountable.[105] If Muslims in general refuse to embark on jihad, when it becomes necessary, they will be considered as sinners, with the exception of women, children, the disabled, and elderly people.[106] This view is supported by a Koranic verse that says,

> And it is not for the believers to go forth [to battle] all at once. For there should separate from every division of them a group [remaining] to obtain understanding in the religion and warn [i.e., advise] their people when they return to them that they might be cautious.[107]

Jihad may also become an individual duty *(fard 'ayn*) when there is an attack on Muslim territory, which makes it a duty on all the

inhabitants of the attacked territory, without exception, to fight against such occupation.[108] Muslim jurists have cited the Qur'anic verse that says, "Go forth, whether light or heavy, and strive with your wealth and your lives in the cause of Allah. That is better for you, if you only knew,"[109] to buttress this statement.[110]

Having discussed two instances that may warrant the use of force based on the Islamic principles of jihad, the next questions that need to be answered are: Who declares the call for jihad, the public or the government? What are the preconditions that must be fulfilled before the public can exercise their right to declare the call for jihad? These questions have become necessary in view of the multiple attacks, in the form of suicide missions; killings; injuries; arsons; and kidnapping, which have been perpetrated particularly against diplomats and diplomatic facilities of non-Muslim countries and their allies from Muslim countries. These attacks, which, in most cases, have been unleashed in the name of jihad, have often been declared by nonstate individuals or organizations. These are the issues to be considered in the next section.

Who Declares the Call for Jihad?

When it becomes necessary to resort to physical jihad or the use of force in self-defense, either due to an actual invasion or a threat of aggression on Muslim territory, there has to be a declaration of jihad. Both classic and modern jurists are unanimous that the decision to initiate war according to Islamic jurisprudence must be taken by the legitimate authority.[111] Basically, at the earliest time in Islam, the sole legitimate authority that must declare the commencement of jihad was Prophet Muhammad (pbuh) who, according to the Qur'an, was commanded to "urge the believers to battle."[112] The responsibility of initiating jihad was placed upon Prophet Muhammad (pbuh), perhaps because jihad was then, just as it is now, "an issue of public safety."[113] Muslims were advised to refer all issues concerning public safety to Prophet Muhammad (pbuh) or to those in position of authority among them. The Koran states, "And when there comes to them information about [public] security or fear, they spread it around. But if they had referred it back to the Messenger or to those of authority among them, then the ones who [can] draw correct conclusions from it would have known about it."[114]

Following the demise of Prophet Muhammad (pbuh), the power to declare jihad devolved upon the imam or caliph,[115] being the head of the Muslim polity.[116] It is not for individual Muslims or an organization(s), not even the *'ulama* (Islamic jurists) to declare jihad without the definite

directive of the caliph or the Islamic head of state.[117] In fact, it is an act of disobedience, according to the *Shari'ah*, to initiate jihad without the authorization of the caliph or the head of the Muslim polity.[118] Abu Yusuf (d. 182/798), a Hanafi jurist, was clear on this point when he said that "no army marches without the permission of the Imam."[119] Ibn Qudamah (d. 1223),[120] a renowned Hanbali scholar, expressed the need for Muslim leadership before the commencement of jihad thus:

> Declaring Jihad is the responsibility of the Ruler and consists of his independent legal judgment. It is the duty of the citizens to obey whatever the Ruler regards appropriate.[121]

It was further stated by al-Jaza'iri that, for jihad to remain valid, it must be

> [a] pure intention that it is performed behind a Muslim Ruler and beneath his flag and with his permission…And it is not allowed for Muslims to fight without a Ruler because Allah says: "O ye who believe! Obey God, and obey the Messenger, and those charged with authority among you" (Qur'an 4:59).[122]

Similarly, Shiite jurists hold a slightly different view from Sunni jurists by saying that the call to jihad can only be proclaimed by a rightful imam in his capacity as a divinely appointed leader of the community.[123] Hence, since according to Shia doctrine, the twelfth imam who has disappeared, otherwise known as "the Hidden Imam," since 874 AD, will only surface at the approach of the Last Day, it therefore means that combative jihad has to continuously remain in abeyance.[124] However, they are of the opinion that, in view of the absence of the Imam, the only jihad that could be embarked upon has to be defensive.[125] This view, according to the opinion of some Shiite jurists, is resolvable in that all legitimate forms of jihad are defensive and therefore can be waged, even in the absence of the Imam.[126]

There are, of course, exceptional situations that may warrant or necessitate the declaration of jihad by nonstate actors (individuals or group of individuals), notwithstanding the existence of an Islamic head of state. Once there is a physical attack on a Muslim land and the Muslim leader or the Islamic head of state appears to be incapable of declaring or refuses to declare a defensive jihad to protect the lives and properties of the Muslims, then the Muslims in that country will have to take up the responsibility of initiating a defensive jihad.[127] The recent Afghanistan war against the Russian occupation of their land in 1979 serves as a

typical example of a defensive jihad declared not by the Muslim ruler, but by the consensus of Afghan Muslim religious leaders.[128] It was a jihad that drew Muslims from around the world and from all walks of life, who migrated to Afghanistan with the intention of defending "their coreligionists and the faith and to resist aggression against the dar al-Islam (House of Islam)."[129] The defensive jihad embarked upon by the Afghans, which was a kind of collective and self-defensive war against the Russian invasion, was said to be compatible with Article 51 of the Charter of the United Nations,[130] which provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."[131]

Can individual or an organization declare jihad against other nation(s), relying on the exceptional situations given above as justification for such declaration, even though there was no actual physical attack from invader(s)? It is highly doubtful that such a declaration can ever be legitimate in Islamic law. This is because, as stated previously, there must be an actual physical attack on the Muslim state from a non-Muslim state. In addition, the Muslim ruler must be unwilling to mount a defensive attack against the invading state. That is when the declaration of jihad becomes the prerogative of the Islamic head of state. Reference, for instance, is made to the two declarations of jihad made by Al-Qaeda[132] in 1996[133] and 1998.[134] Usama bin Laden,[135] who was the leader of Al-Qaeda, issued jihad declarations both in 1996 and 1998, calling on all Muslims of the world "to kill the Americans and their allies, civilians and military."[136] The 1998 declaration further stressed that it "is an individual duty of every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque [in Jerusalem] and the Holy Mosque [in Mecca] from their grip and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim."[137] Several verses of the Qur'an were cited in the 1996 and 1998 declarations, wherein the Muslims were reminded of their duty to Allah and Islam concerning waging jihad against the infidels.

Most attacks that were launched against diplomats and diplomatic missions were, for instance, most likely, inspired by these two declarations of jihad by Al-Qaeda,[138] prominent among which were the two attacks on the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, both of which occurred on August 7, 1998. No fewer than 200 people lost their lives in the two attacks, and more than 1,000 people suffered severe injury.[139] The 1996 and 1998 declarations of jihad made by Usama bin Laden in collaboration with leaders of extremist groups in Pakistan, Egypt, and Bangladesh remain inconsistent with the

classic traditions of Islamic jurisprudence. The recent terrorist attack on the UN building in Abuja, the Nigerian capital, by an Islamist group popularly known as Boko Haram,[140] which killed at least 21 people and injured 60 in the summer of 2011, is also worth mentioning.[141] The Boko Haram is a group that is believed to have received training from al-Qaeda in the Lands of the Islamic Maghreb (AQIM).[142] Jihad has now become a word that is loosely and commonly used by warmongers among Muslims who camouflage themselves as "Muslim jihadists" employing the jihad as a justification for illegitimately spilling the blood of non-Muslims, and even Muslims who do not subscribe to their ideological manifestation, all in the name of Islam.

Jihad, according to Islamic jurisprudence, is to be seen and used in the last resort as a defensive mechanism and not to be used for aggressive warfare. Moreover, since jihad, according to Ibn Taymiyyah, is "a defensive war against unbelievers whenever they threatened Islam,"[143] it therefore means that peace, if desired by non-Muslims, should ordinarily characterize the normal and permanent interaction between Muslims and non-Muslims.

Protection of Diplomatic Envoys and Civilians during Jihad

Jihad is now being embarked upon by some individual Muslim groups and organizations under the pretense of Islam, to carry out some nefarious activities against diplomatic personnel, non-Muslim as well as Muslim civilians, as if they are legitimate targets. We must not forget that these groups always make reference to Islamic sources (the Qur'an and the *Sunnah*) to justify their actions, but the truth is that their actions regarding the practice and conduct of jihad clearly contradict the rules and norms in Islamic jurisprudence.[144] The killing of the US ambassador to Libya, Christopher Stevens, and three other Americans in the US consulate, Benghazi, on September 12, 2012, is one of the most recent examples of these terrorist activities perpetrated in the name of Islamic jihad.[145] The attack on the US consulate was sparked by a film produced in America entitled *Innocence of Muslims*, which was reported to have insulted the Islamic faith. Muslim states in general were unanimous in their condemnation of the attack on the diplomatic mission, particularly the killing of its diplomatic personnel. The OIC seriously condemned the killing of Stevens and the three US diplomats, stating that their death "is not a loss for the Americans only, but for the international diplomatic vitality."[146] Perhaps, this explains why Al-Qaeda's violent activities, in

the words of Ahmed, have been found to be unacceptable to the classic norms of Islamic jihad on five major grounds:

i. Individual and organizations cannot declare a jihad, only states can officially declare wars.
ii. Even in war, one cannot kill innocent women and children.
iii. One cannot wage war against a country in which Muslims can freely practice their religion (i.e., the United States).
iv. Prominent Muslim jurists around the world have condemned bin Laden's ideology and tactics. Their condemnation forms a consensus, known in Islamic jurisprudence as *ijma*, which has authority only next to the divine injunctions.
v. The welfare and interest of the Muslim community, known in Islamic jurisprudence as *maslaha*, is harmed by bin Laden's actions. Thus, such actions are un-Islamic.[147]

Islamic law of armed conflict is clear when it comes to determining those who are the combatants (*ahl al-qitaal*) and the noncombatants (*ghayr ahl al-qitaal*). The combatants are those who are actively engaged in war or preparing to engage in war either as military officers or volunteers.[148] The noncombatants, in contrast, are those who do not fight and are indifferent to the effects of war. This includes children, particularly those below the age of fifteen,[149] women (provided she is not the queen of the enemy),[150] the very old, monks, sick and disabled persons,[151] diplomats, peasants, and merchants.[152] These categories of persons are protected under Islamic law from any kind of attack in times of war, unless they are found to have compromised their immunity by partaking in the fight or by providing assistance to the enemy.[153] Surprisingly, Ibn Taymiyyah (d. 1328), whose legal pronouncements on the issue of jihad have often been misinterpreted or quoted out of context by some radical Muslim groups, says that noncombatants, who do not participate in war efforts either by deeds or by words, such as "women, children, the monk, old man, the blind and the chronically ill should not be killed according to the majority of the scholars."[154] The immunity given to noncombatants is based on the Islamic law principle that "everything is immune from attack unless it is explicitly permitted to be attacked."[155] The immunity granted to those who are not directly engaged in active combat or providing any kind of assistance to the enemy is particularly authorized in various verses of the Qur'an and specific Prophetic instructions given to Muslim fighters. When the Qur'an, for instance, says, "Fight in the way of Allah those who fight you but do not transgress,"[156] which could also mean that Muslims are restrained from fighting those who do not fight

them; otherwise, it could amount to a transgression (*'i'tidaa'*).[157] In other words, going by the dictates of this verse, women, children, the elderly, monks, the sick, and the disabled should not be targeted in the course of physical jihad, and in fact, they are to be protected.

Similarly, Prophet Muhammad (pbuh) was reported to have issued instructions to the Muslim fighters when they were dispatched against the advancing Byzantine force, which read as follows:

> In avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infants at the breast or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitants; destroy not the means of their subsistence, nor their fruits-trees and touch not the palm.[158]

There was another incident in which Prophet Muhammad (pbuh) saw a woman who was killed in the Battle of Hunayn (630 AD), and upon inquiry he was informed that the woman was killed by one of his military commanders, who claimed that he killed her because she struggled to get his sword off him in order to kill him. He (the Prophet) immediately warned him that women should never be killed in battle as they are incapable of fighting.[159]

The companions of Prophet Muhammad (pbuh) were relentless in adhering to his instructions regarding the protection of noncombatants in the conduct of jihad. The instructions given by Abu Bakr (d. 634 AD) to Yazid bin Abu Sufyan (d. 640 AD) while he was the commander of the Muslim army that was to confront the Roman army in Syria was, "I prescribe ten commandments to you: do not kill a woman, a child, or an old man, do not cut down fruitful tress, do not destroy inhabited areas, do not slaughter any sheep, cow or camel except for food, do not burn date palms nor inundate them, do not embezzle, nor be guilty of cowardliness."[160] The instructions given by Abu Bakr were considered by Bosworth as "humane precepts [that] served like a code of laws of war during the career Mohammedan conquest."[161]

Diplomatic personnel have a special kind of protection in Islamic law bestowed on them by the provisions of the Qur'an,[162] numerous traditions of Prophet Muhammad (pbuh),[163] and the practice of the various Muslim states.[164] Such protections as personal inviolability, immunity from the court's jurisdiction, freedom of religion, and exemption from taxation are all guaranteed under Islamic diplomatic law.[165] Both the classic and modern periods of Islamic history attest to the fact that the diplomatic envoy must not be imprisoned, maltreated, injured, or killed while he

is within Muslim territory.[166] If Prophet Muhammad (pbuh) could not sever the heads of the two diplomatic envoys of Musaylimah (the false prophet), despite the verbal confirmation of their belief in the prophethood of Musaylimah, which was considered a culpable offense according to Islamic law, then what justification would Al-Qaeda and the likes have in targeting diplomats and diplomatic facilities in their attacks? At least, it is obvious that out of all the Muslim states, none has been attacked by a non-Muslim state as in the time Usama bin Laden, Al-Qaeda, and other similar organizations declared their global jihad particularly against the United States and their allies. Even if the declaration of jihad by Al-Qaeda were legitimate, is it permissible or do they have the authority to injure or kill noncombatant civilians (women, elderly, children, religious priest, etc.), and non-Muslims who are protected in Muslim countries, such as those enjoying diplomatic protection or those with valid entry visas, who may be considered as having *aman*, or safe conduct? The justification put forward by Al-Qaeda that

> The American people should remember that they pay taxes to their government and that they voted for their president.... The American Congress endorses all government measures and this proves that the entire America is responsible for the atrocities perpetrated against Muslims.[167]

One wonders whether this justification can withstand the overwhelming authority in the main sources of Islamic law, the Qur'an, and the authentic Prophetic traditions, as quoted above. The fact that the Qur'an and the *Sunnah* do not endorse the killing of noncombatants and diplomatic envoys cannot be overemphasized.

The Reality of the Concepts of Dar al-Islaam *and* Dar al-Harb

The division of the world into two belligerent camps—*dar al-Islaam* and *dar al-harb*—was formulated by majority of Muslim jurists, consisting of Imam Abu Hanifah (d. 767 AD),[168] Imam Malik (d. 795 AD),[169] and Imam Hambal (d. 855 AD),[170] in the second century after death of Prophet Muhammad (pbuh), precisely in the era of the Abbasid and Umayyad dynasties.[171] This was made possible because at that time, the Muslims were united under a single caliphate.[172] The Islamic empire later became fragmented into different autonomous caliphates, and later independent states, which, of course, threatened the relevance and practicability of this dichotomy. The relations between *dar al-Islaam*, as the abode of peace, and *dar al-harb*, as the world of unbelievers, in the words

of Tibi, "were defined in terms of war, according to the authoritative commentaries of Islamic jurists."[173] This division has, thus, been erroneously used as the basis of a permanent state of war between Muslim states and non-Muslim states.

The *dar al-Islaam* and *dar al-harb* are concepts that distinguish territories that are strictly under the governance of Islamic law from those that are not so governed. Aside from Muslim citizens, there were also non-Muslim residents of *dar al-Islaam*. These were people who had acquired the status of *dhimmi* (those given protection) on the condition that their poll taxes, commonly referred to as *jizyah,* had to be paid.[174] Diplomatic immunity and inviolability were granted to non-Muslim foreign envoys during their visitation to the Muslim territories. *Aman* (safe conduct) was equally granted to non-Muslims from *dar al-harb* who were visiting *dar al-Islaam* for peaceful purposes (e.g., for commercial transactions). The rest of the world that had belligerent relations with *dar al-Islaam* are described as *dar al-harb*,[175] and most likely, with the exception of a territory referred to as *dar al-hiyad* (the abode of neutrality), was ascribed to the people of Abyssinia (now known as Ethiopia) by Prophet Muhammad (pbuh) on the condition that they did not attack the Muslims.[176] In a nutshell, *dar al-harb* can be described as a territory that does not tolerate the freedom to practice Islam and in which the lives and properties of Muslims are not safe.

There are controversies among modern Islamic scholars regarding the meaning of *dar al-Islaam* and *dar al-harb,* most especially "[t]he growth of Muslim communities in non-Muslim countries during the last decades of the twentieth century [which] has accentuated old dilemmas and created new ones."[177] There are those with the most radical views who contend that *dar al-Islaam* is any country that is governed purely by the *shari'ah*.[178] One may want to doubt the existence of such a country in today's dispensation. One further wonders if the monarchical system of Islamic governance as practiced in the Kingdom of Saudi Arabia qualifies for pure Islamic state. It will definitely be impossible, they further argue, for Muslims to remain in the territories of *dar al-Islaam* since all "Muslim countries are . . . ruled by corrupt apostate regimes."[179] Yet some Muslim scholars maintain the validity of the old concepts of *dar al-Islaam* and *dar al-harb* even when the prerequisites for their application are lacking.[180] This, in particular, forms the cornerstone of the rulings on jihad to them. There are some other scholars who maintain a moderate position by defining *dar al-Islaam* as any country where Muslims have the liberty to freely practice the tenets of Islam regardless of whether the country is a secular or non-Muslim state. Boisard contends that "a non-Muslim States which does not threaten the community

of believers, respect justice, and guarantee freedom of worship, should not be considered *dar al-harb*."[181]

It must be understood that the creation of this universal dichotomy between *dar al-Islaam* and *dar al-harb* was neither Qur'anic nor contained in any Prophetic traditions.[182] It was the creation of medieval Islamic scholars based on their respective *ijtihaad*. If one may ask, Can the *dar al-Islaam* automatically take the rest of the world as *dar al-harb* with which jihad becomes inevitable in the present world order? The likes of Al-Qaeda may want to answer this question in the affirmative. The answer, in my opinion, would be in the negative. First, as previously stated, the two concepts of *dar al-Islaam* and *dar al-harb* never originated from the Qur'an or from the *Sunnah*, which are the main sources of the Islamic jurisprudence. The Qur'an, thus, recognizes the existence of other states with the Muslim states. For instance, the Qur'an warns, "And do not be like she who untwisted her spun thread after it was strong [by] taking your oaths as [means of] deceit between you because one community [nation] is more plentiful [in number or wealth] than another community [nation]."[183] Second, this may also be impossible because of the absence of the relevant conditions that are necessary before a territory can be defined as either *dar al-Islaam* or *dar al-harb*.

Dar al-sulh (abode of treaty) or *dar al-ahd* (abode of truce), which is the third category, was devised by Imam Shafi'i (d. 820 AD)[184] in the second/eighth century.[185] He was the founder of the Shafi'i school of law. *Dar al-Sulh* was interposed as a compromise between *dar al-Islaam* and *dar al-harb* to allow for "peaceful coexistence based on 'armistice, diplomatic ties or peace agreements.'"[186] Non-Muslim states that are at peace with Muslim states on the basis of the existence of peace treaties between them are considered to be in *dar al-sulh*. An example can be drawn from the treaty that was concluded by Prophet Muhammad (pbuh) with the people of Najran, who were Christians, and likewise the people of Nawba and Armenia, whom the Muslims exempted from paying tax.[187]

The majority of Muslim jurists consisting of Hanafi, Maliki and Hanbali, however, did not accept the validity of *dar al-sulh*. They maintained that once a non-Muslim territory signs a peace treaty with Muslims and agrees to the payment of tribute, it henceforth becomes part of *dar al-Islaam*.[188]

With the establishment of the UN, when all countries of the world came together with the agreement "to live together in peace"[189] with each other, that brought an end to "this whole theoretical, historical, circumstantial division"[190] of the world, otherwise known as *dar al-Islaam* and *dar al-harb*. It therefore becomes doubtful whether there is any country where Muslims are not safe to profess their belief in Islam and establish

regular prayers. That in itself makes the whole world come under *dar al-Islam*, according to Abu Hanifah's opinion.[191]

The division of the world into *dar al-Islaam* and *dar al-harb* was, in fact, temporary and not permanent, as stated by Munir, that presently "Muslims are safe everywhere and can carry out their religious practices anywhere they want."[192] He says further that "Muslim states have signed almost every international convention, especially the UN Charter that gives equal status and sovereignty to every states."[193] Hence, jihad, according to Islamic law, cannot be based on the theoretical dichotomy of the world into *dar al-Islaam* and *dar al-harb*, which does not seem to exist anymore. Rather, jihad will continue to be used, whenever the need arises, as a means of protecting Muslims against oppression, and to defend the freedom of religion and the social order, and to prevent aggression and injustice.[194]

Moreover, it has also become clear that this theoretical division of the world into *dar al-Islaam* and *dar al-harb* cannot be a basis for a permanent tension or state of war between Muslim states and non-Muslim states since Allah has enjoined Muslims to remain "righteous towards them (the non-Muslims) and acting justly towards them (the non-Muslims)" once non-Muslims are not in war with them. It therefore means that, in the absence of war or a warlike situation, peaceful diplomatic relations can and should be established between Muslim states and the rest of the world.

How Is Terrorism Considered under Muslim State Practices?

Modern Muslim state practices have condemned acts of terrorism in all their manifestations and forms. In fact, there was a concordant criticism by individual Muslim states as reflected in one of the conferences of the OIC, which says that

> [s]uch shameful terrorist acts are opposed to tolerant divine message of Islam which spurns aggression, calls for peace, coexistence, tolerance and respect among people, highly prizes the dignity of human life and prohibits the killing of the innocent. It further rejected any attempts to allege the existence of any connection or relation between the Islamic faith and the terrorist acts, as such attempts are not in the interest of multilateral efforts to combat terrorism and further damage relations among people of the world. It stressed as well the need to undertake a joint effort to promote dialogue and create between Islamic world and the West in order to reach mutual understanding and build bridges of confidence between the two civilizations.[195]

Truly, terrorism has gone global, to the extent that it cannot be taken as a mere domestic problem. However, the national jurisdiction of domestic laws of various states is still sustained to a large extent.[196] The current spate of terrorism, particularly in Muslim countries, has continuously served as constant reminder of the efficacy of domestic counterterrorism legislation, which complements the various international conventions that were also created to combat terrorism. Virtually all Muslim states are parties to most of the international conventions on terrorism. Some of these international conventions are the 1973 Convention on the Prevention of Crimes against Internationally Protected Persons, including Diplomatic Agents; the 1979 International Convention against the Taking of Hostages; the 1997 International Convention for the Suppression of Terrorist Bombings; the 1999 International Convention for the Suppression of the Financing of Terrorism; and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.[197] Different articles in these conventions provide for the domestication of crimes of terrorism in individual states. For instance, Article 3(1) of the 1973 Convention on the Prevention of Crimes against Internationally Protected Persons, including Diplomatic Agents provides that

> [e]ach State Party shall take such measure as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:
> (a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
> (b) when the alleged offender is a national of that State; and
> (c) when the crime is committed against an internationally protected person as defined in article 1, who enjoys his status as such by virtue of functions that he exercises on behalf of that State.

Member states are thus conferred with the domestic jurisdiction to try offenses that fall under the meaning of terrorism. This, in other words, means that states that are parties to these conventions can have local laws with the enabling jurisdiction to convict any person found guilty of the offense of terrorism.

Modern scholars of Islamic jurisprudence are of the view that the traditional meaning of *hiraabah,* which forms one of the *huduud* offenses, should be extended to incorporate the act of terrorism.[198] This, to my mind, justifies the argument expressed by Crane, that terrorists should be held to account under the Islamic crime of *hiraabah* in the following words:

> They [the extremists] are exhibiting the most serious crime condemned in the Qur'an, which is the root of almost all the other crimes, namely,

> arrogance. They are committing the crime of *hirabah*, which is the attack on the very roots of civilization, and justifying it in the name of Islam. There can be no greater evil and no greater sin. If there is to be a clash of civilizations, a major cause will be the *muharibun,* those who commit inter-civilizational *hirabah*.[199]

Ibn Hazm (994–1064 AD), a Spanish Muslim jurist, meticulously defined a *hiraabah* offender as

> [o]ne who puts people in fear on the road, whether or not with a weapon, at night or day, in urban areas or in open spaces, in the palace of a caliph or a mosque, with or without accomplices, in the desert or in the village, in a large or small city, with one or more people…making people fear that they'll be killed…whether the attackers are one or many.[200]

Aside from the two countries, Saudi Arabia[201] and Iran,[202] that, most probably, embrace classical Islamic law in their legal systems, there are some Muslim states, such as Pakistan,[203] Sudan[204] and most of the northern states of Nigeria,[205] that have recently reintroduced Islamic criminal law into their respective legal systems.[206] According to classical Islamic criminal law, which forms part of the legal systems of these Muslim countries, *hiraabah,* that is, waging war against God and His Apostle and spreading corruption on the earth, being one of the *huduud* offenses, has been generally argued to include the offense of terrorism. The Kingdom of Saudi Arabia stresses in one of the counterterrorism reports it submitted to the UN Security Council that

> [t]he commission of terrorist acts and support for such acts are included among the crimes of *hirabah* in the Islamic Shariah as applied by the Kingdom. This is the category that includes the most serious crimes and those for which the severest penalties are prescribed in the *hirabah* verses of the Holy Koran [Koran 5:33]. In accordance with the statutes in force in the Kingdom, the courts have jurisdiction to decide all cases relating to terrorism and, in accordance with its Statute, the Commission for Investigation and Public Prosecution investigates such crimes and prosecutes them in the courts.[207]

The Islamic Republic of Iran also made a similar commitment to combating terrorism by saying that "based on the sublime teachings of Islam, which denounce and prohibit incitement to terrorist acts, Iran is determined to combat the culture of terrorism."[208]

The crime of and punishment for *hiraabah* is specifically mentioned in the Qur'an thus:

> Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment, except for those who return [repenting] before you apprehend them. And know that Allah is Forgiving and Merciful.[209]

After introducing the meaning of the offense of *hiraabah*, that is, "wag[ing] war against Allah and His Messenger and strive upon earth [to cause] corruption," the verses then prescribe four alternative punishments ranging from death, crucifixion, and amputation of the hand and foot, to exile, depending on the circumstances of each case. For instance, terrorizing the public without killing and taking any property is punishable with banishment, which also implies life imprisonment, according to Hanafi jurists;[210] one who terrorizes the public by taking away their properties will have his right hand and left foot amputated; one who terrorizes by killing without taking any property will be sentenced to death by beheading; and one who terrorizes the public by taking their property and killing them will, of course, be beheaded and crucified thereafter.[211]

Hiraabah is considered, in Islamic criminal law, to have the severest punishment. It is also extremely detrimental, in the words of the Maliki jurist, Al-Qurtubi, who says that

> because it prevents people from being able to earn living. For indeed, commerce is the greatest and most common means of earning a living, and people must be able to move in order to engage in commerce… But when the streets are terrorized (*ukhifa*), people stop travelling and are forced to stay at home. The doors to commerce are closed and people are unable to earn a living. Thus, God instituted the severest punishment for *hirabah* as a means of humiliating and discouraging the perpetrators thereof and in order to keep the doors of business open.[212]

According to the Saudi legal system, terrorism is considered a serious crime, which, of course, attracts strict penalties. It is, thus, stated that "[i]n as much as terrorist offences come under serious crimes included in the category of crimes against society (*hirabah*), the penalties imposed for them are severe, ranging up to execution. Saudi Arabia is known internationally for having the severest penalties for perpetrators of terrorist

offences. The reason for this is its adherence to the provisions of the Islamic Shariah, which criminalizes all forms of terrorism."[213]

Similarly, in Sudan, the severity of the punishment for committing any act of terrorism or participating in any terrorist activities is such that, upon conviction, the person might be executed or made to serve life imprisonment.[214] It is not a surprise that those who engage in acts of terrorism by waging illegitimate war against their own state's governments and terrorizing innocent people are usually considered as *Muhaaribun* in Islam.[215] Therefore, if one considers the strictness in the punishments set down for the act of terrorism by the Islamic criminal jurisprudence, which cannot be compared with conventional penalties,[216] it will, obviously, sound ridiculous to then equate Islam or Islamic jihad with terrorism.

Conclusion

The need to protect diplomats and diplomatic facilities from the onslaught of and deadly attacks by terrorists cannot be overemphasized. It has been established in this chapter that terrorist attacks that are unleashed on diplomatic establishments, particularly those perpetrated by Muslims within Muslim and non-Muslim states cannot be justified as being a lawful jihad under Islamic law. The reasons have been summarized as follows: 1) Jihad is generally the prerogative of the Muslim head of state. It is hardly declared by individual or a group of individuals. In an exceptional situation in which the lives and property of Muslims are endangered by external aggression and the Muslim head of state appears to be too weak or refuses to call for jihad in defense of Muslims, the responsibility of declaring jihad will then rest on individual Muslims or Muslim organizations. 2) It is a fundamental principle of Islamic jihad that diplomatic facilities and their personnel along with noncombatants should not be deliberately targeted for attack, while terrorist attacks are indiscriminately targeted against diplomatic envoys and noncombatants as well as diplomatic facilities. 3) Usually, jihad is resorted to as a defensive mechanism for fighting all forms of aggression and oppression against the Muslim community. But terrorist attacks are, in most cases, offensively launched mainly for ideological goals. 4) The act of terrorism, being one of the offenses of *hirābah* under Islamic penal law, is strictly punishable with death and or amputation, and as such, it is unanimously condemned by all the Muslim states. The foregoing points further confirm the incongruity between the Islamic jihad and terrorism. They are two parallel lines that remain permanently far apart and can never meet.

7

Conclusion

Forming a Bridge of Compatibility between Islamic Diplomatic Law and International Diplomatic Law

This book has advanced, through comparative analysis, the compatibility between international diplomatic law and Islamic diplomatic law, and thus, established that Islamic diplomatic law complements international diplomatic law due to their compatibility. The process of achieving greater compatibility between Islamic diplomatic law and international diplomatic law was arrived at by considering historical and analytical jurisprudential comparative approaches, that is, by (a) examining the universality of diplomatic practice among various ancient civilizations from a historical perspective, particularly the contribution made by Islamic civilization to modern diplomatic practice; (b) considering a theoretical comparative overview of the sources of the two legal systems; (c) evaluating different principles of diplomatic immunity and privileges and their theoretical justifications under Islamic diplomatic law and international diplomatic law; (d) critiquing some Muslim states' diplomatic practices on the basis of Islamic diplomatic law; and (e) discussing various types of terrorist attacks perpetrated by Muslims on diplomatic missions and their personnel in the name of the Islamic jihad and how they are treated under Islamic law. These can be summed up under the following headings: i) historical compatibility; ii) compatibility in legal sources; iii) compatibility in principles; and iv) compatibility in states' practices. Each of these headings will be discussed below with recommendations.

Historical Compatibility

This book has examined how diplomatic relations and diplomatic inviolability were practiced in various ancient civilizations, such as the Greek, Roman, Indian, Chinese, African, and Islamic civilizations. We must remember that the universalistic trend of diplomatic practice has been traced back to the times of the ancient world civilizations. The principle of diplomatic immunity, for instance, was long been deeply ingrained in the customary fabrics of these ancient communities. The fact that different governments are in the habit of observing the principle of extending immunity to diplomatic envoys for many centuries confirms the universality of diplomatic relations. Ogdon is, in fact, correct when he concludes that

> [t]hese practices of ancient peoples in different periods and under peculiar circumstances exhibit a fundamental relationship between the function of the embassy and the reason why diplomatic immunity was allowed to thrive.... The importance of the embassy seems in itself to have been reason enough for receiving an ambassador, for communicating with him, and for allowing him freedom to return with a message to his native camp.[1]

Hence, the phrase in the preamble of the 1961 VCDR, which states that "*Recalling* that peoples of all nations from ancient times have recognized the status of diplomatic agent" could not be more correct (italics added).

There may be some variation in the manner in which each of these ancient civilizations dispensed the principles of diplomatic immunity whenever they received diplomats from foreign territories, and the reception protocols that were to be observed by incoming diplomatic envoys. Looking at the history of diplomatic practice and diplomatic immunity in all the ancient civilizations, as discussed in chapter 2, it may be correct to suggest that throughout Islamic history, there was no reported incident of maltreatment or the killing of any diplomatic envoy, perhaps with the exception of some isolated cases that were recorded, for instance, during the Ottoman Empire.[2] Moreover, the Islamic civilization has greatly contributed in its dealings with other nations, particularly with the Western world, to the making of what is now known as international diplomatic law. This has been made possible by the friendly interaction that existed between the Islamic and the Western civilization resulting from their contemporaneous existence. All these facts confirm the historical compatibility between Islamic diplomatic law and international diplomatic law.

Compatibility in Legal Sources

A ground of commonality has also been found to exist between Islamic diplomatic law and international diplomatic law through an examination, with clear precision, of the different sources of the two legal regimes. It is quite important to stress that, notwithstanding the fact that the sources of the two legal systems have different origins, this should not be taken as grounds for incompatibility between the two legal regimes. Truly, the Qur'an and the *Sunnah*, being the main sources of Islamic diplomatic law, are mainly divine in nature, since they are formulated based on divine inspiration and command. However, there are other nondivine legal principles and methods of Islamic law that are manifested in the form of *ijmaa'* (consensus of opinion), *qiyaas* (analogical deduction), *istihsaan* (judicial preference), *maslahah* (public interest), and *'urf* (custom), constituting what is known as the legal mechanism of *ijtihaad*. International diplomatic law, in contrast, has international treaties, international customary law, general principles of law, judicial decisions, and scholarly writings as its sources, which are the creation of man. Inasmuch as the sources of the two legal systems have been found to overlap with each other in many respects, this therefore opens up the possibility of their compatibility. After all, the mere fact that there are differences in the origin of the sources of municipal law and international law do not, necessarily, make them incomparable. Moreover, it can thus be asserted that Islamic law gives full respect to all the legal sources of international diplomatic law, inasmuch as they are in conformity with the fundamental objectives of Islamic law. It has, also, been sufficiently shown that there is compatibility in the principles emanating from the sources of Islamic diplomatic law and international diplomatic law.

Compatibility in Principles

The general principles of diplomatic immunity as spelled out in the 1961 VCDR and 1963 VCCR were highlighted and compared with the principles of diplomatic immunity as obtained under Islamic law, as discussed in chapter 4. All three theoretical justifications for diplomatic inviolability (exterritoriality, representative character, and functional necessity) are considered in this book by evaluating their presence in the two legal systems. The result of this evaluation strongly impugns the incompatibility theory by suggesting a close relationship between the legal justifications

for and the principles of diplomatic inviolability in both Islamic and international diplomatic law. This goes to confirm the convergence in the legal purposes of the two legal systems.

The codified principles of diplomatic immunity specified in the 1961 VCDR and the 1963 VCCR, which represents the foundational principles in international diplomatic law, have also been found to be closely related to the Islamic principles of diplomatic immunity. Such principles include personal inviolability, immunity from the court's jurisdiction, freedom of religion, and exemption from taxation. Some other privileges, such as freedom of movement, protection of diplomatic bags and couriers, freedom of communication, the inviolability of a mission's archives, and the inviolability of a mission's premises and private residence, though not explicitly mentioned, are generally covered by the Islamic law principle that views that whatever is not specifically prohibited either in the Qur'an or in the *Sunnah* as permissible.[3] Once these principles of diplomatic immunity are capable of serving the general interests of the Muslim community, which automatically bring them within the general contemplation of *maslahah,* Muslim states will, ordinarily, be under an obligation to apply and observe them.

In addition, Islamic law imposes a legal obligation on any Muslim state that enters into an agreement or treaty with other states, be it a Muslim or a non-Muslim state, to discharge the terms of the agreement to the latter. And most importantly, the two legal systems crave peaceful interrelations and coexistence among different states of the world.

Compatibility in States' Practices

The failure of some Muslim states to strictly adhere to and observe the principles of diplomatic immunity as clearly stated in the 1961 VCDR and the 1963 VCCR, as well as their flagrant abuse of diplomatic privileges should not and cannot be blamed on the principles of Islamic law. This is so because one hardly finds any area of conflict between the principles of international diplomatic law and the principles of Islamic law. The fact that one or two Muslim states have chosen to act differently should not be taken as implying tension between the two legal regimes. We must not forget that the United States and the United Kingdom were both criticized for violating and invading the sovereignty of the state of Iraq by many international law commentators since it was predicated on fallacious grounds that Iraq was in possession of weapons of mass destruction (WMD).[4] Even in that case, it would be incorrect to, therefore, suggest that international law had failed or that it has some inadequacies simply

because the United States and United Kingdom failed to adhere to and observe the principles of international law by respecting the sovereignty of Iraq. In the same ways, it would also be erroneous to attribute the failure of the governments of the Islamic Republic of Iran[5] and Libya[6] to respect and observe the terms of the 1961 VCDR and the 1963 VCCR to certain inadequacies in the Islamic diplomatic law. It has, of course, been argued that had the Islamic Republic of Iran been tried under the Islamic judicial system, Iran would most certainly have been found liable for failing to discharge its diplomatic commitments to the staff and mission of the US embassy within its territory.

Diplomatic privileges and immunity are granted to agents of foreign missions mainly for the purpose of discharging their diplomatic transactions freely and effectively without any interruption from the authority of the receiving state. Conversely, the diplomatic and consular agents of foreign nations, equally, owe the receiving state the duty not to disrespect its laws and regulations, and not to use their embassies in any manner incompatible with the provisions of the 1961 VCDR.[7] Of course, the act of killing innocent citizens or innocent public officers, as in the case of shooting Constable Yvonne Fletcher, the British woman police officer, by an unidentified person from within the Libyan Peoples' Bureau cannot be justified or seen as part of diplomatic duties that are compatible with the 1961 VCDR. The decision of the British government to cut all diplomatic ties with the Libyan regime by declaring the Libyan diplomats as persona non grata was not only consistent with Article 9 of the VCDR but also compatible with the principles of Islamic diplomatic law.

Likewise, the settlement in the Davis case, which was based on the provisions of Section 345 of the Pakistan Code of Criminal Procedure and Section 310 of the Pakistan Penal Code, was a clear indication of how Islamic law, through the application of a portion of its Islamic criminal jurisprudence, can positively interact with international law. At least, the payment of $2.3 million by Davis as blood money—*diyah* to the relatives of the two victims, which was voluntarily accepted in settlement of the criminal charges against Davis, helped avert what could have degenerated into diplomatic upheaval between the Islamic Republic of Pakistan and the United States.

Similarly, Muslim states have been unanimous in their condemnation of terrorist attacks that are unleashed on diplomats and diplomatic facilities, particularly those perpetrated by Muslims within Muslim and non-Muslim states. This unanimous condemnation of terrorist attacks on diplomatic institutions has been made crystal clear to the international community by Muslim states, not just because they gave their consent to

the various relevant international treaties but also because such terrorist attacks are strongly condemned as a criminal act under Islamic law. Of course, it would be wrong to equate such attacks with the Islamic concept of jihad. It is a fundamental principle in the Islamic jihad that diplomatic facilities and their personnel, including noncombatants, should not be targeted for attacks.

Recommendations

The general findings in this book have clearly shown that there is a great deal of compatibility between Islamic law and international diplomatic law, which may further enhance "the development of friendly relations among nations, irrespective of their differing constitutional and social systems."[8] It can thus be recommended that this compatibility in the two legal systems may also help in contributing to a further development of international diplomatic law so as to make it more readily acceptable to the generality of the Muslim states. This, however, does not mean that the two legal regimes do not have their differences, which may be considered minimal as they do not affect the substance of the laws. In other words, what the international community needs at this present moment is a cross-cultural understanding of the various states, including Muslim and non-Muslim states, so as to have a better diplomatic legal system. It is also important to point out that the fact that diplomatic missions and personnel belonging to the Western states are often targeted for terrorist attacks, mostly in Muslim states by non-state actors, should not be taken as implying noncompatibility between the diplomatic principles in Islamic diplomatic law and international diplomatic law.

It noteworthy also to mention that if the universal purpose and principles entrenched in the UN Charter[9] are to be achieved for the benefit of humanity, it is imperative that a meaningful dialogue among diverse civilizations be encouraged with a view to consolidating and harmonizing not just the various areas of congruency but also the perceived areas of tension. Perhaps an appreciation of the need to engage the various civilizations of the world in a constructive dialogue impelled the UN General Assembly's Resolution 53/22 to proclaim the year 2001 as "the United Nations Year of Dialogue among Civilizations."[10] The resolution further stressed the need to recognize "the diverse civilizational achievements of mankind"[11] and further made a strong reaffirmation "that civilizational achievements constitute the collective heritage of mankind, providing a source of inspiration and progress for humanity at large."[12]

Table of Cases

Table of Treaties and Statutes

Treaties

Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, 1955

Vienna Convention on Consular Relations, 1963

Vienna Convention on Diplomatic Relations, 1961

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986

Vienna Convention on the Law of Treaties, 1969

Statutes

Charter of the United Nations, 1945

Diplomatic and Consular Privileges Act, 1972 (Pakistan)

Diplomatic Privileges Act of 1708 (United Kingdom)

Diplomatic Privileges Act, 1964 (United Kingdom)

Pakistan Code of Criminal Procedure, 1898

Pakistan Penal Code, Act XLV of 1860

Statute of International Court of Justice, 1945

Abbreviations

AJISS	American Journal of Islamic Social Sciences
AJSS	Asian Journal of Social Sciences
Am. J. Comp. L	American Journal of Comparative Law
Am. J. Int'l. L.	American Journal of International Law
Am. U. J. Int'l. L. & Pol'y	American University Journal of International Law and Policy
Anglo-Am. L. Rev.	Anglo-American Law Review
ASILP	American Society of International Law Proceedings
B. U. Int'l L. J.	Boston University International Law Journal
Brit. Y. B. Int'l L.	British Yearbook of International Law
Brook J. Int'l L	Brook Journal of International Law
Cal. L. Rev.	California Law Review
Cal. W. Int'l LJ	California Western International Law Journal
Cardozo L. Rev	Cardozo Law Review
Colum. L. Rev.	Columbia Law Review
Colum. J. Transnat'l. L	Columbia Journal of Transnational Law
Conn. L. Rev.	Connecticut Law Review
Denv. J. Int'l. L. and Pol'y	Denver Journal of International Law and Policy
HICJ	Harvard International Club Journal
HJIL	Houston Journal of International Law
I.L.C.	International Law Commission
I.C.J.	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ILR	International Law Report
ILS	Islamic Law and Society
Indian J Int'l L	Indian Journal International Law
Int'l & Comp L. Q	International and Comparative Law Quarterly
Islamabad LR	Islamabad Law Review
JCSL	Journal of Conflict and Security Law
JIL	Journal of Islamic Law
LIM	Legal Information Management
Man. L. J.	Manitoba Law Journal
O.I.C	Organisation of Islamic Cooperation
S.I.C.J	Statutes of International Court of Justice
TILJ	Texas International Law Journal
Tul. L. Rev	Tulane Law Review

UN	United Nations
Uni. St TLJ	University of St. Thomas Law Journal
Vand. J. Transnat'l L	Vanderbilt Journal of Transnational Law
VJIL	Virginia Journal of International Law
Wash. & Lee L. Rev	Washington and Lee Law Review
Y.B. Int'l L. Comm'n	Yearbook of International Law Commission

Notes

Preface

1. Charter of the United Nations, 1945, preambular paragraph 1.
2. Carl von Clausewitz, *On War*, trans. Colonel J.J. Graham (London: Kegan Paul, Trench, Trubner & Co., 1918), Vol. 1, p. 22.
3. C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Basingstoke: Macmillan, 1988, p. 166.
4. ICJ Reports 1980, p. 41.
5. Judgment of 24 May 1980, par. 86.

1 Introduction

1. See J. C. Barker, *The Protection of Diplomatic Personnel* (Ashgate Publishing Limited, Farnham, UK, 2006), p. 29, while referring to the work of Harold Nicolson that it is not beyond probability that the communities of the cave-dwelling anthropoid apes would have by diplomatic means resolved among one another a day's battle. Nicolson, *Diplomacy*, 2nd ed. (Oxford: Oxford University Press, 1969), p. 6.
2. L. S. Frey and M. L. Frey, *The History of Diplomatic Immunity* (Columbus: Ohio State University Press, 1999), p. 3.
3. Ibid., p. 4.
4. Ibid., p. 12.
5. See Article 3 of the 1961 VCDR. This Convention came into force on April 24, 1964, and was agreed to in Vienna, Austria. The choice of Vienna as the venue of the Convention was informed by the fact that it played host to the first international Conference on the status of diplomatic agents in 1815. See L. S. Frey and M. L. Frey, op. cit., p. 480; See United Nations, Treaty Series, vol. 500, p. 95, untreaty.un.org, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf [accessed October 12, 2008]. See also Article 5 of the 1963 VCCR. This Convention was also agreed to in Vienna and came into force on March 19, 1967; see United Nations, Treaty Series, vol. 596, p. 261, untreaty.un.org, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf [accessed October 12, 2008].
6. J. C. Barker, op. cit. (2006), p. 16.
7. *US Diplomatic and Consular Staff in Tehran* (1980) ICJ Rep. 3 at 42 para 91.

8. This abbreviation (pbuh), which means "Peace be upon him," is the translation of the Arabic eulogy used after the name of Prophet Muhammad.
9. It is also known as *Sulh al-Hudaybiyyah*. It is the treaty that was signed between the state of Madina as represented by Prophet Muhammad on the one hand and the Quraysh tribe of Makkah as represented by Suhayl bin 'Amr on the other hand. The treaty was signed in March, 628 CE, at a place called al-Hudaybiyyah, which was on the edge of the sacred territory of Makkah. See W. M. Watt, *Muhammad at Medina* (Karachi, Pakistan: Oxford University Press, 1981), pp. 46–52; see also Sh. Safiur-Rahman Al-Mubarakfuri, "Al-Hudaibiyah Treaty," islaam.com, http://www.islaam.com/Article.aspx?id=461 (accessed December 3, 2008). The treaty of *Hudaybiyyah* is usually considered as a *locus classicus* when discussing diplomacy in Islamic law because, in the words of Bassiouni, "its negotiating history demonstrate the sanctity of emissaries, that a violation of an amassador's immunity is a *casus belli,* and that no ambassador may be detained or harmed. See M. C. Bassiouni, "Protection of Diplomats Under Islamic Law," *American Journal of International Law*, 74(3) (1980), p. 611.
10. Partial Translation of Sunan Abu-Dawud, Book 14, Jihad (Kitab al-Jihad), Hadith Number 2752, www.muslimaccess.com, http://www.muslimaccess.com/sunnah/hadeeth/abudawud/014.html [accessed September 12, 2011]. See also M. Hamidullah, *Muslim Conduct of State* (Lahore, Pakistan: Sh. Muhammad Ashraf Publishers, 1961), p. 148.
11. G. Jackson, *Concorde Diplomacy: The Ambassador's Role in the World Today* (London: Hamish Hamilton, 1981), pp. 92–93.
12. J. C. Barker, op. cit. (2006), p. 15.
13. On September 22, 2008, Abdul Khaliq Farahi, the Afghanistan ambassador designate to Pakistan, was kidnapped by gunmen, who also killed his driver. See http://www.thenews.com.pk/daily_details.asp?id=137541 [accessed on March 29, 2009]. Less than two months later, on November 13, 2008, another diplomat, Heshmotollah Attarzadeh Niyaki (Commercial Attaché to the Iranian Peshawar Consulate, Pakistan), was again abducted by gunmen after killing the policeman assigned to guard him. See also http://www.alertnet.org/thenews/newsdesk/SP376391 [accessed on March 29, 2009].
14. The dual terrorist bomb attacks on the US embassies both in Kenya and Tanzania on August 7, 1998, in which over 220 lives were lost and about 4,000 others wounded, is recorded as the most devastating attack to be unleashed on diplomatic missions. See J. C. Barker, op. cit., p. xi. On June 4, 2006, a Russian diplomat (Vitaly Vitalyevich Titov) was shot dead in Baghdad, while other four diplomatic employees were abducted. See http://www.foxnews.com/story/0,2933,198054,00.html [accessed on 29/03/2009]. In August 2008, there was an attempt on the life of the head of the US consulate, Lynne Tracy, in northwestern Pakistan, http://www.foxnews.com/wires/2008Aug26/0,4670,Pakistan,00.html [accessed on March 29, 2009].
15. The 1979 seizure and detention of the US diplomatic staff in Tehran.
16. This Convention was signed on February 2, 1971, and came into force in 1973. See http://treaties.un.org/doc/db/Terrorism/Conv16-english.pdf.
17. The Convention was signed on December 14, 1973, and came into force in 1977. See http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf.

18. United Nations Security Council letter dated August 17, 2011, from the Chair of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counterterrorism, addressed to the Secretary-General (UN Doc. S/2011/463), para. 12.
19. L. S. Frey and M. L. Frey, op. cit. (1999), p. 508.
20. Ibid., pp. 507–508.
21. K. Dalacoura, "Violence, September 11 and the Interpretations of Islam," *International Relations*, 16 (2002), p. 269.
22. The meaning of Islamic international law is given in chapter 1 of this book.
23. J. L. Esposito, *Unholy War: Terror in the Name of Islam* (New York: Oxford University Press, 2002), p. 120.
24. Ibid., p. 151. If one carefully follows the records of terrorist attacks in recent times, one may be favorably inclined toward Esposito's submission that "[i]n recent years, radical groups have combined nationalism, ethnicity, or tribalism with religion and used violence and terrorism to achieve their goals: Serbs in Bosnia, Hindu Nationalist in India, Tamil and Sinhalese in Sri Lanka, Jewish fundamentalist in Israel, Christian extremists in the United States. However, the most widespread examples of religious terrorism have occurred in the Muslim world." See also D. A. Shawartz, "International Terrorism and Islamic Law," *Colum. J. Transnat'l L.*, 29 (1991), p. 630. "International terrorism is a global challenge. Most significantly, a substantial number of terrorist acts are perpetrated by or upon Muslims, or within Islamic lands." It must, however, be pointed out that this does not and cannot justify the imputation of terrorism to Islam.
25. E. Young, "The Development of the Law of Diplomatic Relations," *Brit. Y. B. Int'l L.*, 40 (1964), 147. In acknowledging numerous treatises that had been produced on diplomatic relations, this article refers to such names as Pierre Ayrault, Gentili, Jean Hotman, and Grotius, alongside their remarkable works that were produced between the sixteenth and early seventeenth centuries. However, Shaybani's treatise on the Islamic law of nations, which includes diplomatic relations, was produced about 800 years before the works of these writers. See M. A. Boisard, "On the Probable Influence of Islam on Western Public and International Law," *Int. J. Middle East Stud.*, 11(4) (1980), pp. 447–448.
26. H. Grotius, *De Jure Belli ac Pacis-The Law of War and Peace* (Oxford: Clarendon Press, 1925), Vol. 2, Book II.
27. Ibid., Section 4.
28. G. Mattingly, *Renaissance Diplomacy* (London: Jonathan Cape, 1955), p. 45.
29. His full name is Abu 'Abdullah Muhammad ibn al-Hasan ibn Farqad al-Shaybani. He was one of the disciples of Imam Abu Hanifah, who is generally acknowledged as the father of Islamic international law.
30. M. A. Ghazi (tr.), *Kitab al-Siyar al-Shaybani—The Shorter Book on Muslim International Law* (New Delhi: Adam Publishers and Distributors, 2004).
31. Ibid., p. 63.
32. M. A. Boisard, op. cit. (1980), p. 430, esp. p. 446.
33. S. Mahmassani, 'The Principles of International Law in The Light of Islamic Doctrine', in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I* (The Hague: Martinus Nijhoff Publishers, 1968), pp. 264–265.
34. Ibid., 265; See M. A. Boisard, op. cit. (1980), p. 442.

35. See T. Hampton, "The Diplomatic Moment: Representing Negotiation in Early Modern Europe," *MLQ*, 67(1) (2006), pp. 82–83.
36. See C. A. Ford, "Siyar-ization and Its Discontents: International Law and Islam's Constitutional Crisis," *TILJ*, 30 (1995), p. 500. See also M. Berger, "Islamic Views on International Law," in P. Meerts (ed.), *Culture and International Law* (The Hague: Hague Academic Coalition, 2008), p. 107; D. A. Westbrook, "Islamic International Law and Public International Law: Separate Expressions of World Order," *VJIL*, 33 (1992–1993), p. 883, and A. I. Bouzenita, "The *Siyar*—An Islamic Law of Nations?" *AJSS*, 35 (2007), p. 44.
37. This literally means the abode or house of Islam, and technically it refers to a domain in which power lies with the Muslims, the rules of Islam are implemented, and Islamic rituals are performed without any inhibition. See Sheikh Wahbeh al-Zuhili, "Islam and International Law," *International Review of the Red Cross*, 87 (858) (2005), p. 278.
38. This literally means the abode or house of war. But technically it refers to the relationship between an Islamic state and neighboring non-Muslim states with which it has not signed a peace treaty or pact. See *The Encyclopaedia of Islam*, new ed. (Leiden: Brill), Vol. 2, p. 126.
39. See N. A. Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan* (Aningdon: Routledge, 2011), p. 16.
40. M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006), Report of the Study Group of the International Law Commission, Geneva, para. 37, p. 25.
41. This Convention was done at Vienna on May 23, 1969, and was entered into force on January 27, 1980. See the United Nations, Treaty Series, vol. 1155, p. 331, also available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [accessed January 20, 2009].
42. V. P. Tzevelekos, "The Use Article 31 (3) (a) of the VCLT In the Case Law of the ECtHR An Effective Anti-Fragmentation Tool or Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration," *Michigan Journal of International Law*, 31 (2010), p. 631.
43. See Article 19 of the 1969 VCLT. The convention was entered into force on 27 January 1980, and it is contained in the United Nations, Treaty Series, vol. 1155, p. 331 See http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [accessed on August 23, 2011].
44. See Guideline 1 (Definition of Reservations), Guide to Practice on Reservations to Treaties, 2011, p. 2, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 75).
45. Ibid., Guideline 1.2 (Definition of Interpretative Declarations), p. 3.
46. O. Dorr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Berlin/Heidelberg: Springer-Verlag, 2012), p. 240.
47. Ibid., Guideline 1.3 (Distinction between Reservations and Interpretative Declarations).
48. Ibid., Guidleine 1.3.1 (Method of Determining the Distinction between Reservations and Interpretative Declarations).
49. See J. C. Barker, op. cit. (2006), p. 26; Nicolson, op. cit. (1969), p. 6.
50. Ibn Hisham, *As-Seeratu-n-Nabawiyyah* (Darul Gadd al-Jadeed, Al-Monsurah), p. 192.

51. See R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: OUP, 1994), pp. 86–87; M. J. L. Hardy, *Modern Diplomatic Law* (Manchester: Manchester University Press, 1968), p. 5.
52. See A. I. Bouzenita, "The Siyar—An Islamic Law of Nations?", *Asian Journal Social Sciences*, 35 (2007), p. 174; S. Mahmassani, op. cit., p. 235; S. Khatab and G. D. Bouma, *Democracy in Islam* (London: Routledge, 2007), p. 174.
53. It should be known that there is a difference between "Islamic States" and "Muslim States." An Islamic state is believed to be a country that adheres and applies fully the principles of Islamic law, while the Muslim state, on the other hand, refers to a country that has a majority Muslim population. Therefore, in this study, Muslim states will mean States that are predominantly a Muslim majority, which also includes states that specifically declare themselves as "Islamic Republics" and those states that declare Islam, in their constitutions, as the states' religion. See M. A. Baderin, *International Human Rights and Islamic Law* (Oxford: OUP, 2003), p. 8; M. Berger, op. cit. (2008), pp. 109–110; and H. Moinuddin, *The Charter of the Islamic Conference and the Legal Framework of Economic Co-operation amongst Its Member States: A Study of the Charter, the General Agreement for Economic, Technical, and Commercial Co-operation and the Agreement for Promotion, Protection, and Guarantee of Investments Among Member States of the OIC* (Oxford: Clarendon Press, 1987), p. 11. It must be noted, however, that the meaning of "Muslim states" does not necessarily cover all the 57 states that are members of the Organisation of Islamic Cooperation (OIC), because there are some member states such as Togo, Uganda, Republic of Benin, Gabon, Mozambique, and Suriname that cannot be said to have a majority Muslim population. Members of the OIC are Azerbaijan, Jordan, Afghanistan, Albania, the United Arab Emirates, Indonesia, Uzbekistan, Uganda, Iran, Pakistan, Bahrain, Brunei-Darussalam, Bangladesh, Benin, Burkina-Faso, Tajikistan, Turkey, Turkmenistan, Chad, Togo, Tunisia, Algeria, Djibouti, Saudi Arabia, Senegal, Sudan, Syria, Suriname, Sierra-Leone, Somalia, Iraq, Oman, Gabon, Gambia, Guyana, Guinea, Guinea-Bissau, Palestine, Comoros, Kyrgyz, Qatar, Kazakhstan, Cameroon, Côte D'Ivoire, Kuwait, Lebanon, Libya, Maldives, Mali, Malaysia, Egypt, Morocco, Mauritania, Mozambique, Niger, Nigeria and Yemen. See the official website of the OIC: http://www.oic-oci.org/member_states.asp [accessed on December 23, 2008].
54. A. E. Mayer, "War and Peace in the Islamic Tradition and International Law," in J. Kelsay and J. T. Johnson, *Just War and Jihad: Historical and Theoretical Perspective on War and Peace in Western and Islamic Traditions* (New York: Green Press, 1991), p. 199.
55. Ibid.
56. Ibid.
57. M. Berger, op. cit. (2008), p. 107.
58. D. A. Westbrook, op. cit. (1992–1993), p. 883.
59. Ibid.
60. Christopher A. Ford, "Siyar-ization and Its Discontents: International Law and Islam's Constitutional Crisis," *Texas International Law Journal*, 30 (1995), p. 500.
61. Ibid.

62. S. Mahmassani, op. cit. (1968); J. Rehman, *Islamic States Practices, International Law and The Threat From Terrorism: A Critique of the "Clash of Civilizations" in the New World Order* (Oxford: Hart Publishing, 2005); and H. M. Zawati, *Is Jihad a Just War? War, Peace and Human Rights under Islamic and Public International Law* (Lewiston: Edwin Mellen Press, 2001).
63. S. Mahmassani, op. cit. (1968), p. 205.
64. H. M. Zawati, op. cit. (2001), p. 6.
65. See N. A. Shah, *Women, The and International Human Rights Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), pp. 8–13.
66. I. Shihata, "Islamic Law and the World Community," *Harvard Int'l C J*, 4 (1962), p. 107.
67. M. Khadduri, "Islam and Modern Law of Nations," *AJIL*, 50 (1956), pp. 370–371.
68. M. A. Baderin, "The Evolution of Islamic Law of Nations and Modern International Order: Universal Peace through Mutuality and Cooperation," *American Journal Islamic Social Sciences*, 17(2) (2000), p. 59.
69. N. A. Shah, op. cit. (2006), pp. 8–13.
70. G. M. Badr, "A Survey of Islamic International Law," *American Society International Law Proceedings*, 76 (1982), p. 58.
71. C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Basingstoke: Macmillan, 1988), p. 166.
72. M. Khadduri, op. cit. (1956), pp. 370–371.
73. I. Shihata, op. cit. (1962), p. 107.
74. (1980) ICJ Rep. 3.
75. C. G. Weeramantry, op. cit. (1988), p. 166.
76. Ibid.
77. G. M. Badr, op. cit. (1982), p. 58.
78. Ibid., p. 59.
79. M. A. Baderin, op. cit. (2000), p. 59.
80. See A. Cassese, *International Law,* 2nd ed. (Oxford: OUP, 2005), p. 213.
81. N. A. Shah, *Self-Defense in Islamic and International Law: Assessing Al-Qaeda and the Invasion of Iraq* (New York: Palgrave Macmillan, 2008), p. 6.
82. Ibid.
83. Ibid.
84. J. Salmond (Glanville L. Williams, ed.) *Jurisprudence*, 10th ed. (London: Sweet & Maxwell, Ltd., 1947), pp. 7–8, cited in B. A. Garner (ed.), *Black's Law Dictionary* (Eagan: Thomson West, 2004), p. 300.
85. Ibid.
86. International Commission of Jurists, *Human Rights in Islam*: Report of a Seminar held in Kuwait in December, 1980 (Geneva: ICJ, 1982), p. 7.
87. Also referred to as *"As-Siyar"* when used as a definite noun.
88. J. L. Esposito (ed.), *The Oxford Dictionary of Islam* (Oxford: OUP, 2003), p. 297.
89. Ibid.; S. Mahmassani, op. cit. (1968), p. 235; M. Khadduri (tr.), op. cit. (1966), p. 40.
90. M. Khadduri (tr.), op. cit. (1966), p. 40, quoting Shams al-Din Muhammad Ibn Ahmad Ibn Sahl al Sarakhsi, *Kitab al-Mabsut* (Cairo: Matba'at al-Sa'adah, 1906), p. 2.

2 Historical Overview of the Universality of Diplomatic Practice

1. D. Quataert, *The Ottoman Empire 1700–1922*, 2nd ed. (Cambridge: Cambridge University Press, 2005), pp. 85–86.
2. Ibid., p. 86.
3. R. Jennings and R. Watts (eds.), *Oppenheim's International Law*, 9th ed. (New York: Addison Wesley Longman Inc., 1996), p. 1054.
4. C. Jonsson and M. Hall, *Essence of Diplomacy* (Hampshire: Palgrave Macmillan, 2005), p. 3.
5. P. Sharp, "For Diplomacy: Representation and the Study of International Relations," *International Studies Review*, 1 (1999), p. 51.
6. W. Bolewski, *Diplomacy and International Law in Globalized Relation* (Berlin/Heidelberg: Springer, 2007), p. 2.
7. Ibid.
8. E. Satow, *A Guide to Diplomatic Practice* (London: Longman, Green and Co., 1932), p. 1.
9. See *Oxford English Dictionary*, Vol. 3 (Oxford: Clarendon Press, 1933), pp. 385–386.
10. D. Drinkwater, *Sir Harold Nicolson and International Relations: The Practitioner as Theorist* (Oxford: Oxford University Press, 2005), p. 89.
11. Ibid., p. 90.
12. H. Nicolson, *The Congress of Vienna: A Study in Allied Unity, 1812–1822* (London: Constable, 1946), pp. 164–165.
13. H. Kissinger, "The Congress of Vienna: A Reappraisal," *World Politics*, 8 (1956), p. 264.
14. J. W. Burton, *Systems, States, Diplomacy and Rules* (Cambridge: The University Press, 1968), p. 199.
15. This statement is quoted from W. Bolewiski, op. cit. (2007), p. 2.
16. See P. C. Habib, "The Practice of Modern Diplomacy," (1979) 9 *California Western International Law Journal*, 9 (1979), p. 485.
17. This assertion is attributed to the eighteenth century French writer, Le Trosne. See A. S. Eban, *The New Diplomacy: International Affairs in the Modern Age* (London: Weidenfeld & Nicolson, 1983), pp. 384–385.
18. This is the observation of Sir Henry Wotton (1568–1639), which is contained in the album of Christopher Flickmore, and is quoted from L. C. Green, "Trends in the Law Concerning Diplomats," *Canadian Yearbook of International Law*, 19 (1981), p. 132.
19. M. Griffiths and T. O'Callaghan, *International Relations: The Key Concepts* (London: Routledge, 2002), p. 79.
20. R. Langhorne, "Current Development in Diplomacy: Who Are the Diplomats Now?", *Diplomacy and Statecraft*, 8 (1997), p. 23.
21. W. Bolewski, op. cit. (2007), p. 2.
22. That is the home state of the head of a diplomatic mission.
23. That is the state that receives the diplomatic mission and personnel.
24. See R. Higgins, "The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience," *AJIL*, 79(3) (1985), p. 641.

25. L. Dembinski, *Modern Law of Diplomacy: External Missions of States and International Organizations* (New York: Springer-Verlag, 1988), p. 1.
26. Ibid., p. 4.
27. Some of these publications include D. J. Hill, *A History of Diplomacy in the International Development of Europe*, Vol. 1 (London: Longmans, Green & Co., 1905); H. Nicolson, *The Evolution of Diplomatic Method* (London: Constable & Co. Ltd., 1954); G. Mattingly, op. cit. (1955); and Frey and Frey, op. cit. (1999).
28. *US Diplomatic and Consular Staff in Tehran* (1980) ICJ Rep. 3, p. 19.
29. See L. S. Frey and M. L. Frey, op. cit. (1999), p. 16. While commenting on the importance of religious belief in the imposition of sanction against acts of discretion of the inviolability of diplomatic envoys, they maintain that "[h]arming a herald violated divine law, for all power and all authority emanated from the gods. Sanctions would inevitably follow." See also L. Oppenheim, *International Law: A Treatise*, 3rd ed. (Clarke, NJ: The Lawbook Exchange Limited, 2005), p. 769; B. Sen, *A Diplomat's Handbook of International Law and Practice* (London: Martins Nijhoff Publishers, 1988) ; E. Young, "The Development of the Law of Diplomatic Relations," *Brit. Y. B. Int'l L.*, 40 (1964), p. 142; and J. C. Barker, op. cit. (2006), p. 29.
30. See Gentilis, *De Legationibus Libris Tres,* Vol. 2, p. 58.
31. J. C. Barker op. cit. (2006), p. 33.
32. J. C. Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Aldershot: Dartmouth, 1996), p. 34.
33. See J. C. Barker, op. cit. (2006), p. 29; M. Ogdon, *Juridical Bases of Diplomatic Immunity* (Washington, DC: John Byrne & Co., 1936), pp. 10–14; and S. V. Viswanatha, *International Law in Ancient India* (Bombay: Green & Co.; Longmans, 1925).
34. R. Numelin, *The Beginnings of Diplomacy: A Sociological Study of Intertribal and International Relations* (London: Oxford University Press, 1950), p. 131. The outcome of the anthropological studies of the primitive societies carried out by Dr. Ragnar Numelin revealed that emissaries were known to enjoy a high degree of generosity and hospitality from their host, which even went so far as including "sexual privileges." See also G. McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (New York: St. Martin's Press, 1989), p. 19.
35. K. Hamilton and R. Langhorne, *The Practice of Diplomacy: Its Evolution, Theory and Administration* (London/New York: Routledge, 1995).
36. According to the Greek mythology, Zeus is the principal god of the Greek pantheon, ruler of the heavens and Mount Olympus, and the father of other gods and mortal heroes. See W. Burkert, *Greek Religion* (Cambridge, MA: Harvard University Press, 1985), p. 125.
37. See G. McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (New York: St. Martin's Press, 1989), p. 21.
38. Raymond Cohen makes this submission while drawing a line of distinction between the diplomatic system of the Amarna Period, which he considered to be more sophisticated, and that of the ancient Greeks, which according to him was "both rudimentary and parochial," resulting from its ineffective method of public oratory, lack of organization, and resident embassies, followed by dearth of documentary records. See R. Cohen, "Reflections on the New Global

Diplomacy: Statecraft 2500 BC to 2000 AD," in J. Melissen, *Innovation in Diplomatic Practice* (New York: Palgrave Macmillan, 1999), p. 10.

39. See E. Young, op. cit. (1964), p. 142.
40. See D. J. Mosley, *Envoys and Diplomacy in Ancient Greece* (Wiesbaden: Franz Steiner Verlag GMBH, 1973), p. 81. Also see K. Hamilton and R. Langhorne, op. cit. (1995), p. 9, where it is further observed that the Greeks' diplomacy identified three kinds of representatives namely: *angelos* or *presbys*, otherwise known as messengers and elders in charge of brief and specific missions; *keryx*, otherwise known as heralds, who were conferred with special rights of personal safety; and *proxenos*, which can be said to be analogous to a consul.
41. D. J. Mosley, op. cit. (1973), p. 83.
42. Ibid.
43. H. Nicolson, op. cit. (1954), p. 10.
44. Ibid.
45. G. McClanahan, op. cit. (1989), p. 22.
46. The College of Fetials, made up of priests, was established by Numa Pompilius (753–673 BC), the King of Rome and, according to Frank, was "a semi religious, semi political board which from time immemorial supervised the rites peculiar to the swearing of treaties and declaration of war, and which formed, as it were, a court of first instance in questions of international disputes as the proper treatment of envoys and the execution of extradition." In addition, the fetials also carried out ambassadorial functions. See T. Frank, "The Import of the Fetial Institution," *Classical Philology*, 7 (1912), p. 335.
47. J. C. Barker, op. cit. (2006), p. 30.
48. D. J. Hill, op. cit. (1905), p. 8.
49. T. Frank, op. cit. (1912), pp. 335 and 342. Hamilton and Langhorne have also observed that the College of Fetials was the only permanent body involved with some international relations responsibilities in ancient Rome. See K. Hamilton and R. Langhorne, op. cit. (1995), p. 14. It must, however, be mentioned that Nicolson finds it difficult to attribute much importance to the fetials institution. To him, the College performed no function different from the Treaty Department in the United Kingdom, which can best be called an archive for treaty documents. See H. Nicolson, op. cit. (1954), p. 18.
50. H. Nicolson, op. cit. (1954), p. 17.
51. Ibid., p. 18.
52. Ibid.
53. This simply means "hospitality." As practiced in both Greece and Rome, it was of a twofold nature. It would be *hospitium privatum* when established between individuals, and *hospitium publicum* when established between two states. These two types of hospitality (private and public) have, however, been found to be prominently common among all the nations of Italy, having existed at a very early period among them. See W. Smith, *Dictionary of Greek and Roman Antiquities*, 3rd ed. (1890), pp. 619–621.
54. J. W. Rich, "Declaring War in the Roman Empire in the Period of Transmarine Expansion," *Collection Latomus*, 149 (1976), p. 109.
55. Ibid.
56. D. J. Bederman, *International Law in Antiquity* (Cambridge: Cambridge University Press, 2004), p. 115. He has made reference to the extraditions of Postumius Albinus to the Samnites in 321 BCE; Fabius Apronius to the

Apolloniates circa 266 BCE; and Lucius Municius Myrtilus and Lucius Manlius to the Carthaginians in 188 BCE for offending against the embassies of these foreign entities.

57. C. Philipson, *The International Law and Custom of Ancient Greece and Rome*, Vol. 1 (London: Macmillan & Co., 1911), pp. 341–342.
58. D. J. Bederman, op. cit. (2004), p. 118.
59. H. Nicolson, op. cit. (1954), pp. 18 and 19.
60. This is a place in the Roman forum in which the ambassadors of foreign states were privileged to stand for the purpose of attending and listening to debates. See W. Smith, op. cit., p. 577.
61. See D. J. Bederman, op. cit. (2004), p. 105.
62. Ibid.
63. H. Nicolson, op. cit. (1954), p. 19.
64. R. Cohen, op. cit., in J. Melissen, *Innovation in Diplomatic Practice* (New York: Palgrave Macmillan, 1999), p. 11.
65. Ibid.
66. H. Nicolson, op. cit. (1954), pp. 22–23.
67. A. S. Altekar, *State and Government in Ancient India* (Delhi: Motilal Banasidass, 2002), pp. 300–301.
68. This is one of the two prominent epic poems of India. It was composed about 300 BC by Valmiki in Sanskrit, and it remains an important part of the Hindu canon. See W. Buck and B. A. van Nooten, *Ramayana* (Los Angeles: University of California Press, 2000), p. xiii.
69. A. S. Altekar, op. cit. (2002), p. 301.
70. This is the greater of the two famous epic poems of India. It symbolizes the Indian cultural heritage. Considered in its Sanskrit original text, it is arguably the longest epic ever composed. See W. Buck and B. A. van Nooten, *Mahabharata* (Los Angeles: University of California Press, 2000), p. xiii.
71. A. S. Altekar, op. cit. (2002), p. 301.
72. L. Rocher, "The Ambassador in Ancient India," *Indian Yearbook of International Affairs*, 7 (1958), pp. 344.
73. H. L. Chatterjee, *International Law and Inter-States Relations in India* (Calcutta: K.L. Mukhopadhya, 1958), p. 66.
74. G. V. G. Kirshnamurty, *Modern Diplomacy: Dialectics and Dimensions* (New Delhi: Sasar Publications, 1980), p. 49.
75. See ibid., p. 48; B. Sen, op. cit. (1988), p. 4; G. McClanahan, op. cit. (1989), p. 23; K. A. Nilakantha Sastri, "International Law and Relations in Ancient India," 1 (1952), *India Yearbook of International Affairs*, pp. 97–109.
76. See B. Sen, op. cit. (1988), p. 4.
77. A. S. Altekar, op. cit. (2002), p. 300.
78. D. J. Bederman, op. cit. (2004), p. 4.
79. R. Cohen, op. cit., in J. Melissen, *Innovation in Diplomatic Practice* (New York: Palgrave Macmillan, 1999), p. 10.
80. See G. McClanahan, op. cit. (1989), p. 24. Some of these envoys would go so far as secretly engaging the services of prostitutes, dancing girls, umbrella bearers, and astrologers, thereby having access to the king within the court with a view to extracting useful information. See also G. K. Mookerjee, *Diplomacy: Theory and History*, Vol. 1 (New Delhi: Trimurti Publications, 1973), p. 8.

81. See Cohen, R., op. cit., in J. Melissen, *Innovation in Diplomatic Practice* (New York: Palgrave Macmillan, 1999), p. 11.
82. G. McClanahan, op. cit. (1989), p. 24.
83. See A. B. Bozeman, *Politics and Culture in International History* (Princeton: Princeton University Press, 1960), p. 133.
84. See R. Cohen, op. cit., in J. Melissen, *Innovation in Diplomatic Practice* (New York: Palgrave Macmillan, 1999), p. 11.
85. G. McClanahan, op. cit. (1989), p. 24.
86. This is a quotation from F. S. Northedge, *The International Political System* (London: Faber and Faber, 1976), p. 40.
87. See E. D. Thomas, *Chinese Political Thought* (New York: Prentice-Hall, 1927), p. 289.
88. See M. Rossabi, *China among Equals: The Middle Kingdom and Its Neighbours, 10th–14th Centuries* (Los Angeles: University of California Press, 1983), p. 2.
89. These tributary states (Korea, Burma, Annam, and Siam) having adopted the Chinese institutions, also greatly benefitted from the Chinese culture and protection. In return for these benefit, they were obliged to send on regular occasions tributary missions to register their appreciations and gratitude to the Chinese Emperor. See A. F. Wright, *The Study of Chinese Civilization,* Vol. 21, No. 2 (Philadelphia: University of Pennsylvania Press, 1960), p. 236.
90. This has generally been defined as a former Chinese custom of knocking the forehead on the ground as a symbol of respect or submission. Attesting to its significance in Chinese diplomatic relations, it was reported that the Japanese military general Toyotomi Hideyoshi knelt five times on the ground and knocked his head three times on the ground at the Chinese court direction to evince his allegiance to the Chinese Ming Dynasty for vassal homage. See http://encyclopedia.thefreedictionary.com/Kotow [Accessed: August 21, 2009]. The traditional importance of this ritual can be distilled from the succinct content of the Court Letter of August 14, 1793, instructing Cheng-jui of what etiquette was expected of Macartney and his envoys in the presence of the Emperor thus: "ought casually in the course of conversation to inform him tactfully that as regards the various vassal states, when they come to the celestial Empire to bring tribute and have an audience, not only do all their envoys perform the ceremony of the three kneeling and the nine knockings of the head, but even the princes who come in person to Court also perform this ceremony." For full text, see J. L. Cranmer-Byng, "An Embassy to China Being the Journal Kept by Lord Macartney during his Embassy to the Emperor Chi'en-lung 1793–1794" (2000) Folio Society, UK, p. 145. It has also been observed based on Macartney's speculation that, perhaps, his refusal to perform the Kotow rituals might have contributed to the reasons behind the refusal of the Chinese Emperor to grant any of his requests. See P. J. N. Tuck, *An Embassy to China: Lord Macartney's Journal, 1793–1794* (London: Routledge, 2000), p. 32.
91. M. Rossabi, op. cit. (1983), p. 2.
92. Ibid.
93. Ibid., p. 4.
94. S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster Paperback, 1996), p. 47.
95. See generally C. M. Fylie, *Introduction to the History of African Civilization: Pre Colonial Africa* (Lanham, MD: University Press of America, 1999).

See also C. Ehret, *The Civilizations of Africa: A History to 1800* (Oxford: James Curry Publishers, 2002), pp. 3–7.

96. G. V. McClanahan, *Diplomatic Immunity: Principles, Practices, Problems* (London: C. Hurst & Co. Ltd., 1989), p. 20.
97. Ibid.
98. J. A. Wilson, *The Burden of Egypt: An Interpretation of Ancient Egyptian Culture* (Chicago: University of Chicago Press, 1951), p. 235.
99. R. S. Smith, *Warfare and Diplomacy in Pre-Colonial West Africa,* 2nd ed. (Madison: University of Wisconsin Press, 1989), p. 7.
100. P. J. Schraeder, *African Politics and Society: A Mosaic in Transformation* (Belmont, CA: Thomson/Wadsworth, 2004), p. 39.
101. R. J. Njoroge, *Education for Renaissance in Africa* (Victoria, BC: Trafford on Demand Pub., 2004), p. 122.
102. Ibid.
103. The Nuban people were known to inhabit the Nuba mountains of South Kordofan state, in Sudan. The Nubans are multiple distinct peoples who speak different languages.
104. W. R. Polk, *Neighbors and Strangers: The Fundamentals of Foreign Affairs* (Chicago: University of Chicago Press, 1997), p. 238.
105. The prince's name was Prince Dom Henrique. See E. M. Ma Khenzu, *A Modern History of Monetary and Financial Systems of Congo, 1885–1995* (Lewiston: Edwin Mellen Press, 2006), p. 26.
106. The Oyo Empire, which was established in the fourteenth century, used to be what is today the western and some parts of northern Nigeria. It was one of the largest kingdoms in the West African region.
107. The Alaafin of Oyo, meaning the king, was the head of the Oyo Empire and supreme overlord of the people. See G. T. Stride and C. Ifeka, *People and Empire of West Africa: West Africa in History, 1000–1800* (New York: Africana Pub. Corp., 1971), p. 298.
108. The word *Ilari* means the parting of the hair in a peculiar way. The term *Ilari* was adopted by Yoruba kings in describing the royal messengers (male and female), who upon their appointment, must shave have their heads completely shaved, with small incisions made on the occiput (for the male) and on the left arm. See S. Johnson, *The History of the Yorubas From the Earliest Times to the Beginning of the British Protectorate* (Lagos: C.S.S. Bookshop, 1921), p. 61.
109. See R. S. Smith, op. cit., p. 12. See also S. Johnson, op. cit., p. 62.
110. F. Adegbulu, "Pre-Colonial West African Diplomacy: Its Nature and Impact," *Journal of International Social Research,* 4(18) (2011), p. 175.
111. W. R. Polk, op. cit., p. 238.
112. See R. S. Smith, op. cit., p. 12. See also K. Yankah, *Speaking for the Chief: Okyeame and the Politics of Akan Royal Oratory* (Bloomington: Indiana University Press, 1995), p. 31.
113. I. Roberts (ed.), *Satow's Diplomatic Practice* (Oxford: OUP, 2009), p. 187.
114. J. F. A. Ajayi and F. Crowder, *History of West Africa,* Vol. 1 (New York: Columbia University Press, 1971), pp. 214–215. It is, however, doubtful whether the Hausaland of Kano was, in fact, conquered by the Songhay Empire.
115. W. J. Argyle, *The Fon of Dahomey: The History and Ethnography of the Old Kingdom* (Oxford: Clarendon Press, 1966), p. 25.

116. O. O. Okege, *Contemporary Social Problems and Historical Outline of Nigeria: A Nigerian Legacy Approach* (Ibadan: Dare Standard Press, 1992), p. 32.
117. G. Mattingly, *Renaissance Diplomacy* (London: Jonathan Cape, 1955), p. 45.
118. A. K. Ajisafe, *The Law and Custom of the Yoruba People* (London: G. Rutledge & Sons, Limited, 1924).
119. R. S. Smith, op. cit., p. 13.
120. Y. Istanbuli, *Diplomacy and Diplomatic Practice in the Early Islamic Era* (Oxford: Oxford University Press, 2001), p. 124.
121. See M. Khadduri, *War and Peace in the Law of Islam* (Baltimore: John Hopkins Press, 1955), p. 241. See also S. Mahmassani, "The Principle of International Law in the Light of Islamic Doctrine, in Hague Academy of International Law," in Hague Academy of International Law (1968), *Recueil Des Cours: Volume 117 (1966/I)* (Leiden: Martinus Nijhoff Publishers, 1968), p. 265.
122. S. Mahmassani, op. cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I* (Leiden: Martinus Nijhoff Publishers, 1968, p. 264.
123. The Quraysh was the tribe of Prophet Muhammad. The genealogy of this tribe is traceable to Adnan, who was a descendant of Isma'il, the son of Ibrahim. The nobility of the Quraysh, coupled with their distinguished virtues of oratory, civility, and gallantry, were unanimously acknowledged by other tribes of Arabia. The Quraysh was, sometime in the early sixth century, entrusted with the management and control of the sanctuary in Makkah (the Kaabah). See S. A. Ali Nadwi, *Muhammad Rasulullah (The Life of Prophet Muhammad)* (Lucknow: Islamic Research and Publications, 1979), p. 66. For further details on the genealogy of the Quraysh and other Arab tribes, see Ibn Hisham, *As-Seeratu-n-Nabawiyyah* (Al-Monsurah: Darul Gadd al-Jadeed).
124. See Al-Sayyid al-Jamili, *Manaaqib Ameer al-Mu'mineen 'Umar ibn al-Khattab* (Beirut: Dar al-Kitab al-'Arabi, 1985), p. 21.
125. M. H. Haykal, *The Life of Muhammad* (Plainfield: North American Trust Publications, 1976), pp. 40–41.
126. Y. Istanbuli, op. cit. (2001), p. 124.
127. See M. Rossabi, op. cit. (1983), p. 2, who says that foreign embassies were only allowed to stay within the Chinese Empire within three to five days.
128. M. Hamidullah, *Muslim Conduct of State* (Lahore, Pakistan: Sh. Muhammad Ashraf Publishers, 1961), p. 144.
129. Quoted in Y. Istanbuli, op. cit. (2001), p. 127, from Arjoun, Sadeq Ibrahim, *Khalid Ibn al-Walid* (Jeddah: Al-Dar Alsaudiah, 1981), p. 244.
130. J. Esposito, op. cit. (2003), p. 69.
131. M. Khadduri, op. cit. (1955), pp. 239–240.
132. See A. A. Vasliev, "Byzantine and Islam," in N. H. Baynes and H. L. B. Moss (eds.), *Byzantium: An Introduction to East Roman Civilization* (Oxford: Clarendon Press, 1953), p. 311.
133. Y. Istanbuli, op. cit. (2001), p. 98.
134. Ibid., p. 99.
135. H. M. Zawati, op. cit. (2001), p. 75.
136. K. Hamilton and R. Langhorne, op. cit. (1995), p. 20.
137. The concepts of *dar al-Islam* and *dar al-harb* are discussed in chapter 6 of this study.

138. The concept of *dar al-sulh* is discussed in chapter 6 of this study.
139. H. M. Zawati, op. cit. (2001), p. 75.
140. He later became the third caliph of the Islamic state after the demise of Prophet Muhammad.
141. See S. A. Ali Nadwi, op. cit. (1979), pp. 262–264.
142. See Safiur-Rahman Al-Mubarakpuri, *Ar-Raheequl-Makthtum* (Beirut), pp. 350–361; H. M. Zawati, op. cit. (2001), p. 77; M. H. Haykal, op. cit. (1976), pp. 374–377.
143. Ibn S'ad, *Kaatib al-Waaqidi Muhammad*, *Tabaqaat*, Vol. 2, p. 23.
144. As-Suyuti, Jalaalud-Deen Muhammad Ibn Ahmad, *Khasaa'is al-Kubra*, Vol. 2, p. 11.
145. S. Al-Mubarakpuri, op. cit., p. 354.
146. P. K. Hitti, *History of the Arabs: From the Earliest Time to the Present* (London: Macmillan & Co. Ltd., 1961), p. 344. See also J. N. Lipman, *Familiar Strangers: A History of Muslims in Northwest China* (Seattle: University of Washington Press, 1997), pp. 25 and 29.
147. Ibid.
148. The hadith of Prophet Muhammad (pbuh) that says, "Seek knowledge in China if necessary," is quoted in P. M. Holt et al. (eds.), *The Cambridge History of Islam* Vol. 2B (Cambridge, UK: CUP, 1970), p. 741.
149. H. M. Zawati, op. cit. (2001), p. 77.
150. S. Al-Mubarakpuri, op. cit., p. 387.
151. Ibid., pp. 158–182.
152. Y. Istanbuli, op. cit. (2001), p. 148.
153. Ibn Hisham, op. cit., Vol. 4, p. 192.
154. Ibid.
155. See Abu Yusuf, Ya'qub ibn Ibraahim al-Ansari, *Kitaab al-Kharaaj* (Cairo: A. H. 1352), pp. 188–189 and H. M. Zawati, op. cit. (2001), p. 77.
156. M. Khadduri, op. cit. (1955), p. 244. A similar unsubstantiated conclusion was made by Hamilton and Langhorne while talking about the fate of foreign ambassadors within the Islamic domain: "If unsuccessful, a cool dismissal followed; and if war broke out before the ambassadors had left, they might be held captive or even executed." See K. Hamilton and R. Langhorne, op. cit. (1995), p. 21.
157. Sadiq Ibrahim Arjoun, "Khalid Ibn al-Walid," *Al-Dar Alsaudiah*, 1981, p. 244.
158. This has been recorded by the Chinese historian Feng Chia Sheng. See M. Nasser-Eddin, *Arab Chinese Relations* (Beirut: Arab Institute for Research and Publishing), p. 15.
159. H. M. Zawati, op. cit. (2001), p. 78.
160. Ibid.
161. Y. Istanbuli, op. cit. (2001), p. 87.
162. P. K. Hitti, *Makers of the Arab History* (New York: St. Martins Press, 1968), p. 43.
163. S. A. El-Wady Romahi, *Studies in International Law and Diplomatic Practice* (Tokyo: Data Labo, 1981), p. 302.
164. B. Sen, op. cit. (1988), p. 5.
165. S. A. Ali, *A Short History of the Saracens* (Abingdon: Taylor & Francis, 2004), p. 622.

166. P. K. Hitti, op. cit. (1968), p. 297.
167. The four schools of Islamic jurisprudence generally belong to the Sunni schools of law. They are (a) the Hanafi School founded by Abu Hanifah Nu'man Ibn Thaabit (c. 699–767) with followership in Iraq, Syria, Central Asia, and India; (b) the Maliki School founded by Maalik Ibn Anas al-Asbaahi (c. 710–796) with followership in North Africa, West of Egypt, Sudan, sub-Saharan West Africa, and Moorish Spain; (c) the Shafi'i School founded by Muhammad Ibn Idris al-Shaafi'i (c. 767–820) with considerable followership in southern Arabia, Egypt, East Africa, southern Asia, and part of Central Asia; and d) the Hanbali School founded by Ahmad Ibn Hanbal (c. 780–855) with followership in Saudi Arabia and Saudi-sponsored institutions abroad. For further details, see M. H. Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld Publications, 2008), pp. 70–86; B. Lewis and B. E. Churchill, *Islam: The Religion and the People* (Upper Saddle River, NJ: Wharton School Publishing, 2009), pp. 30–31.
168. His full name is Yaaqub Ibn Ibraahim al-Ansari. He was one of the prominent students of Abu Hanifah, the founder of the Hanafi School. He held the position of a judge in Baghdad prior to his elevation to the high position of a Chief Justice (*qaadi al-qudaat*) under Harun al-Rashid, who requested that he write the book *Kitaab al-Kharaj*. See J. Esposito, op. cit. (2003).
169. Y. Istanbuli, op. cit. (2001), p. 87.
170. He was otherwise known as Charles the Great or Charles I. As the King of the Franks, he was renowned for his success in uniting most of Western Europe during the Middle Ages and laying the foundations for modern France and Germany.
171. Ibid., p. 101.
172. The pursuit of self-interest has been observed as the main reason or factor that brought these two imperial powers together. Charlemagne has been depicted as one who saw in Caliph Harun al-Rashid an ally against his rivals, the Byzantium, while Harun is portrayed as a person who saw in Charlemagne an ally against his bitter opponents, the Umayyads of Spain. See P. K. Hitti, op. cit. (1968), p. 298.
173. Ibid. Hitti and some other writers have expressed much surprise over the utter silence of Muslim historians regarding this exchange of embassies and gifts between the Islamic Empire and the Frankish monarch. It can as well be observed, however, that this utter silence by Muslim writers may not be unrelated to doubts surrounding the historicity of the entire event. See N. Daniel, *The Arabs and the Medieval Europe* (London: Longman Group Limited, 1979), p. 50.
174. A. A. Vasiliev, "Byzantium and Islam," in N. H. Baynes and H. Moss (eds.), *Byzantium: An Introduction to East Roman Civilization* (Oxford: Clarendon Press, 1953), p. 312.
175. Ibid.
176. S. A. Ameer Ali, *Short History of the Saracens* (London: Macmillan and Co., 1955), pp. 250–251; P. K. Hitti, op. cit., p. 299.
177. D. Quataert, op. cit. (2005), p. 1.
178. F. M. Gocek, *East Encounters West: France and the Ottoman Empire in the Eighteenth Century* (New York: Oxford University Press, 1987), p. 4.
179. E. Yurdusev, "Studying Ottoman Diplomacy: A Review of the Sources," in A. N. Yurdusev (ed.), *Ottoman Diplomacy: Conventional or Unconventional?* (Basingstoke, Hampshire: Palgrave Macmillan, 2004), p. 167.

180. B. Ari, "Early Ottoman Diplomacy: Ad Hoc Period" in A. N. Yurdusev (ed.), *Ottoman Diplomacy: Conventional or Unconventional?* (Basingstoke, Hampshire: Palgrave Macmillan, 2004), p. 36.
181. D. Quataert, op. cit. (2005), pp. 80–81.
182. B. Ari, op. cit., in A. N. Yurdusev (ed.), *Ottoman Diplomacy: Conventional or Unconventional?* (Palgrave Macmillan: Basingstoke, Hampshire, 2004), p. 48.
183. D. Quataert, op. cit. (2005), p. 79.
184. F. M. Gocek, op. cit. (1987), p. 20.
185. D. Quataert, op. cit. (2005), p. 79.
186. See T. Naff, "Reform and the Conduct of Ottoman Diplomacy in the Reign of Selim III 1789–1807," (1963) 83, *Journal of the American Oriental Studies*, p. 296, in which he says, "Ottoman thinking in diplomacy, as in all matters of government, derived from the Muslim concept of the state, which was rooted in the Shari'a (Holy Law); traditionally, the Shari'a provided for all the exigencies of life and government, thus making the Muslim state, in theory, self-sufficient. In this sense, the Ottoman Empire was pre-eminently a Shari'a state." See also M. S. Anderson, *The Rise of Modern Diplomacy 1450–1919* (London: Longman, 1993), pp. 9 and 71.
187. A. N. Yurdusev, "The Ottoman Attitude toward Diplomacy," in A. N. Yurdusev (ed.), *Ottoman Diplomacy: Conventional or Unconventional?* (Basingstoke, Hampshire: Palgrave Macmillan, 2004), p. 6.
188. T. Naff, "Ottoman Diplomatic Relations with Europe in the Eighteenth Century: Patterns and Trends," in T. Naff and R. Owen (eds.), *Studies in Eighteenth Century Islamic History* (Carbondale and Edwardsville: Southern Illinois University Press, 1977), pp. 93 and 97.
189. Ibid.
190. H. A. Gibbons, *The Foundation of the Ottoman Empire: A History of the Osmanlis, 1300–1403* (Oxford: Oxford University Press, 1916).
191. M. F. Köprülü, *The Origins of the Ottoman Empire*, trans. and ed. Gary Leiser (Albany: State University of New York Press, 1992).
192. P. Wittek, *The Rise of the Ottoman Empire* (London: Royal Asiatic Society, 1938).
193. R. P. Lindner, *Nomads and Ottomans in Medieval Anatolia* (Bloomington: Indiana University Press, 1983).
194. See N. Itzkowitz, *Ottoman Empire and Islamic Tradition* (Chicago: University of Chicago Press, 1972), pp. 6 and 11. See also H. Inalcik, "The Rise of the Ottoman Empire," in M. A. Cook (ed.), *A History of the Ottoman Empire to 1730* (Cambridge: Cambridge University Press, 1976), p. 31.
195. A. N. Yurdusev, op. cit., in A. N. Yurdusev (ed.), *Ottoman Diplomacy: Conventional or Unconventional?* (Basingstoke, Hampshire: Palgrave Macmillan 2004, p. 14.
196. H. Inalcik, op. cit., in M. A. Cook (ed.), *A History of the Ottoman Empire to 1730* (Cambridge: Cambridge University Press, 1976), pp. 47–48.
197. Bulent Ari analyzed that the Ottoman state did observe basic Islamic principles in many respects, but they also did not hesitate to combine these practices with the Turkish traditions and on many occasions "followed a practical path without adhering strictly to religious law." B. Ari, op. cit., in A. N. Yurdusev (ed.), *Ottoman Diplomacy: Conventional or Unconventional?* (Basingstoke, Hampshire: Palgrave Macmillan, 2004), pp. 43–44.

198. It is similar to *aman*, which means safe conduct and freedom for foreign envoys to live within the territories of the Ottoman Empire not under the Ottomans laws, but rather under the laws of their own countries.
199. See N. Sousa, *The Capitulatory Regime of Turkey: Its History, Origin, and Nature* (Baltimore: Johns Hopkins Press, 1933), p. 16. Article XVI of the Agreement reads as follows: "that his lordship of Venice may, if he desires, send to Constantinople a governor (consul), with his suit, according to existing custom, which governor (consul) shall have the privilege of ruling over, governing, and administering justice to the Venetians of every class and condition."
200. Qur'an 8 verse 61 says the following: "And if they (the enemy) incline to peace, then incline to it [also] and rely upon Allah. Indeed, it is He who is the Hearing, the Knowing." The English translation of the Qur'an in *The Qur'an: English Meaning and Notes by Saheeh International* (Jeddah: Al-Muntada Al-Islami Trust, 2012) will be used throughout this book.
201. The notion of jihad and when it can be resorted to against non-Muslims is well discussed in H. M. Zawati, op. cit. (2001), pp. 36–39. See also A. H. A. Abu Sulayman, *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* (Herndon: International Institute of Islamic Thought, 1987).
202. A. N. Yurdusev, op. cit., in A. N. Yurdusev (ed.), *Ottoman Diplomacy: Conventional or Unconventional?* (Basingstoke, Hampshire: Palgrave Macmillan, 2004), p. 15. (Italics in original).
203. M. A. Baderin (ed.) *International Law and Islamic Law* (Hampshire: Ashgate Publishing Limited, 2008), p. xv. See also M. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003), p. 13, and J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. (Oxford: Clarendon Press, 1963), p. 1.
204. J. C. Barker, op. cit., p. 57.
205. M. A. Baderin, "Religion and International Law: An Analytical Survey of the Relationship," in D. Armstrong, *Routledge Handbook of International Law* (Oxon: Routledge, 2009), p. 167.
206. See A. E. Mayer, "War and Peace in the Islamic Tradition and International Law," in J. Kelsay and J. T. Johnson (eds.), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Westport, CT: Greenwood Press, 1991), p. 199.
207. M. A. Boisard (1980), p. 430. A clearer picture of this alleged psychological prejudice exhibited against Islam is objectively and well depicted by Watt in the *Cambridge History of Islam* thus: "some occidental readers are still not completely free of the prejudices inherited from their medieval ancestors. In the bitterness of the Crusades and the other wars against the Saracens, they came to regard the Muslims, and in particular Muhammad, as the incarnation of all that is evil, and the continuing effect of the propaganda of that period has not yet been completely removed from occidental thinking about Islam." M. W. Watt, "Muhammad," in P. M. Holt et al. (eds.), *Cambridge History of Islam* (Cambridge: Cambridge University Press, 1970), p. 30.
208. *US Diplomatic and Consular Staff in Tehran* (1980) *ICJ Rep.* at para. 86, p. 40.

209. L. Oppenheim, *International Law: A Treatise*, Vol. 1, 3rd ed. (Clark, NJ: The Lawbrook Exchange Ltd., 2005), p. 48. See also M. N. Shaw, *International Law*, 6th ed. (Cambridge, UK: CUP, 2008), p. 13.
210. O. Yasuaki, "When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilisational Perspective," *Journal of the History of International Law*, 2 (2000), p. 7.
211. M. A. Boisard, op. cit. (1980), p. 430.
212. See M. N. Shaw, op. cit. (2008), pp. 22–24.
213. The prevalent assertion that Grotius is the father of modern international law has been strongly challenged by some other scholars such as Scott, who are of the fervent view that the renowned Spanish scholar Francisco De Vitoria is more deserving of that amiable position than Grotius. See J. B. Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Clarke, NJ: The Lawbook Exchange Limited, 2000).
214. M. Hamidullah, op. cit. (1961), p. 62.
215. Ibid.
216. See L. Oppenheim, op. cit. (2005), pp. 56 and 58.
217. Ibid.
218. Ibid.
219. L. Oppenheim, op. cit. (2005), p. 63.
220. Ibid.
221. M. Khadduri (tr.) *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: The John Hopkins Press, 1966), p. 38.
222. Ibid., p. 56. See also *Jahrbücher der Literatur* (Vienna: J. C. B. Mohr, 1827), Vol. 40, p. 48.
223. C. G. Weeramantry, op. cit. (1988), p. 130.
224. Ibid., p. 151.
225. See M. Hamidullah, op. cit. (1961), note 3 p. 66.
226. C. G. Weeramantry, op. cit. (1988), p. 152.
227. M. A. Boisard, op. cit. (1980), p. 441.
228. Attention has been drawn to the relevant portion of King Alfonso's *Las Siete Partidas*, which acknowledges the influence of Islamic law by Nys while reviewing the *Siete Partidas* thus: "In the second *Partida* some chapters are given to military organisation and to war. As regards war, much is borrowed from the Etymologiae of St. Isidore of Seville…and *in many respects the influence of Musulman law is very apparent*." (Italics added). See Nys, 1964, Introduction, p. 62.
229. C. G. Weeramantry, op. cit. (1988), p. 158. Hamidullah, in his account, has given a vivid description of these famous writers thus: "they were all the product of the renaissance provoked by the impact of Islam on Christendom." See M. Hamidullah, op. cit. (1961), p. 66.
230. C. G. Weeramantry, op. cit. (1988), p. 157.
231. See M. Lombard, *The Golden Age of Islam* (Princeton: Markus Weiner Publishers, 2004), p. 87; M. A. Boisard, op. cit. (1980), p. 435.
232. See M. A. Bosard, op. cit. (1980), p. 432.
233. Ibid., p. 442.
234. Ibid., p. 436.
235. Ibid., p. 435.

3 Sources of Islamic and International Diplomatic Law: Between Tension and Compatibility

1. See C. A. Ford, "Siyar-ization and Its Discontents: International Law and Islam's Constitutional Crisis," *Texas Int'l Law Journal* 30 (1995), p. 500. See also M. Berger, op. cit., in P. Meerts (ed.), *Culture and International Law* (The Hague: Hague Academic Coalition, 2008), p. 107, and D. A. Westbrook, op. cit. (1992–1993), p. 883.
2. C. A. Ford, op. cit. (1995), p. 500.
3. A. I. Bouzenita, op. cit. (2007), p. 44.
4. See S. Mahmassani, The Principle of International Law in the Light of Islamic Doctrine, in Hague Academy of International Law, *Recueil Des Cours*: Volume 117 1966/I (Leiden: Martinus Nijhoff Publishers, 1968), p. 205. See also I. Shihata, "Islamic Law and the World Community," *Harvard International Club Journal* 4 (1962), p. 101; H. M. Zawati, op. cit. (2001), p. 6; and G. M. Badr, op. cit. (1982), pp. 58–59.
5. C. G. Weeramantry, op. cit. (1988). p. 166.
6. S. Mahmassani, op. cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I* (Leiden: Martinus Nijhoff Publishers, 1968), p. 205.
7. See S. S. Ali, "The Twain Doth Meet! A Preliminary Exploration of the Theory and Practice of as-Siyar and International Law in the Contemporary World," in J. Rehman and S. C. Breau (eds.), *Religion, Human Right and International Law* (Leiden: Martinus Nijhoff Publishers, 2007), p. 90; A. I. Bouzenita, op. cit. (2007), p. 24. See also S. Mahmassani, op. cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I* (Leiden: Martinus Nijhoff Publishers, 1968), p. 235; S. Khatab and G. D. Bouma, *Democracy in Islam* (London: Routledge, 2007), p. 174; F. A. Hassan, op. cit., p. 72; M. Khadduri, *War and Peace in the Law of Islam* (Clarke, NJ: The Lawbook Exchange Limited, 2006), p. 47; and S. S. Ali and J. Rehman, "The Concept of Jihad in Islamic International Law," *JCSL*, 10(3) (2005), p. 324.
8. M. Khadduri, op. cit. (1966), p. 6. See also *Qureshi v. U. S. S. R.* PLD (1981) SC, p. 377.
9. M. Baderin, "Understanding Islamic Law in Theory and Practice," *Legal Information Management*, 9 (2009), p. 186.
10. See M. H. Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld Publications, 2008), p. 14.
11. See Ibid.; J. L. Esposito, op. cit. (2003), pp. 287–288; and C. Glasse and H. Smith, *The New Encyclopedia of Islam* (New York: AltaMira Press, 2001), p. 419.
12. See H. Abd Al-Ati, *The Family Structure in Islam* (Indianapolis: ATP, 1977), p. 13.
13. See M. H. Kamali, op. cit. (2003), p. 41.
14. B. Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), p. 1.
15. M. Baderin, op. cit. (2009), pp. 186–187.

16. Ibid., p. 187.
17. Ibid.
18. Ibid., pp. 186–187.
19. Ibid., p. 187.
20. Ibid.
21. H. Abd Al-Ati, op. cit. (1977), p. 14.
22. M. Baderin, op. cit. (2009), p. 187.
23. H. Abd Al-Ati, op. cit. (1977), pp. 14–15.
24. M. H. Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 1991), p. 9.
25. Ibid.
26. I. A. K Nyazee, *Islamic Jurisprudence* (New Delhi: Adam Publishers and Distributors), p. 33.
27. M. Hamidullah, op. cit. (1961), p. 18.
28. M. H. Kamali (1991), op. cit., p. 10. See also IAK Nyazee, op. cit. (2006), p. 144.
29. N. A. Shah, *Women, The Koran and International Human Rights Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), p. 70.
30. See M. C. Bassiouni, "Protection of Diplomats under Islamic Law," *American Journal of International Law*, 74 (1980), p. 609; J. Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the "Clash of Civilisation" in the New World Order* (Oxford: Hart Publishing, 2005), p. 11.
31. I. A. K. Nyazee, op. cit. (2006), p. 144. See also M. Baderin, op. cit. (2009), p. 189.
32. See generally M. H. Kamali, "Qawa'id al-Fiqh: The Legal Maxims of Islamic Law," *Muslim Law Journal*, 3 (1998), pp. 77–110.
33. This is a juristic tool resorted to by jurists through intellectual exertion with a view to expanding the law by having recourse to the primary sources of the *shari'ah* so as to provide solutions to new legal problems. See A Khan, "The Reopening of the Islamic Code: The Second Era of Ijtihad," *Uni. St. TLJ*, 1 (2003), p. 345.
34. The Sunni and the Shia schools constituted the two major divisions within the legal schools of Islam about three decades after the demise of Prophet Muhammad. The Sunni school, which forms the majority, is further divided into four major *madhaahib*, namely: Hanafi School, founded by Abu Hanifah Nu'maan ibn Thaabit (d. 767), with followers in Turkey, Syria, Lebanon, Jordan, India, Pakistan, Afghanistan, Iraq, and Libya; Maaliki School, founded by Maalik ibn Anas al-Asbahi (d. 795), with followers in North Africa, West Africa, and Kuwait; Shaafi'i School, founded by Muhammad ibn Idris as-Shaafi'i (d. 820), with followers in Southern Egypt, Southern Arabia, East Africa, Indonesia, and Malaysia; and Hanbali School, founded by Ahmad ibn Hanbal (d. 855), with followers in Saudi Arabia and Qatar. The Shia School is subdivided into three surviving schools of law: Ithnaa Ashariyyah School, otherwise known as the "Twelvers"; Zaydi School; and Ismaa'ili School, also referred as "*Sab'iyyah*," otherwise known as the Seveners. See M. H. Kamali (2008), op. cit., pp. 70–87; W. B. Hallaq, *Origins and Evolution of Islamic Law* (Cambridge: CUP, 2005), pp. 150–177; M. Baderin, op. cit. (2009), p. 189; and N. A. Shah, op. cit., p. 69.

35. M. Hamidullah, op. cit. (1961), p. 19.
36. S. Mahmassani, op. cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I* (Leiden: Martinus Nijhoff Publishers, 1968), p. 229. The scholars, however, maintain divergent views regarding the interpretation ascribed to some verses of the Qur'an that precipitated the emergence of the branch of knowledge known as *'ilmut-tafseer al-Qur'an*—science of exegesis of the Qur'an.
37. See M. H. Kamali (2008), op. cit., p. 19.
38. Ibid. See also I. A. K. Nyazee, op. cit. (2006), p. 161, and M. Baderin, op. cit. (2009), p. 187.
39. See M. H. Kamali (2008), op. cit., p. 20, in which he refers to the observation of As-Shawkaani in *Irshaadul-Fuhuul,* at p. 250.
40. See N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), p. 12.
41. See M. Baderin, op. cit. (2009), p. 187.
42. Ibid; M. E. Badar, "Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court," *Leiden Journal of International Law*, 24 (2011), p. 415; H. H. Hassan, *An Introduction to the Study of Islamic Law* (New Delhi: Adam Publishers and Distributors, 2005), p. 143; Article 1 of the Saudi Arabian Constitution (adopted by Royal Decree of King Fahd on March 1992); Article 2(6)(a) of the 1979 Constitution of the Islamic Republic of Iran and paragraph 5 of the preamble to the 1973 Constitution of the Islamic Republic of Pakistan.
43. Their close intimacy to the Prophet, coupled with their exceptional knowledge of the Qur'an, along with circumstances surrounding the revelation of its verses account for their unique position within the sphere of Islamic jurisprudence.
44. A. Khan, "The Reopening of the Islamic Code: The Second Era of Ijtihad," *Uni. St. TLJ*, 1 (2003), p. 351.
45. Qur'an 4:59. See also Qur'an 59:7.
46. C. G. Weeramantry, op. cit. (1988), p. 35.
47. M. Hamidullah, op. cit. (1961), p. 21.
48. A. B. Atwan, *The Secret History of Al-Qaeda* (Oakland: University of California Press, 2006), p. 68.
49. This collection was compiled by Abu 'Abdullah Muhammad bin Isma'il al-Bukaari (810–870 AD).
50. This is the collection of Abul Husayn Muslim ibn al-Hajjaj Qushayri al-Nishapuri (821–875 AD).
51. This is the collection of Abu Daawud Sulayman ibn Ash'ath al-Azadi al-Sijistani (817–888 AD).
52. This is the collection of Abu Isa Muhammad ibn Isa ibn Sawrah ibn Shaddaad at-Trimidhi (824–892).
53. This is the collection of Ahmad ibn Shu'ayb ibn Ali ibn Sinan Abu 'Abdur-Rahman an-Nasaa'i (829–915).
54. This is the collection of Abu 'Abdullah Muhammad ibn Yazeed ibn Maajah (824–887).
55. W. B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: CUP, 2004), p. 166.
56. This quotation is cited in W. B. Hallaq, *Law and Legal Theory in Classical and Medieval Islam* (Aldershot: Variorum, 1994), p. 197.

57. I. A. K. Nyazee, op. cit. (2006), p. 263.
58. T. J. Al-Alwani, *Issues in Contemporary Islamic Thought* (London: International Institute of Islamic Thought, 2005), p. 68.
59. T. Ramadan, *Western Muslims and the Future of Islam* (Oxford: OUP, 2004), p. 43. See also M. K. Masud, *Shatibi's Philosophy of Islamic Law* (Islamabad: The Islamic Research Institute, 1995), p. 367, and IAK Nyazee, op. cit. (2006), p. 263.
60. This opinion has been attributed to the traditionalists. They challenge the possibility and propriety of human rationality (Ijtihaad) as a valid source of law even when a direct solution to a pending legal question appears not to be forthcoming in the two divine sources of the shari'ah. See A. Khan, op. cit. (2003), p. 362.
61. See A. Khan, op. cit. (2003), p. 363. See also M. Baderin, op. cit. (2009), p. 188.
62. Mu'aadh ibn Jabal was one of the companions of Prophet Muhammad whom he deployed to Yemen as a judge. He asked him what would be his source of law when adjudicating on matters brought before him, to which he replied, "I will judge with what is in the book of God (the Qur'an)." The Prophet probed further: "And if you do not find a clue in the book of God?" Mu'aadh replied, "Then with the Sunnah of the Messenger of God." The Prophet went ahead again to ask, "And if you do not find a clue in that?" Mu'aadh responded again by saying, "I will exercise my own reasoning (ijtihaad)." The Prophet was reported to be pleased with and approved of Mu'aadh's response. See Imam Hafiz Abu Dawud Sulaiman ibn Ash'ath, *English Translation of Sunan Abu Dawud* (Trans. Yaser Qadhi), Vol. 4, Hadith No. 3592 (Riyadh: Darussalam, 2008), p. 180.
63. See T. Ramadan, op. cit. (2004), pp. 44–45, in which he refers to some classical scholars like Imam Al-Ghazali, as-Shaatibi, Ibn al-Qayyim al-Jawziyyah, al-Khallaf, and Abu Zahra, who equally acknowledged the jurisprudential importance of *ijtihaad* as a third source of Islamic law.
64. M. H. Kamali, op. cit. (2008), p. 366.
65. This definition has been cited by G. F. Hourani, *Reason and Tradition in Islamic Ethics* (Cambridge: CUP, 1985), p. 193, when referring to the work of Muhammad b. Hamza al-Ghaffari (d. AD 1430/31), *Fusul al-bada'i fi usul ash-Shara'i*. See also IAK Nyazee, op. cit., p. 183 and M. H. Kamali, op. cit. (2008), p. 169.
66. Qur'an 4:59. Other authorities from the Qur'an validating the concept of *ijmaa'* are Qur'an 4:115 and Qur'an 4:83.
67. This hadith has been variously reported by Ibn Maajah, Al-Tirmidhi, and Abu Daawud.
68. The Shafi'i school of law's acceptance of *ijmaa'* is limited to obligatory duties alone. The Zahiri and Hanbali schools, however, will only approve of *ijmaa'* if it is within the scope of the consensus of the companions of the Prophet alone. But to the Maliki school, *ijmaa'* is just the consensus of the people of Madinah, while the Hanafis will accept as a valid *ijmaa'* the consensus of the jurists belonging to any age. But according to the Shia juridical school, no *ijmaa'* is valid save the consensus drawn from the Prophet's household (*ahl al-bayt*). See M. H. Kamali, op. cit. (2008), pp. 182–183; K. M. Khan, "Juristic Classification of Islamic Law," *HJIL*, 6 (1983–1984), p. 34; and C. G. Weeramantry, op. cit. (1988), p. 40.

69. See F. E. Vogel, op. cit. (2000), p. 48. This generation (the era of the companions of the Prophet) has been exempted because of the few and identifiable numbers of the qualified scholars among them, and moreover most of them were resident in Madinah.
70. Ibid.
71. M. H. Kamali, op. cit. (2008), p. 190.
72. S. Mahmassani, op. cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I* (Leiden: Martinus Nijhoff Publishers, 1968), p. 231.
73. See M. Baderin, op. cit. (2009), pp. 188–189 and M.H. Kamali, op. cit. (2008), p. 200.
74. M. H. Kamali, op. cit. (2008), pp. 198–199.
75. See M. Baderin, op. cit. (2009), p. 189.
76. The primary purposes and objectives that have also been designated as necessities (*daruraat*) that must remain preserved, according to the Muslim jurists are religion (*ad-din),* life (*an-nafs*), progeny (*an-nasl*), intellect (*al-'aql*), and wealth (*al-maal*). These objectives, according to Imam al-Ghazzali, are meant "to promote the well-being of all mankind," and "whatever ensures the safeguard of these five serves public interest and is desirable." See M. U. Chapra, *The Future of Economics: An Islamic Perspective* (Leicester: The Islamic Foundation, 2000), p. 118, and I. A. K. Nyazee, op. cit. (2006), pp. 199 and 202.
77. M. H. Kamali, op. cit. (2008), p. 54.
78. This statement has been cited in M. Kayadibi, "Ijtihad by Ra'y: The Main Source of Inspiration behind Istihsan," *American Journal of Islamic Social Sciences*, 24(1) (2007) p. 8, with references from Hatib, *Al-Faqih,* 1: 200 and Ibn al-Qayyim, *I'lam,* 1:126.
79. See J. Makdisi, "Legal Logic and Equity in Islamic Law," *Am. J. Comp. L*, 3 (1985), p. 73.
80. See M. Kayadibi, op. cit., p. 75. See also MH Kamali, *Istihsan: Juristic Preference and Its Application to Contemporary Issues* (Jeddah: Islamic Development Bank, IRTI, 1997), p. 24, and Jassas Abu Bakr Ahmad ibn 'Ali al-Razi, *Al-Fusul fi al-Usul*, ed. Ajil Jasim al-Nashmi (Kuwait: Wizarat al-Awqaf wa al-Shu'un al-Islamiyyah, 1988), 4: 234.
81. B. Weiss, "Interpretation in Islamic Law: The Theory of Ijtihad," *Am. J. Comp. L*, 26(2) (1978), p. 202.
82. Qur'an 2:185.
83. N. J. Delong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad* (Oxford: OUP, 2004), p. 101. See also J. L. Esposito and N. J. Delong-Bas, *Women in Muslim Family Law*, 2nd ed. (Syracuse, NY: Syracuse University Press, 2001), pp. 8–9.
84. These are indispensable interests the realization of which is paramount to the sustainability of the social order of the community. According to the Muslim scholars, it consists of preservation and safeguarding of the five core objectives of the shari'ah (religion, life, intellect, property, and lineage).
85. These are things needed for the achievement and effective functioning of the community's interest.
86. This consists of things that lead to the perfection of the community condition and social order.

87. Muhammad al-Tahir Ibn Ashur, *Ibn Ashur: Treatise on Maqāṣid al-Shari'ah* (Herndon: The International Institute of Islamic Thought, 2006), p. 116.
88. Ibid., p. 131.
89. G. Libson, "On the Development of Custom as a Source of Law in Islamic Law," *ILS*, 4(2) (1997), p. 134.
90. See N. J. Coulson, op. cit. (1964), p. 143.
91. G. Libson, op. cit. (1997), p. 135.
92. N. A. Shah, op. cit. (2006), pp. 74–75 See also N. J. Coulson, "Muslim Custom and Case-Law," *Die Welt des Islams*, 6 (1959), p. 14.
93. See I. Abdal-Haqq, "Islamic Law: An Overview of its Origin and Elements," *JIL*, 1 (1996), pp. 34–35.
94. Ibid., p. 35.
95. Ibn Hisham, *As-Seeratu-n-Nabawiyyah*, Vol. 4 (Al-Monsurah: Darul al-Gadd al-Jadeed), p. 192.
96. The rightly guided caliphs are: Abu Bakr ibn Abi Quhafah (d. 634 AD), 'Umar ibn Kattab (d. 644 AD), 'Uthman ibn 'Affan (d. 656 AD), and 'Ali ibn Abi Talib (d. 661 AD). Most writers considered 'Umar ibn 'Abdul-'Azeez (d. 720 AD), an Umayyad caliph, as one of the rightly guided caliphs. See A. S. Najeebabadi, *The History of Islam,* Vol. 2 (London: Darussalam International Publications Limited, 2001), pp. 194 and 212.
97. See M. Khadduri, op. cit. (1966), p. 9; S. Mahmassani, op. cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I* (Leiden: Martinus Nijhoff Publishers, 1968), p. 236.
98. M. Khadduri, *War and Peace in the Law of Islam* (Baltimore: John Hopkins Press, 1955), pp. 213–214.
99. M. Hamidullah, op. cit. (1961), p. 23.
100. Ibid.
101. M. Khadduri, op. cit. (1955), pp. 216–218.
102. These are the 1961 VCDR and 1963 VCCR, which codified customary diplomatic practice.
103. See M. J. L. Hardy, *Modern Diplomatic Law* (Manchester: Manchester University Press, 1968), p. 4.
104. See R. Higgins, *Problems and Process: International Law and How We Use it* (Oxford: OUP, 1994), pp. 86–87, and M. J. L. Hardy, op. cit., p. 5.
105. M. J. L. Hardy, op. cit. (1968), p. 4.
106. Ibid.
107. D. J. Bederman, *The Spirit of International Law* (Athens/London: University of Georgia Press, 2002), p. 28.
108. See M. N. Shaw, op. cit. (2008), p. 70. See also I. Brownlie, *Principles of Public International Law* (Oxford: OUP, 2003), p. 5, and M. O. Hudson, *The Permanent Court of International Justice* (New York: Macmillan Company, 1934), pp. 601 ff.
109. A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford: OUP, 2012), p. 797.
110. Ibid., pp. 797–798.
111. M. Mendelson, "The International Court of Justice and the Sources of International Law," in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (Cambridge: CUP, 1996), p. 64.

112. This conforms with the principles of free consent and of good faith, and the *pacta sunt servanda* rule, which are variously contained in Articles 1, 2(1)(b), 6, 11 and 16 of the VCLT, according to which every state may equally establish consent to be bound by a treaty on the international plane. See M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009), p. 48.
113. M. W. Janis, "An Introduction to International Law," *Conn. L. Rev.*, 16 (1983–1984), p. 900.
114. Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties.
115. Ibid. Article 2(a) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, signed on March 21, 1986. Also available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf [accessed August 9, 2010].
116. G. M. Danilenko, *Law-Making in the International Community* (London: Martinus Nijhoff Publishers, 1993), p. 45.
117. See the judgments of the ICJ in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Jurisdiction and Admissibility*, Judgment of 1 July 1994, 1994 ICJ Reports, p. 112, and in the case of *Aegean Sea Continental Shelf*, 19 December 1978, 1978 ICJ Reports, p. 3.
118. I. Seidl-Hohenveldern, "Hierarchy of Treaties," in E. W. Veirdag et al. (eds.), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Veirdag* (The Hague: Martinus Nijhoff Pubishers, 1998), p. 7.
119. It must be noted that in some exceptional cases, a state may not be a signatory to a treaty and yet be expected to be bound by it. There is, for instance, a clear-cut category of "dispositive treaties" creating a legal regime that binds a third party. They are considered to be valid *ergo omnes*, i.e., effective against the entire world. Treaties that govern international waterways, such as the Permanent Neutrality and Operation of the Panama Canal Treaty 1978 and those determining boundaries, are such treaties. See J. O'Brien, *International Law* (London: Cavendish Publishing Limited, 2001), p. 80, and the *Case concerning Kasikili/Sedudu Island (Botswana/Namibia),* 1999 ICJ Reports, 1045.
120. See A. Abass, *Complete International Law* (Oxford: OUP, 2012), p. 89.
121. ICJ Reports 1969 pp. 3 and 25.
122. M. N. Shaw, op. cit. (2008), p. 95.
123. See the third paragraph of the preamble to the 1969 VCLT.
124. C. G. Weeramantry, *Universalising International Law* (Leiden: Martinus Nijhoff Publishers, 2004), p. 239.
125. C. Schreuer, "Sources of International law: Scope and Application," Emirates Lecture Series 28, The Emirates Center for Strategic Studies and Research, pp. 5–6.
126. M. N. Shaw, op. cit. (2008), p. 95.
127. L. Oppenheim, op. cit. (2005), p. 22.
128. Ibid.
129. J. Brown, "Diplomatic Immunity: State Practice under Vienna Convention on Diplomatic Relations," *ICLQ*, 37 (1988), p. 53.
130. M. J. L. Hardy, op. cit. (1968), p. 5.

131. M. N. Shaw, op. cit. (2008), p. 73.
132. W. Friedman, *The Changing Structure of International Law* (New York: Columbia University Press, 1964), pp. 121–123.
133. A. D'Amato, *The Concept of Custom in International Law* (1971), p. 12.
134. ICJ Report 1985, p. 13.
135. It is known as opinion *juris sive necessitatis*, meaning "opinion that an act is necessary by rule of law." The legal phrase was first propounded by a French writer, Francois Geny, to identify legal custom from mere social usage. That is, for a conduct or practice to attain the status of international customary law, nations must be shown to believe that indeed international law and not moral obligation mandate the practice or conduct. See B. A. Garner (ed.) *Black's Law Dictionary*, 8th ed. (St, Paul, MN: Thomson West Publishing, 2004), p. 1125, and M. N. Shaw, op. cit. (2008), p. 75.
136. ICJ Report 1985, 29.
137. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, ICJ Reports 1986, p. 14, at p. 97.
138. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, ICJ Reports 2012, para. 55.
139. A. M. Weisburd, "Customary International Law: The Problem of Treaties," *V and J. Transnat'l L.*, 21 (1988), p. 6.
140. J. L. Kunz, "Nature of Customary International Law," *Am. J. Int'l. L.*, 47 (1953) p. 666. See also H. E. Chodosh, "Neither Treaty Nor Custom: The Emergence of Declarative International Law," *Tex. Int'l. L. J.*, 26 (1991), p. 100. He cited with approval the statement of Tunkin, where he agrees that discontinuity is not a decisive indication of a rule's nonexistence. See generally G. I. Tunkin, "Co-existence and International Law," *Recuel Des Cours* 95 (3) (1958), pp. 1–82.
141. 1923 PCIJ (ser. A) No. 1, at 15, 25 and 28. (Aug. 17).
142. 1927 PCIJ (ser. A) No. 10, at 4 and 29 (Sept. 7).
143. A. D'Amato, *The Concept of Custom in International Law* (1971), p. 175. It is, however, uncertain whether Kunz subscribed to a single precedential practice by two or more states as constituting customary rule of law. He asserted that the practice must not only be continuous but also it must be "repeated without interruption of continuity." As to whether there has to be a unanimous practice of the customary usage by the states, he argues that what is required is "general" practice. J. L. Kunz, op. cit. p. 666.
144. G. I. Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law," *Cal. L. Rev.*, 49 (1961), p. 419.
145. G. I. Tunkin, op. cit. (1961), p. 420.
146. Ibid.
147. A. T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: OUP, 2008), p. 185.
148. Ibid.
149. Ibid.
150. A. T. Guzman, "Saving Customary International Law," *Michighan Journal of International Law,* 27 (2005), p. 35.
151. A. D'Amato, op. cit. (1971), pp. 61–64.
152. I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Clarendon Press, 1990), p. 6.

153. M. Akehurst, "Custom as a Source of International Law," *British Yearbook of International Law*, 47 (1974–5a), p. 10.
154. ICJ Reports 1952, p. 176, at p. 200.
155. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, ICJ Reports 1986, p. 14, at pp. 98–99.
156. T. Hillier, *Sourcebook on Public International Law* (London: Cavendish Publishing Limited, 1998), p. 75; M. Dixon, *Textbook on International Law*, 6th ed. (Oxford: OUP, 2007), p. 34.
157. I. Brownlie, op. cit. (1990), p. 8.
158. M. Dixon, op. cit. (2007), p. 34.
159. A. T. Guzman, op. cit. (2008), p. 195.
160. M. N. Shaw, op. cit. (2008), p. 75.
161. Special Tribunal for Lebanon Appeals Chamber's 2011 *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL-11–01/I/AC/R176bis), p. 76 para. 118.
162. J. L. Kunz, op. cit. (47, *AJIL*), p. 664.
163. H. Thirlway, "The Sources of International Law," in M. D. Evans (ed.), *International Law* (Oxford: OUP, 2003), p. 125.
164. I. Brownlie, op. cit. (1990), p. 341.
165. M. J. L Hardy, op. cit. (1968), p. 6.
166. See paragraph 5 of the Preamble to the 1961 Vienna Convention on Diplomatic Relations which expressly provides that "the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention."
167. ICJ Reports (1980), pp. 30–43.
168. Ibid., p. 31, para., 62; See also p. 33, para. 69.
169. H. Lauterpacht, "Some Observation on the Prohibition of 'Non Liquet' and the Completeness of the Law," in *Symbolae Verzijl* (The Hague: Martinus Nijhoff, 1958), pp. 205–206; H. Lauterpacht, *The Foundation of Law in the International Community* (Oxford: OUP, 1933), pp. 66–67.
170. C. A. Ford, op. cit. (1995), p. 525; see also M. Akehurst, "The Hierarchy of Sources of International Law," *Brit. Y. B Int'l L*, 47 (1975), pp. 274 and 279.
171. M. C. Bassiouni, "A Functional Approach to 'General Principles of International Law,'" *Mich. J. Int'l L.* 11 (1989–1990), p. 768; V. D. Degan, *Sources of International Law* (The Hague: Martinus Nijhoff Publishers, 1997), p. 67.
172. See M. Dixon, op. cit. (2007), p. 41; A. Cassese, *International Law,* 2nd ed. (Oxford: OUP, 2005), p. 188. (Italics in original).
173. Art. 21 (1)(c) of the Statute of International Criminal Court signed into law on July 17, 1998, provides that the Court shall apply "general principles of law derive 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." http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94 0A655EB30E16/0/Rome_Statute_English.pdf [accessed on October 11, 2010].
174. See C. W. Henderson, *Understanding International Law* (West Sussex: Wiley-Blackwell, 2010), p. 72. It has also been observed by Shaw that most writers

admit that general principles of law stand as separate source of international law as reflected in the decisions of the Permanent Court of International Justice and the International Court of Justice. M. N. Shaw, op. cit. (2008), p. 99; H. Thirlway, op. cit., in M. D. Evans (ed.), *International Law* (Oxford: OUP, 2003), p. 132.

175. Cited in I. Brownlie, op. cit. (1990), p. 8.
176. T. Hillier, op. cit. (1998), p. 84.
177. A. C. Arend, *Legal Rules and International Society* (Oxford/New York: OUP, 1999), p. 52.
178. P. Malanczuk, op. cit. (1997), p. 48.
179. F. O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden: Martinus Nijhoff Publishers, 2008), p. 22.
180. R. M. M. Wallace, *International Law,* 4th ed. (London: Sweet & Maxwell, 2002), p. 23.
181. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment,* ICJ Reports 2007, p. 43 at pp. 50–51, para. 114; *Administrative Tribunal* case ICJ Reports, 1954, p. 53; *Corfu Channel* case, ICJ Reports, 1949, p. 248.
182. The ICJ has confirmed the meaning of *estoppel* in *Cameroon v Nigeria ICJ Reports*, 1998, pp. 275, 303: "An estoppels would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues only. It would further be necessary that, by relying on such attitude, Nigeria had changed position to its own or had suffered some prejudice." See also *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits,* Judgment of 15 June 1962: ICJ Reports 1962, p. 6 at pp. 23, 31, and 32.
183. See *Mosul Boundary* case PCIJ Rep., ser. B, No. 12 (1925), p. 32.
184. See *AMCO v Republic of Indonesia* 89 *ILR* 366, 495–497.
185. The third paragraph of the preamble of the 1969 VCLT provides that "Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized."
186. See *Chorzow Factory* case PCIJ Series A, No. 17, 1928, p. 29, where the Permanent Court of International Justice stresses that "a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law."
187. See *Maritime Delimitation (Norway v Denmark)* (1993), ICJ Reports, pp. 211–279.
188. See *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 49–50. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment* ICJ Reports 1982, p. 18, at p. 60 and *Delimitation of Maritime Boundary in the Gulf of Maine Area*, Judgment, ICJ Reports 1984, p. 246, at pp. 313–314 and 325–330.
189. R. M. M. Wallace, op. cit. (2002), p. 24.
190. Ibid.
191. Examples of the Islamic law principles that could also be applied as general principles of law by the international court are discussed in chapter 3 of this volume.

192. It is a short form of the Latin maxim "stare decisis et non quieta movere," which means "to stand by things decided, and not to disturb settled points." It is used to describe the doctrine of precedent, where a court is expected to follow an earlier judicial decision, particularly when a similar point arises again in litigation. See B. A. Garner (ed.) *Black's Law Dictionary*, 8th ed. (St Paul, MN: Thomson West Publishing Co., 2004), p. 1443.
193. Bing Bing Jia, "Judicial Decisions as a Source of International Law and the Defense of Duress in Murder or Other Cases Arising from Armed Conflict," in S. Yee and W. Tieya (eds.), *International Law in the Post-Cold War World: Essays In Memory of Li Haopei* (New York: Routledge, 2001), pp. 83–95.
194. M. Shahabuddeen, *Precedent in the World Court* (Cambridge, UK: University of Cambridge, Research Centre for International Law, 1996), p. 99.
195. R. M. M. Wallace, op. cit. (2002), p. 25.
196. *Reservation to the Convention on the Prevention and the Punishment of the Crime of Genocide, Advisory Opinion* ICJ Rep. 1951, p. 15.
197. *Reparation for Injuries Suffered in the Service of United Nations, Advisory Opinion* ICJ Rep. 1949, p. 174.
198. ICJ Rep. 1955, p. 4.
199. ICJ Rep. 1951, p. 116.
200. H. Lauterpacht, *The Development of International Law by International Court* (Cambridge: CUP, 1996), p. 14.
201. C Schreuer, "Sources of International Law: Scope and Application," Emirate Lecture Series 28 (n.p.: The Emirates Center for Strategic Studies and Research), p. 8.
202. B. A. Boczek, *International Law: A Dictionary* (Toronto: Scarecrow Press, 2005), p. 33. See also T. Hillier, op. cit. (1998), p. 94.
203. S. Rosenne, *The Law and Practice of the International Court of Justice*, 2nd ed. (The Hague: Kluwer Law International, 1985), pp. 614–616.
204. R. M. M. Wallace, op. cit. (2002), p. 28.
205. See generally K. L. H. Samuel, *The OIC, the UN, and Counter-Terrorism Law-Making: Conflicting or Cooperative Legal Orders* (London: A & C Black, 2014), pp. 143–157.
206. M. Khadduri, "Islam and the Modern Law of Nations," *AJIL*, 50 (1956), p. 359. See also H. M. Zawati, op. cit. (2001), p. 6.
207. C. A. Ford, op. cit. (1995), p. 500. See also M. Berger, op. cit., p. 107; D. A. Westbrook, op. cit. (1992–1993), p. 883; and A. I. Bouzenita, op. cit. (2007), p. 44.
208. S. Habachy, "Property, Right and Contract in Muslim Law," *Colum. L. Rev.*, 62 (1962), p. 461.
209. Qur'an 9:4.
210. Qur'an 9:7.
211. M. H. Haykal, *The Life of Muhammad* (Plainfield: North American Trust Publications, 1976), p. 354.
212. *Saudi Arabia v. ARAMCO I.L.R.*, 27 (1963), p. 117.
213. M. Munir, op. cit. (2003), p. 428.
214. M. Khadduri (tr.), op. cit. (1966), pp. 16–17.
215. M. R. Zaman, "Islamic Perspectives on Territorial Boundaries and Autonomy," in S. H. Hashmi (ed.), *Islamic Political Ethics: Civil Society, Pluralism and Conflict* (Princeton: Princeton University Press, 2002), p. 94.

216. See A. Sulayman, Towards an *Islamic Theory of International Relations* (Herndon: International Institute of Islamic Thought, 1987), p. 18.
217. See M. Munir, op. cit. (2003), p. 428.
218. With the conclusion of the Treaty of Hudaybiyyah, Prophet Muhammad was accorded an official recognition by the Makkans as the leader of the Muslim community. Also, the Muslims had the opportunity to preach Islam without any persecution during the pendency of the treaty. See L. A. Bsoul, "International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Siyar (Islamic International Law)," PhD diss., McGill University, Montreal, 2003, p. 191. See also S. Al-Mubarakpuri, *The Seal Nectar (Ar-Raheequl-Makhtum)* (Riyadh: Darussalam, 2002), pp. 305–306; M. Lecker, "Glimpses of Muhammad's Medinan Decade," in J. E. Brockopp (ed.), *The Cambridge Companion to Muhammad* (Cambridge: CUP, 2010), p. 74.
219. S. Habachy, op. cit. (1962), p. 471.
220. See N. Saleh, "The Law Governing Contracts in Arabia," *Int'l & Comp L. Q.*, 38 (1989), pp. 761 and 773.
221. Qur'an 2:194 "[Battle in] the sacred month is for [aggression committed in] the sacred month, and for [all] violations is legal retribution. So whoever has assaulted you, then assault him in the same way that he has assaulted you. And fear Allah and know that Allah is with those who fear Him."
222. W. M. Zuhili, "Islam and International Law," *International Review of the Red Cross*, 87 (2005), p. 275.
223. Qur'an 16:126.
224. Qur'an 9:7.
225. G. M. Badr, op. cit. (1982), p. 59.
226. See M. Munir, op. cit., *Islamabad LR*, 1(3&4) (2003), p. 428.
227. G. Schwartzenberger, *Foreword* to B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: CUP, 2006), p. xi.
228. Ibid.
229. S. Mahmassani, op. cit., p. 222.
230. C. B. Lombardi, "Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis," *Chi. J. Int'l. L.*, 8 (2007–2008), p. 92.
231. *Eritrea v. Yemen* 119 *ILR*, 417.
232. Muhammad al-Tahir Ibn Ashur, op. cit. (2006), p. 131.
233. J. Kelsay and J. T. Johnson, *Just War and Jihad: Historical and Theoretical Perspectives of War and Peace in Western and Islamic Traditions* (New York: Greenwood Press, 1991), p. 200.
234. M. A Baderin (ed.), *International Law and Islamic Law* (Aldershot: Ashgate Publishing Limited, 2008), p. xvi.

4 A General Overview of Diplomatic Immunity in International Diplomatic Law and Islamic Law

1. B. Sen, *A Diplomat's Handbook of International Law and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1988), p. 6.

2. F. Przetacznik, "The History of the Jurisdictional Immunity of the Diplomatic Agents in English Law," *Anglo-American Law Rev*eiw 7 (1978), p. 353.
3. M. G. Fry et al., *Guide to International Relations and Diplomacy* (London: Continuum, 2002), p. 542.
4. It is traditionally known as "extraterritoriality" but commonly shortened and referred to as exterritoriality as used above.
5. G. V. McClanahan, *Diplomatic Immunity: Principles, Practices, Problem* (New York: St. Martin's Press, 1989), pp. 27–28.
6. M. J. L. Hardy, op. cit. (1968), p. 9.
7. R. A. Wilson, "Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations," *Loy. L. A. Int'l & Comp. L. J.*, 7 (1984), p. 114.
8. H. Grotius, *De Jure Belli ac Pacis,* published 1625, ed. Scott (Paris: Buon: Classics of International Series, 1925), Section 4.
9. Bynkershoek, C. *De Foro Legatorum Liba Singularis*, published 1721 (Oxford: Clarendon Press, 1946), p. 44.
10. M. Ogdon, *Juridical Bases of Diplomatic Immunity* (Washington DC: John Byrne & Co., 1936), p. 105.
11. B. Sen, op. cit. (1988), p. 97.
12. C. E. Wilson, *Diplomatic Privileges and Immunities* (Tucson: University of Arizona Press, 1967), p. 3.
13. *Bergman v. De Sieiyes*, 71 F. Supp. 334, 341 (S.D.N.Y. 1946).
14. (1812)11 US (7 Cranch) 116, 138. Also available at: http://www.uniset.ca/other/css/11US116.html [accessed August 4, 2010].
15. J. C. Barker, op. cit. (2006), p. 45.
16. Ibid.
17. H. Barnett, *Constitutional and Administrative Law,* 8th ed. (Oxon: Routledge, 2011), p. 131.
18. C. E. Wilson, op. cit. (1967), p. 4.
19. Ibid.
20. Indeed in some democracies, like that of Nigeria, under the constitution, while the executive arm appoints ambassadors, the National Assembly (the legislative arm) still has to assess and approve each candidate for diplomatic posts.
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22. Art. 3 VCDR.
23. G. V. McClanahan, op. cit. (1989), p. 30.
24. M. S. Ross, "Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities," *Am. U. J. Int'l L. & Pol'y*, 4 (1989), p. 178.
25. Cited in M. Ogdon, op. cit. (1936), p. 68.
26. C. E. Wilson, op. cit. (1967), p. 6.
27. Barnes, "Diplomatic Immunity from Local Jurisdiction: Its Historical Development under International Law and Application in United State Practice," *Dept. St. Bull*, 43 (1960), p. 175.
28. (1889) 4 N. Y. S. 714. The italics in the quotation are added by me for emphasis.
29. (1765) 96 Eng. Rep. 315.
30. E. Young, "The Development of the Law of Diplomatic Relations," *Brit. Y. B. Int'l L.*, 40 (1964), p. 170.

31. M Ogdon, op. cit. (1936), pp. 102–103.
32. Hurst, "Diplomatic Immunities—Modern Developments," *Brit. Y. B. Int'l L.*, 10 (1929), p. 13.
33. M. J. L. Hardy, op. cit. (1968), p. 10.
34. V. L. Maginnis, "Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations," *Brook J. Int'l L.*, 28 (2002–2003), p. 994.
35. R. A. Wilson, op. cit. (1984), p. 117.
36. E. de Vattel, *The Law of Nations,* trans. by J. Chitty (Philadelphia: T. & J. W. Johnson, Law Booksellers, 1844), p. 471.
37. (1885) 16 Q.B.D., p. 152.
38. Y. Ling, "A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Official with the Traditional Privileges and Immunities of Diplomatic Agents," *Wash. & Lee L. Rev.*, 33 (1976), p. 94.
39. F. Przetacznik, "The History of Jurisdictional Immunity of the Diplomatic Agents in English Law," *Anglo-Am. L. Rev.*, 7 (1978), p. 357.
40. S. L. Wright, "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts," *B. U. Int'l L. J.*, 5 (1987), p. 200.
41. T. A. O'Neil, "A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978," *Tul. L. Rev.*, 54 (1980), p. 669.
42. Paragraph 4 of the preamble to the VCDR.
43. I. Brownlie, op. cit. (1984), p. 345.
44. C. E. Wilson, op. cit. (1967), p. 22.
45. R. A. Wilson, op. cit. (1984), p. 118.
46. L. S. Frey and M. L. Frey, op. cit. (1999), p. 339.
47. V. L. Maginnis, op. cit. (2002–2003), p. 996.
48. Ibid.
49. M. S. Ross, op. cit. (1989), p. 179.
50. P. L. D. 1985 Federal Shariat Court, 344.
51. Ibid., p. 354.
52. Ibid.
53. H. M. Zawati, op. cit. (2001), p. 79.
54. It was adopted by the Seventh Islamic Conference of Foreign Ministers held in Istanbul, Republic of Turkey, from Jamad Al-Awal 13–16, 1396H (May 12–15, 1976).
55. Hassan ibn 'Ali, Hubert Darke (tr.), *Siyar Al-Muluk or Siyasat-Nama (The Book of Government or Rules for Government)* (London: Persian Heritage Foundation, 2002).
56. Ibid., p. 99.
57. E. Satow, *Satow's Guide to Diplomatic Practice*, 5th ed. (London: Longman Group Limited, 1979), p. 107.
58. See *Comina v. Kite*, F. It. Vol. 1 (1922), 343.
59. E. Satow, op. cit. (1979), p. 107.
60. Ibid.
61. Ibid., p. 108.
62. B. Sen, op. cit. (1988), p. 103.
63. *AJIL*, 26 (1932) (Suppl.), p. 19.

64. E. Satow, op. cit. (1979), p. 108.
65. The ILC was created in 1947 by the General Assembly Resolution 174 (II) of the UN. The ILC is charged with the task of "preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently in the practice of States." In addition, the ILC also works on the codification of international law in fields in which there already has been extensive state practice, precedent, and doctrine. See *The Work of the International Law Commission,* vol. 1 (Herndon, VA: United Nations Publications, 2007), p. 7. Also available at: http://www.un.org/law/ilc/ [accessed August 7, 2011].
66. UN General Assembly, Resolution 685 (VII) of December 5, 1952.
67. *The Work of the International Law Commission,* 7th edn., Volume 1 (United Nations, New York, 2007), p. 136.
68. G. V. McClanahan, op. cit. (1989), p. 42.
69. E. Satow, op. cit. (1979), p. 108.
70. L. Dembinski, *The Modern Law of Diplomacy: External Missions of States and International Organizations* (Dordrecht: Martinus Nijhoff Publishers, 1988), pp. 8–9. See *The Work of the International Law Commission* (New York: United Nations, 1988), pp. 41 ff.
71. *United Nations Conference on Diplomatic Intercourse and Immunities,* Official Documents, 2 vols. A/Conf. 20/14.
72. E. Satow, op. cit. (1979), p. 108.
73. R. Cohen, "Reflections on the New Global Diplomacy: Statecraft 2500 BC to 2000 AD," in J. Melissen, ed. *Innovation in Diplomatic Practice* (New York: St. Martin's Press, 1999, 1999), p. 14.
74. E. Satow, op. cit. (1979), p. 108.
75. Article 47 (2) (a) and (b) of the Vienna Convention provides that "(a) [w]here the receiving States applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State; (b) [w]here by custom or agreement States extend to each other more favorable treatment than is required by the provisions of the present Convention," such actions, for purpose of this Convention, will not be regarded as discrimination.
76. E. Denza, *Diplomatic Law* (New York: Oceana Publications, 1976), p. 1.
77. J. Brown, op. cit. (1988), p. 54.
78. These are articles 29–40 of the Vienna Convention on Diplomatic Relations, 1961.
79. E. Denza, op. cit. (1976), p. 136.
80. The word "diplomatic agent" as defined by Article 1 (e) of the 1961 VCDR "is the head of the mission or member of the diplomatic staff of the mission." See J. Brown, "Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations," *International and Comparative Law Quarterly* 37 (1988), pp. 54–55.
81. B. Sen, op. cit. (1988), p. 107.
82. The fourth paragraph of the preamble of the VCDR.
83. The complete version of Article 29 of the VCDR states that "[t]he 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."

84. R. Vark, "Personal Inviolability and Diplomatic Immunity in Respect of Serious Crime," *Juridica International*, 8 (2003), pp. 111–112.
85. L. Oppenheim, op. cit. (2005), pp. 561–562. The incident of the Libyan People's Bureau in London in which a diplomatic agent fired shots into the crowd of demonstrators, killing a British policewoman, Constable Yvonne Fletcher, and injuring eleven people illustrates a classic example. The British government, understanding the implication of inviolability of diplomatic personnel and mission, did not arrest or prosecute the perpetrator, but eventually precipitated a severance of diplomatic relations with the Libyan government by declaring its diplomats persona non grata. See G. V. McClanahan, op. cit. (1989), p. 5; L. S. Farhangi, "Insuring Against Abuse of Diplomatic Immunity," *Stanford Law Review*, 38(6) (1989), pp. 1523–1524.
86. R. G. Feltham, *Diplomatic Handbook*, 5th ed. (London: Longman Group Limited, 1988), p. 42.
87. C. J. Lewis, *State and Diplomatic Immunity*, 3rd ed. (London: Lloyd's of London, 1990), p. 135. The ILC, long before the Vienna Conference for Diplomatic Intercourse and Immunities, a Conference that ushered in the VCDR, has maintained that personal inviolability does not exclude self-defense and, in exceptional circumstances, other measures to prevent a diplomat from committing a crime. See R. Vark, op. cit., p. 111; *ILC Yearbook*, 2 (1958), p. 97.
88. In the celebrated *Case Concerning United States Diplomatic and Consular Staff in Tehran*, the ICJ ordered reparations against the government of the Islamic Republic of Iran for having violated in several respects the diplomatic inviolability and "obligations owed by it to the United States of America under international conventions in force between the two countries, as well as under long-established rules of general international law." See *United States of American v. Iran* (1980), ICJ Reports, p. 44, para. 95 (1).
89. B. Sen, op. cit. (1988), p. 107.
90. Article 37 (1) VCDR.
91. Article 37 (2) VCDR.
92. See the United Nations Treaty Collection, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en [accessed August 6, 2011].
93. Egypt, Morocco, and Qatar do not apply the provisions of Article 37(2).
94. For instance, Iraq and Sudan will only apply Article 37(2) on the basis of reciprocity.
95. Libya, for example, will not be bound by Article 37(3) of the VCDR except on the basis of reciprocity.
96. E. Satow, op. cit. (1979), p. 122.
97. Ibid.
98. Ibid., pp. 122–123.
99. B. Sen, op. cit. (1988), p. 110.
100. Article 1(i) of the 1961 VCDR.
101. Sir G. Fitzmaurice, *Yearbook of the International Law Commission,* Vol. 1 (New York: United Nations, 1957), p. 53.
102. This is contained in Article 30 of the VCDR, which states that "[t]he private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission."
103. B. Sen, op. cit. (1988), p. 111.

104. M. J. L. Hardy, op. cit. (1968), p. 44.
105. *Yearbook of the ILC, 1957*, Vol. II, p. 137; UN Doc. A/CN.4/91, p. 2, Article 12.
106. *Yearbook of the ILC, 1958,* Vol. I, p. 129. Cited in E. Denza, op. cit., p. 83.
107. E. Denza, op. cit. (1976), p. 84.
108. See Commentaries on Article 20 adopted by the International Law Commission at its tenth session.
109. E. Denza, op. cit. (1976), p. 84.
110. See the *Friday Times* website: http://www.thefridaytimes.com/04032011/page26.shtml [accessed on March 15, 2011]; See also *Observer,* February 11, 1973.
111. E. Denza, op. cit. (1976), p. 268.
112. Article 22(2) of the VCDR.
113. *Yearbook of the ILC 1958*, Vol. 2, p. 95.
114. *Guardian*, "Egyptian Protesters Break into Israeli Embassy in Cairo," September 10, 2011, http://www.guardian.co.uk/world/2011/sep/10/egyptian-protesters-israeli-embassy-cairo [accessed October 9, 2011].
115. *Guardian*, "Israel Evacuates Ambassador to Egypt after Embassy Attack," September 10, 2011, http://www.guardian.co.uk/world/2011/sep/10/egypt-declares-state-alert-embassy?INTCMP=ILCNETTXT3487 [accessed October 9, 2011].
116. Moore, *Digest,* Vol. 6, p. 62.
117. This is cited in E. Denza, op. cit., p. 108.
118. E. Denza, op. cit. (1976), p. 110.
119. Article 1(1) (k) of the VCCR.
120. E. Denza, op. cit. (1976), p. 119; E. Satow, op. cit. (1979), p. 116.
121. B. S. Murty, *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order* (New Haven: New Haven Press, 1989), p. 385.
122. There is also an identical provision in Article 35 of the 1961 VCCR.
123. R. G. Feltham, op. cit. (1988), p. 39.
124. E. Denza, op. cit. (1976), p. 120; *Yearbook of the ILC 1957*, Vol. I7, pp. 75–76.
125. E. Satow, op. cit. (1979), p. 116–117.
126. Ibid.
127. Article 27 (1) 1961 VCDR.
128. *UK Treaty Series*, No. 41 (1967), para. 261; *Yearbook of the ILC 1957*, Vol. 2, p. 138.
129. Article 41 (1): "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State." (3) "The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State."
130. A. B. Lyons, "Personal Immunities of Diplomatic Agents," *Brit. YB Int'l L* 31 (1954), p. 334.
131. Diplomatic bags have been defined as "usually large sacks sealed with the official stamps of the sending country and a label identifying the contents as diplomatic." A. Zeidman, "Abuse of the Diplomatic Bag: A Proposed Solution," *Cardozo L. Rev.*, 11 (1989–1990), p. 427 (Footnote 3).

132. *ILC, Report on the 41st Session* (1986), A/41/10, Article 3, para. 1, point (2).
133. See Article 27, para. (2), (3), and (4) of the 1961 VCDR, which state the following:
    (2) The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
    (3) The diplomatic bag shall not be opened or detained.
    (4) The package constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.
134. See the United Nations Treaty Collection available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en [accessed August 6, 2011]. It must be noted, however, that the practice of challenging a consular bag where it is suspected to have contained unauthorised contents is still in operation. See E. Satow, op. cit. (1979), p. 117. See also Article 35 of the 1963 VCCR.
135. Goldberg, "The Shoot-Out at the Libyan Self-Styled People's Bureau: A Case Supported International Terrorism," *S. Dak. L. Rev.*, 30 (1984), p. 1.
136. In May 1982, it was reported that a Thai diplomat smuggled up to twenty million dollars' worth of heroin into the United States in diplomatic bags. See *New York Times*, May 2, 1982, p. A34, col. 1.
137. See *New York Times*, December 2, 1988, p. D1, col. 1, which disclosed that two million dollars were laundered in the United States by using Yugoslav diplomatic channels.
138. See *Economist,* "Nigeria Kidnapping," July 14, 1984, pp. 55–56; see also Davenport, "Mercenaries Held after Kidnap of Doped Nigerian," "Mr. Umaru Dikko (Abduction)" *Hansard,* July 06, 1984 vol. 63 also available at: http://hansard.millbanksystems.com/commons/1984/jul/06/mr-umaru-dikko-abduction [access February 22, 2012];*Times* (London), July 7, 1984, p. 1, col. 2.
139. Brett, "Giving the Diplomatic Rules Some Teeth," *Times* (London), April 28, 1984, at p. 8, col. 2.
140. A. Zeidman, op. cit. (1989–1990), p. 433.
141. B. Sen, op. cit. (1988), p. 136.
142. Article 27(5) of the VCDR.
143. Article 27(6) of the VCDR.
144. Article 27(7) of the VCDR.
145. E. Denza, op. cit. (1976), p. 149.
146. *Reports on Legislative History of the Diplomatic Relations* (96th Cong. 1st Session, 1979), 12.
147. D. B. Michaels, *International Privileges and Immunities: A Case for Universal Statute* (The Hague: Martinus Nijhoff, 1971), p. 50.
148. Article 31 (1) of the VCDR provides that "[a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State."
149. Article 37 of the 1961 VCDR provides that "[t]he members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36."
150. See *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) Judgment, ICJ Reports 2002, p. 3, at para. 54; H. Fox, *The Law of State Immunity*, 2nd ed. (Oxford: OUP, 2008), p. 694.

151. See M. S. Ross, op. cit. (1989), p. 181.
152. (1996) 1 Q.B. p. 426.
153. (1930) 1 K.B. 376.
154. See R. Vark, op. cit. (2003), p. 113.
155. B. Sen, op. cit. (1988), p. 137.
156. It is important to stress that courts in common law countries do not generally exercise jurisdiction over offenses committed while abroad. See M. J. L. Hardy, op. cit. (1968), p. 55.
157. B. Sen, op. cit. (1988), p. 137.
158. B. Sen, op. cit. (1988), p. 140.
159. Ibid.
160. Ibid.
161. In 1958, the International Law Commission took deliberations on whether the draft articles should contain immunity as stated in the original draft: "A diplomatic agent cannot be compelled to appear as a witness before a court" or confer on diplomatic agent an exemption from liability. The Vienna Conference eventually opted for the second option by adopting the proposal of Sir Gerald Fitzmaurice, which was Article 31(2). See E. Denza, op. cit. (1976), pp. 168–169.
162. Article 31(2) of the 1961 VCDR.
163. J. B. Moore, *Digest of International Law*, Vol. 4, p. 642.
164. E. Denza, op. cit. (1976), p. 170.
165. G. R. Berridge, *Diplomacy: Theory and Practice*, 2nd ed. (Hampshire: Palgrave, 2002), p. 114.
166. E. Satow, op. cit. (1979), p. 118.
167. J. Kish, *International Law and Espionage* (The Hague: Kluwer Law International, 1995), p. 59.
168. Official Records, Vol. 1, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole (Geneva 1962), p. 152.
169. Ibid.
170. Ibid.
171. E. Denza, op. cit. (1976), p. 118.
172. A similar provision is also contained in Article 49 of the 1963 VCCR, which states, "Consular officers and consular employees and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal."
173. Article 34(a) of the VCDR.
174. E. Satow, op. cit. (1979), p. 136.
175. Article 34(b) of the VCDR.
176. Article 34(c) of the VCDR.
177. Article 39(4) of the VCDR.
178. B. Sen, op. cit. (1988), p. 176.
179. Article 34(d) of the 1961 VCDR.
180. B. Sen, op. cit. (1988), p. 177.
181. Article 36 of the 1961 VCDR and Article 50 of the 1963 VCCR.
182. Ibid.
183. L. Dembinski, op. cit. (1988), p. 219.
184. Ibid.
185. E. Denza, op. cit. (1976), p. 211; E Satow, op. cit. (1979), p. 137.

186. L. Dembinski, op. cit. (1988), pp. 218–219.
187. Ibid.
188. M. C. Bassiouni, "Protection of Diplomats under Islamic Law," *AJIL*, 74 (1980), p. 611.
189. This is a pilgrimage to Makkah at any other time outside the specified period for the obligatory hajj. Unlike the hajj, which is obligatory, the umrah is only considered a meritorious act of worship. See J. L. Esposito, op. cit. (2003). p. 327.
190. It was narrated by Ibn Ishaq, with a sound chain from Muswar ibn Makhramah and Marwan ibn al-Hakim. According to Bukhari and Ahmad in another narration, this was the reply given by Prophet Muhammad when he was asked by Budayl bin Warqa' Al-Khuza'i what was his mission. See also S. Al-Mubarakpuri, op. cit. (2002), p. 300; S. A. Ali Nadwi, Muhammad Rasulallah (Lucknow, India: Academy of Islamic Research and Publication, 1979), pp. 264–265; Ibn Al-Athir Izzuddin, *Al-Kamil Fil-Tarikh*, Vol. 2 (Beirut: Dar Sadir, 1979), p. 200, cited in Y. Istanbuli, op. cit. (2001), p. 39.
191. M. Al-Ghazali, *Fiqh-Us-Seerah: Understanding the Life of Prophet Muhammad* (Riyadh: International Publishing House, 1999), p. 360.
192. Ibid.
193. See M. H. Haykal, *IRA*, al-Faruqi (tr.), op. cit. (1976), p. 350.
194. All the Muslims took a pledge in the hand of Prophet Muhammad to avenge the death of 'Uthman bin Affan by fighting to the last man. Thus the pledge of Ridwaan, which was taken under the acacia tree, finds a mention in Qur'an 48:18, in which Allah says, "Certainly was Allah pleased with the believers when they pledged allegiance to you [O Muhammad], under the tree, and He knew what was in their hearts."
195. Y. Istanbuli, op. cit. (2001), p. 42.
196. See Ibn Hajar, "Ahmad ibn Muhammad al-'Asqalaani," in Ali Muhammad al-Bajawi (ed.), *Al-Isaaba fi Tamyiz as-Sahaba* (Cairo: Maktabat al-Nahdha, 1392/1972), 1:94; Muhammad ibn Sa'ad, *al-Tabaqaat al-Kubra* (Beirut: Daar Saadir, 1958), 2:95.
197. While converting the treaty into writing, Suhayl insisted that the phrase "in the name of God, the Merciful, the Compassionate" should be removed, saying that he did not reckon with those attributes. He also demanded that the phrase "Muhammad, the Prophet of God" be expunged on the grounds that he had never accepted Muhammad as the Prophet of God. See M. H. Haykal, op. cit., p. 353.
198. M. H. Haykal, op. cit. (1976), p. 352; M. Hamidullah, A. Iqbal (tr.), *The Emergence of Islam* (New Delhi: Adam Publishers and Distributors, 2007), p. 234.
199. Tabari, Abu Ja'far Muhammad ibn Jarir, "Kitaab al-Jihaad wa al-Jizya wa Ahkaam al-Muhaaribun," in Joseph Shacht (ed.), *Ikhtilaaf al-Fuqahaa'* (Leiden: E. J. Brill, 1933), p. 32.
200. M. H. Haykal, op. cit. (1976), pp. 353–354; Y. Istanbuli, op. cit., pp. 42–43; A. M. Salamat, *The Life of Muhammad* (Riyadh: Dar Al-Huda Publishing and Distributing House, 1997), p. 634.
201. M. Hamidullah, op. cit. (2007), p. 234.
202. M. H. Haykal, op. cit. (1976), p. 356.
203. M. Khadduri, op. cit. (1955), p. 212–213.
204. M. H. Haykal, op. cit. (1976), p. 404.

205. M. C. Bassiouni, op. cit. (1980), p. 611.
206. Saba' is also known as Himyar, and according to Ibn Katheer, it was a dynasty in Yemen. See Abi Fidaai Ismaeel Ibn Katheer, *Tafseer al-Qur'an al-'Adheem,* Vol. 3 (Beirut: Dar al-Marefah), p. 373.
207. M. C. Bassiouni, op. cit. (1980), p. 610.
208. Qur'an 27:35.
209. M. C. Bassiouni, op. cit. (1980), p. 610.
210. Qur'an 27: 36–37.
211. H. M. Zawati, op. cit. (2001), p. 77.
212. M. Hamidullah, op. cit. (1961), p. 146.
213. Cited in Abubakr Jabir Al-Jazaa'iri, *Minhaaj Al-Muslim* (Madinah: Maktabat Al-'Ulum wal-Hakam, 1995), p. 112.
214. Cited in M. H. Haykal, op. cit. (1976), p. 354.
215. Sadiq Ibrahim Arjoun, *Khalid Ibn al-Walid* (Jeddah: Dar al Sa'ud'iyah li al Nashr, 1981), p. 244.
216. Evidence of the diplomatic interactions of the Islamic eras, starting from the periods of the first four caliphs (632–661 AD), the Umayyad and the Abbasid dynasties (661–750 AD) down to the Ottoman periods, has been discussed in chapter 2.
217. See I. Shihata, "Islamic Law and the World Community," *Harv. Int'l Club J.*, 4 (1962), p. 109.
218. This was the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference.
219. M. C. Bassiouni, op. cit. (1980), p. 612.
220. M. Hamidullah, op. cit. (1961), p. 147.
221. A. Iqbal, *The Prophet's Diplomacy: The Art of Negotiation as Conceived and Developed by the Prophet of Islam* (Cape Cod, MA: Claude Stark & Co., 1975), pp. 54–55.
222. Ibn Hishaam, *As-Seeratu-n-Nabawiyyah*, Vol. 4 (Al-Monsurah: Darul Gadd al-Jadeed), p. 192.
223. This is the second major battle that Prophet Muhammad and the Muslims fought against the Makkans in 625 AD.
224. See Abu al-Fidaa' al-Hafiiz Ibn Katheer, *al-Bidaaya wal-Nihaaya,* Vol. 4 (Beirut: al-Maktabat al-Ma'aarif, n.d.), 4:17–19. See also Abu Ja'far Muhammad Ibn Jareer al-Tabari, *Tarikh al-Tabari: Tarikh al-Umam wal-Muluk,* Vol. 1 (Beirut: Mu'assasat 'Izz al-Deen lil-Tibaa'a wal-Nashr, 1987), 1:576.
225. A. A. Saif, "Taif," in Michael Dumper and Bruce E. Stanley (eds.), *Cities of The Middle East and North Africa: A Historical Encyclopedia* (Santa Barbara: ABC-CLIO, 2007), p. 342.
226. *Re: Islamisation of Laws Public Notice No. 3 1983* PLD (1985) Federal Shariat Court 344, at p. 354.
227. Partial Translation of Sunan Abu-Dawud, Book 14, Jihad (Kitab al-Jihad), Hadith Number 2752 http://www.muslimaccess.com/sunnah/hadeeth/abudawud/014.html [accessed September 12, 2011].
228. M. Hamidullah, op. cit. (1961), p. 148.
229. Cited in M. C. Bassiouni, op. cit. (1980), p. 612.
230. M. Hamidullah, op. cit. (1961), p. 148.
231. A. Rashid, "Islam et droit des gens," *Recueil des Cours*, Vol. 2 (Paris: Librairie de Recueil Sirey, 1973), p. 498.

232. Y. Istanbulii, op. cit. (2001), p. 146.
233. Ibn Hishaam, op. cit., p. 192.
234. M. A. Gazi (tr.), *Kitab Al-Siyar Al-Kabir: The Shorter Book on Muslim International Law* (New Delhi: Adam Publishers & Distributors, 2004), p. 63; M. Khadduri (tr.), op. cit. (1966), p. 170.
235. See M. A. Gazi (tr.), op. cit. (2004), p. 63. Khadduri's submission that in the event the messenger is unable to produce a confirmation letter from his ruler, "he will be liable to be killed" calls for further clarification as to reference. See M. Khadduri, op. cit. (1955), pp. 165–166.
236. Crimes are designated as *hudud* (sing. *hadd*) when they fall within the categories of "prohibitions ordained by Divine Law [shariah], from which we are restrained by God with punishment decreed by Him; they form an obligation to God." These are offenses with specific punishments contained in the Qur'an and the *Sunnah*, otherwise known as *'uquubaat muqaddarah*. These crimes are theft (*sariqah)*; the drinking of alcohol *(shrub al-khamr);* unlawful sexual intercourse *(zinah)*; false accusation of unlawful sexual intercourse *(qadhf)*; banditry and highway robbery *(hiraabah)*; and apostasy *(ridda)*. See J. L. Esposito, op. cit. (2003), p. 101. See also R. Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: Cambridge University Press, 2005), p. 53, and M. A. Baderin, "Effective Legal Representation in '*Shari'ah*' Courts as a Means of Addressing Human Rights Concerns in the Islamic Criminal Justice System of Muslim States," *Yearbook of Islamic and Middle Eastern Law*, 11 (2004–2005), p. 145.
237. Abu Yusuf, *Al-Radd 'ala Siyar al-Awza'I* Ḥaydarābād al-Dakkan. Lajnat Iḥyā' al-Ma'ārif al-Nu'mānīyah (1938), pp. 80–83.
238. Ibid.
239. M. Khadduri (tr.), op. cit. (1966), 225, p. 172.
240. Ibid., p. 94. See also Abu Ja'far Muhammad Ibn Jarir Tabari, *Ikhtilaaf al-Fuqaaha',* ed. Joseph Schacht (Leiden: Brill, 1933), pp. 56–57.
241. Hamidullah, op. cit. (1961), para. 291.
242. Qur'an 5:45 provides the following: "And We ordained for them therein a life for life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution."
243. M. Munir, "Immunity or Impunity: A Critical Appraisal of the Immunity of Diplomats in International Law and Its Status in Sha'ria," *Journal of Law and Society*, 12(35) (2000), p. 49.
244. Ibn Hishaam, op. cit., p. 192.
245. See Qur'an 2:256, which says, "There shall be no compulsion in [acceptance of] the religion. The right course has become distinct from the wrong." See also Qur'an 18:29, which says, "And say the truth is from your Lord, so whoever wills—let him believe, and whoever wills—let him disbelieve."
246. See Shah, T. S. et al. (eds.), *Rethinking Religion and World Affairs* (Oxford : OUP, 2012), p. 110. See also H. M. Zawati, op. cit. (2001), p. 98.
247. Imam Hafiz Abu Dawud Sulaiman ibn Ash'ath, *English Translation of Sunan Abu Dawud* (Trans. Yaser Qadhi), Vol. 3 Hadith No 3052 (Riyadh: Darussalam, 2008), p. 527. However, this hadith has been categorized as weak because those who narrated it are said to be unknown.
248. See F. Malekian, *Principles of Islamic International Criminal Law: A Comparative Search,* 2nd ed. (Leiden: Koninklijke Brill NV, 2011), p. 112.

249. See M. Hamidullah, op. cit. (1961), pp. 147–148; A. Iqbal, op. cit. (1975), p. 55; M. A. Hamoud, *Diplomacy in Islam: Diplomacy During the Period of Prophet Muhammad* (Jalpur, India: Pricewell, 1994), p. 232; H. M. Zawati, op. cit. (2001), p. 80; and C. Bassiouni, op. cit. (1980), p. 612.
250. M. Hamidullah, op. cit. (1961), p. 148.
251. H. M. Zawati, op. cit. (2001), p. 80.
252. Quoted from Sarakhsi, *Sharh al-Siyar al-Kabeer*, Vol. 4, p. 67, by M. Hamidullah, op. cit. (1961), p. 148.
253. See Qur'an 55:60.
254. Abu Yusuf, *Kitab al-Kharaj* (Beirut: Dar Al-Ma'a refah).
255. Ibid., p. 106.
256. These are freedom of movement; freedom of communication; protection of diplomatic bags and couriers; and inviolability of diplomatic mission and archives, which have been discussed under the conventional principles of diplomatic immunities above.
257. *Nass* denotes either a verse of the Qur'an or a clear, authentic and explicit sunnah of Prophet Muhammad (pbuh).
258. See M. C. Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (Cambridge: CUP, 2014), p. 128. See also A. A. T. Vivian, *Beating Women Is Forbidden in Islam* (Athens: European Research Islamic Centre), p. 5.
259. Y. Al-Qaradawi, *The Lawful and the Prohibited in Islam* (Selangor, Malaysia: Islamic Book Trust, 2013), pp. 5–6.
260. Y. al-Qaradawi, op. cit. (2013), pp. 4–5.
261. This hadith was narrated by Al-Haakim, who classified it as authentic, and it was cited in Y al-Qaradawi, op. cit. (2001), p. 7.
262. Y. al-Qaradawi, op. cit. (2013), p. 6.
263. H. M. Zawati, op. cit. (2001), p. 58.
264. Qur'an 9:6.
265. Ali Ibn Abi Talib was the fourth caliph after the death of Prophet Muhammad.
266. Abu Dawud Sulayman Ibn al-Ash'ath, *Sunan Abi Dawud,* 2 vols. (Beirut: Dar al-Janaan, 1988), 2:93.
267. See L. A. Bsoul, "International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Siyar (Islamic International Law)," PhD diss., McGill University, Montreal, 2003, p. 140.
268. Tabari, *Kitaab al-Jihaad wa al-Jizya wa Ahkaam al-Muhaaribun,* ed. Joseph Shacht (Leiden: Brill, 1933), p. 29. See also Abul-Hassan al-Mawardi, *Al-Ahkam As-Sultaniyyah* [The laws of Islamic governance], tr. Asadullah Yate (London: Ta-Ha Publishers Ltd.), p. 79.
269. See H. M. Zawati, op. cit. (2001), p. 59. See generally Abu Bakr Muhammad Ibn Ahmad al-Qaffaal al-Shaashi, *Hilyat al-'Ulamaa' fi Ma'rifat Madhaahib al-Fuqahaa'*, 8 vols. (Amman: Maktabat al-Risaala al-Haditha, 1988), 3:449; Muhammad Ibn 'Abd al-Waahid Ibn al-Humaam, *Fath al-Qadeer Sharh al-Hidaaya lil-Margheenaani,* 10 vols. (Beirut: Dar al-Fikr, 1990), 4:302.
270. See H. M. Zawati, op. cit. (2001), p. 59.
271. N. Yakoob and A. Mir, "A Contextual Approach to Improving Asylum Law and Practices in the Middle East," in Y. Y. Haddad and B. F. Stowasser (eds.), *Islamic Law and the Challenges of Modernity* (Walnut Creek, CA: Altamira Press, 2004), p. 109.
272. M. Khadduri (1955), op. cit., p. 164.

273. J. Allain, "Acculturation through Middle Ages: The Islamic Law of Nations and Its Place in the History of International Law," in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Cheltenham: Edward Elgar Publishing, 2011), p. 399.
274. *History of Humanity* (London, Routledge: UNESCO, 2000), p. 53.
275. M. A. Boisard, op. cit. (1980), p. 432.
276. Qur'an 9:2 states, "So travel freely, [O disbelievers], throughout the land [during] four months but know that you cannot cause failure to Allah and that will disgrace the disbelievers."
277. H. M. Zawati, op. cit. (2001), p. 60.
278. Ibid.
279. N. Yakoob and A. Mir, op. cit., in Y. Y. Haddad and B. F. Stowasser (eds.), *Islamic Law and the Challenges of Modernity* (Walnut Creek, CA: Altamira Press, 2004), p. 109. See generally L. A. Bsoul, op. cit., pp. 141–143.
280. See M. Khadduri (1955), op. cit., p. 168; see also H. M. Zawati, op. cit. (2001), pp. 60–61.
281. M. C. Bassiouni, op. cit. (1980), p. 613.
282. There are disagreements among Muslim jurists as to the application of the *hudud* penalties against an offending *musta'min*. See generally M. Khadduri (1955), op. cit., pp. 166–167; L. A. Bsoul, op. cit., pp. 151–152; and M. R. Zaman, op. cit., p. 93.
283. M. C. Bassiouni, op. cit. (1980), pp. 613–614.
284. A. K. S. Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford: OUP, 1981), p. 209–210.
285. M. C. Bassiouni, op. cit. (1980), p. 610.
286. Y. Istanbuli, op. cit. (2001), p. 127.
287. B. Lewis, *The Political Language of Islam* (Chicago: University of Chicago Press, 1988), p. 76. See also S. Mahmassani, op. cit., in *Hague Academy of International Law, Recueil Des Cours: Vol. 117 1966/I* (Leiden: Martinus Nijhoff Publishers, 1968), p. 266.

5 Diplomatic Immunity in Muslim States: Islamic Law Perspective on Muslim State Practice

1. The Muslim States are as listed by the Organisation of Islamic Cooperation. See chapter 1 of this volume.
2. It was formerly known as the Libyan Arab Jamahiriya, but following the adoption by the General Assembly of Resolution 66/1, the Permanent Mission of Libya to the United Nations formally notified the UN of a Declaration by the National Transitional Council of August 3, 2011, changing the official name to Libya.
3. It was originally enacted in Pakistan as Diplomatic and Consular Privileges Ordinance XV of 1972 (gazetted on 4–5-1972), but later reenacted and repealed on September 12, 1972 by Diplomatic and Consular Privileges Act as No 9 of 1972. See *A. M. Qureshi v. Union of Soviet Socialist Republics* PLD (1981) SC at p. 396.

4. See Section 4 DCP Act.
5. (1986) 19 SCMR (SC) 907 (Pak.) See also *British High Commission Diplomatic Enclave v. Sajjad Anwar*, 2000 YLR (Lahore) 1833, 1839–40 (Pak.).
6. (1986) 19 SCMR (SC) at p. 915.
7. (1977) P.Cr.L.J. (Lahore), p. 686.
8. Ibid., p. 687.
9. T. Hassan, "Diplomatic or Consular Immunity for Criminal Offences," *Virginia Journal of International Law Online* 2(1) (2011), p. 27.
10. Article 41 (1) of the VCDR. There is also a corresponding provisions in Article 55 (1) of the VCCR.
11. O. Engdahl, *Protection of Personnel in Peace Operation: The Role of the "Safety Convention" against the Background of General International Law* (Leiden: Martinus Nijhoff Publishers, 2007), p. 51.
12. See Article 43 (1) of the VCCR which provides that "consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions." Once the criminal acts are not committed during the performance of their consular functions, they may be liable to prosecuted.
13. See T. J. Gardner and T. M. Anderson, *Criminal Law*, 11th ed. (Belmont: Wadsworth, 2012), p. 160.
14. Article 32 (1) of the VCDR.
15. "US Man Raymond Davis Shot Pakistan Pair in 'Cold Blood,'" *BBC News*, February 11, 2011 available at http://www.bbc.co.uk/news/world-south-asia-12427518 [accessed June 12, 2012].
16. Pakistan Penal Code, Act XLV of 1860, pakistani.org, available at pakistani.org, http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html [accessed June 14, 2012].
17. Press Release, US Embassy in Pakistan, "U.S. Calls for Release of American Diplomat," islamabad.usembassy.gov, January 29, 2011, available at http://islamabad.usembassy.gov/pr_11012901.html [accessed June 12, 2012].
18. Daily Press Briefing, US Department of State, state.gov, February 9, 2011, available at http://www.state.gov/r/pa/prs/dpb/2011/02/156277.htm#PAKISTAN [accessed 12 June, 2012].
19. J. Tapper and L. Ferran, "President Barack Obama: Pakistan Should Honor Immunity for 'Our Diplomat,'" *ABC News*, February 16, 2011, available at http://abcnews.go.com/Blotter/raymond-davis-case-president-barack-obama-urges-pakistan/story?id=12922282 [accessed June 12, 2012].
20. T. Hassan, op. cit. (2011), pp. 19–20.
21. See T. Hassan, op. cit. (2011), p. 23.
22. Ashraf, S. "Raymond Davis Affair: A Case with Global Ramification," RSIS Commentaries No. 033 (March 3, 2011), p. 2; also available at http://dr.ntu.edu.sg/bitstream/handle/10220/7868/RSIS0332011.pdf?sequence=1 [accessed June 15, 2012].
23. Ibid.
24. H. Yusuf, "Dealing with Davis: Inconsistencies in the US-Pakistan Relationship," *Asia Pacific Bulletin*, No. 103, March 28, 2011, p. 1; also available at http://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/19853/APB%20no.%20103.pdf?sequence=1 [accessed June 15, 2012].

25. H. Kopp and C. A. Gillespie, *Career Diplomacy: Life and Work in the U.S. Foreign Service*, 2nd ed. (Washington, DC: Georgetown University Press, 2011), p. 68.
26. S. Ashraf, op. cit. (2011), p. 2.
27. See also Article 45 (1) of the VCCR.
28. Section 3 of the DCP Act, 1972.
29. US Department of State Bureau of Diplomatic Security, "Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities," Publication No. 10524 (Revised July 2011), p. 14, available at http://www.state.gov/documents/organization/150546.pdf [accessed June 17, 2012].
30. Ardeshir Cowasjee, "A Diplomatic Tangle," www.dawn.com/opinion, February 6, 2011, available at http://dawn.com/2011/02/06/a-diplomatic-tangle/ [accessed June 17, 2012].
31. Ibid.
32. J. Preston, "U.S. Asks Pakistan to Lift U.N. Envoy's Immunity after a Violent Quarrel," *New York Times*, January 8, 2003, available at http://www.nytimes.com/2003/01/08/world/us-asks-pakistan-to-lift-un-envoy-s-immunity-after-a-violent-quarrel.html [accessed June 17, 2012].
33. A. Cowasjee, "A Diplomatic Tangle," www.dawn.com/opinion, February 6, 2011, available at http://dawn.com/2011/02/06/a-diplomatic-tangle/ [accessed June 17, 2012].
34. K. Baig, "Raymond Davis, America and Justice," *Express Tribune*, February 20, 2011, available at http://tribune.com.pk/story/121295/raymond-davis-america-and-justice/ [accessed June 17, 2012].
35. T. Hassan, op. cit. (2011), p. 36.
36. Section 310 of the PPC.
37. J. Ditz, "Raymond Davis a CIA Contractor, US Confirms," antiwar.com, February 21, 2011, available at http://news.antiwar.com/2011/02/21/raymond-davis-a-cia-contractor-us-confirms/ [accessed June 18, 2012].
38. *Express Tribune*, "Kerry Meets Political Leadership," February 16, 2011, available at http://tribune.com.pk/story/119713/court-to-decide-raymond-davis-immunity-gilani/ [accessed June 18, 2012]. See also "Raymond Davis and Lahore Shootings-Unanswered Questions," *BBC News*, March 16, 2011, available at http://www.bbc.co.uk/news/world-south-asia-12491288 [accessed June 18, 2012].
39. *Diyat* is defined in Section 299 (e) of the PPC as the compensation specified in Section 323 [of the PPC] payable to the heirs of the victim.
40. "CIA Contractor Ray Davis Freed Over Pakistan Killings," *BBC News*, March 16, 2011, available at http://www.bbc.co.uk/news/world-south-asia-12757244 [accessed June 18, 2012].
41. *Los Angeles Times*, "CIA Contractor Raymond Davis Freed in Pakistan Killings," March 17, 2011, available at http://articles.latimes.com/2011/mar/17/world/la-fg-pakistan-davis-freed-20110317 [accessed June 19, 2012].
42. The word *qisas* has been defined as "punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed *qatl-i-amd* in exercise Of the right of the victim or a *Wali*," in Section 299 (k) of the PPC.
43. Section 299 (m) of the PPC defines *wali* as "a person entitled to claim *qisas*."
44. Section 307(1)(b) of the PPC.

45. This was a statement made by Rana Sanaullah, the Punjab provincial law minister, and reported in *Los Angeles Times,* "CIA Contractor Raymond Davis Freed in Pakistan Killings," March 17, 2011, available at http://articles.latimes.com/2011/mar/17/world/la-fg-pakistan-davis-freed-20110317 [accessed June 19, 2012].
46. Miller, G. and Constable, P. "CIA contractor Raymond Davis freed after 'blood money' payment" *Washington Post*, March 17, 2011, available at http://www.washingtonpost.com/cia-contractor-raymond-davis-freed-after-blood-money-payment/2010/08/19/AByVJ1d_story.html [accessed June 19, 2012].
47. The Pakistan Code of Criminal Procedure, 1898 was amended by Act 2 of 1997.
48. See the explanation of Section 311 of the PPC at www.pakistani.org, http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html#f125` [accessed April 4, 2013].
49. (2000) PCRLJ 1841.
50. T. Hassan, op. cit. (2011), p. 39.
51. This section was originally published in an expanded form as an article by the author entitled "The 1979 United States—Iran Hostage Crisis Reviewed from an Islamic International Law Perspective," *Denver Journal of International Law and Policy* 42(1) (2013), pp. 19–40.
52. See A. Rafat, "The Iran Hostage Crisis and the International Court of Justice: Aspects of the Case Concerning United States Diplomatic and Consular Staff in Tehran," *Denver Journal of International Law and Policy* 10 (1980–1981), p. 426.
53. Now a professor of political science, he was at that time assigned to the US embassy in Tehran, and he happened to be one of those taken as hostage by the Iranian militants in 1979.
54. W. J. Daugherty, "Jimmy Carter and the 1979 Decision to Admit Shah into the United States," unc.edu (2003), http://www.unc.edu/depts/diplomat/archives_roll/2003_01–03/dauherty_shah/dauherty_shah.html [accessed October 17, 2011].
55. See *New York Times*, November 19, 1979, p. 1, col. 6, where it was reported that a woman and two African American men were released on November 18, 1979. Another ten women and an African American man were released on November 19, 1979. See *New York Times*, November 20, 1979, p. 1, col. 4.
56. L. H. Legault, "Hostage-Taking and Diplomatic Immunity," *Manitoba Law Journal* 11 (1980–1981), p. 359.
57. See Order of December 15, 1979, ICJ Reports (granting provisional measures), pp. 10–11.
58. *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ Reports 1980, para. 95, p. 44.
59. Ibid., para. 75, p. 35.
60. C. G. Weeramantry, op. cit. (1988), p. 166.
61. Ibid.
62. *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ Reports 1980 at para. 86, p. 40.
63. It must be noted that the dissenting opinion of Justice Tarazi only related to the grounds of the jurisdiction of the Court and the issue of the responsibility of the Iranian government in the matter of reparations.

64. *United States Diplomatic and Consular Staff in Tehran* (1980), 19 ILM 553 (ICJ).
65. *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ Reports 1980 at para. 17, p. 12.
66. A. Rafat, op. cit. (1980–1981), p. 426; Roling, B. V. A. "Aspects of the Case Concerning United States Diplomatic and Consular Staff in Tehran," *Netherlands Yearbook of International Law* 11 (1980), p. 125.
67. A. Rafat, op. cit. (1980–1981), p. 428.
68. R. Falk, "The Iran Hostage Crisis: Easy Answers and Hard Questions," *AJIL* 74 (1980), pp. 411–412. See also J. Rehman, op. cit. (2005), p. 124.
69. He was an Iranian religious and supreme leader who led the 1979 Iranian Revolution that overthrew the government of Mohammed Reza Pahlavi, the shah of Iran.
70. A. Rafat, op. cit. (1980–1981), p. 427.
71. Ibid., para. 71, pp. 33–34.
72. "Tehran Students Seize U.S Embassy and Hold Hostages," *New York Times*, November 5, 1979, http://www.nytimes.com/learning/general/onthisday/991104onthisday_big.html? [accessed November 22, 2011].
73. Ibid.
74. *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ Reports 1980 at p. 33, para. 70.
75. The choice of Clark may not be unconnected to the fact that he happened to be a relentless critic of the former shah of Iran, and more so, he was known to have indicated his support for the Islamic revolution during his meeting with Ayatollah Khomeini while he (Khomeini) was in exile. See L. S. Vandenbroucke, *Perilous Options: Special Operation as an Instrument of U.S. Foreign Policy* (New York/Oxford: OUP, 1993), p. 117. According to Phillips, the United States placed its trust in the "anti-shah credentials of these two liberals (Clark and Miller)" whom they thought could give them credibility by having the crisis resolved through diplomatic means. See A. Phillips, op. cit., p. 13.
76. *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ Reports 1980 at p. 15, para. 26.
77. Ibid., p. 34, para. 73.
78. Ibid.
79. A. Rafat, op. cit. (1980–1981), p. 427.
80. M. Ayub, *Understanding Islamic Finance* (Oxford: John Wiley & Son, 2007), p. 348.
81. This is a quotation in S. Mahmassani, "Transactions in Shari'a," in M. Khadduri and H. J. Liebesny (eds.), *Origin and Development of Islamic Law* (Clarke, NJ: The Lawbrook Exchange Limited, 2008), p. 187.
82. The VCDR was signed by the Islamic Republic of Iran on May 27, 1961, and also signed by the United States on June 29, 1961. See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en [accessed December 2, 2011].
83. The VCCR was signed on April 24, 1963 by the Islamic Republic of Iran and the United States. See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en [accessed December 2, 2011].

84. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents was adopted by the General Assembly of the UN in New York and opened for signature on December 14, 1973 (United Nations Treaty Series, Vol. 1035, No. 15410). The Convention was ratified by the Islamic Republic of Iran on July 12, 1978, while the United States signed it on December 28, 1973. See http://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xviii/xviii-7.en.pdf [accessed December 2, 2011].
85. Treaty of Amity, Economic Relations and Consular Rights was signed between the governments of the United States and Iran in Tehran on August 15, 1955 and entered into force ion June 16, 1957.
86. See *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ Reports 1980 at para. 8 (a), pp. 5–6. See also A. Rafat, op. cit., pp. 425–426.
87. Articles 22, 24, and 27 of the VCDR, and Articles 31 and 33 of the VCCR.
88. Article 29 of the VCDR, and Article 40 of the VCCR.
89. Article 31 of the VCDR; Article 43 of the VCCR; and Article XVIII of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the Islamic Republic of Iran and the United States of America.
90. Article 37 of the VCDR.
91. Article 26 of the VCDR, and Article 34 of the VCCR.
92. Articles 2 (3), 4, and 7 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.
93. Articles II (4) and XIII of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the Islamic Republic of Iran and the United States of America.
94. Ayatollah Khomeini proclaimed the Iranian Islamic Revolution in February 1979, but Iran was properly voted, constitutionally as an Islamic State, on December 3, 1979. See M. C. Bassiouni, op. cit. (1980), p. 622.
95. The Shia Imamiyyah is the predominant sect in the Islamic Republic of Iran, although there are numerous denominations within the Shia sect. One of the core principles within the Shia Imamiyyah sect is that Prophet Muhammad (pbuh) bestowed his succession on his son-in-law, who was also his cousin, ‘Ali ibn Abu Talib (d. 661). Shias also hold the view that the position of imam, which started with ‘Ali ibn Abu Talib, then continued with his male heirs up to the twelfth imam, Muhammad ibn al-Hassan al-Askari, who was said to have disappeared miraculously upon God’s command in the year 873–874 AD. This, perhaps, explains why the Shia Imamiyyah sect is sometimes referred to as *al-Ithna-Ashariyyah,* the Twelvers. See S. Akhavi, “Shiite Theories of Socia Contract,” in A. Amanat and F. Griffel (eds.), *Shari’a: Islamic Law in the Contemporary Context* (Redwood City, CA: Stanford University Press, 2007), p. 140. See also M. C. Bassiouni, op. cit. (1980), p. 617.
96. The Sunnis, otherwise known as *ahlu-sunnah wal-jama’ah*, which means the people of the tradition of Prophet Muhammad (pbuh) and the consensus of the *ummah*, form the largest group in Islam.
97. S. Habachy, “Right, and Contract in Muslim Law,” *Columbia Law Review* 62 (1962), p. 459.
98. *Saudi Arabia v. Arabian American Oil Company* (ARAMCO),” *ILR* 27 (1963), p. 117.

99. Cited in S. Habachy, op. cit. (1962), p. 452.
100. L. A. Bsoul, "Islamic Diplomacy: Views of the Classical Jurists," in M. Frick and A. T. Muller (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (Leiden: Martinus Nijhoff Publishers, 2013), p. 134.
101. Ibn Taymiyyah, *Majmu'at Fatawa* (1908–1911), p. 331.
102. S. Habachy, op. cit. (1962), p. 451.
103. This is a quotation from S. Habachy, op. cit. (1962), p. 460.
104. Quran 5:1.
105. J. N. D Anderson and N. J. Coulson, "The Moslem Ruler and Contractual Obligations," *NYUL Rev.* 33 (2958), p. 923 See also P. N. Kourides, "The Influence of Islamic Law on Contemporary Middle Eastern Legal System: The Formation and Binding Force of Contracts," *Colum. J. Transnat'l L.* 9 (1980), p. 394.
106. Qur'an 9:4.
107. See Qur'an 2:100, which says, "Is it not [true] that every time they took a covenant a party of them threw it away? But, [in fact], most of them do not believe."
108. G. W. Heck, *When Worlds Collide: Exploring the Ideological and Political Foundations of the Clash of Civilizations* (New York: Rowman & Littlefield, 2007), p. 170.
109. Muhammad ibn Isa Tirmidhi, *Sahih al-Tirmidhi*, vol. 6 (Cairo: al-Matba'a al-Misriyya bil-Azhar, 1931), p. 104.
110. Cited in M. H. Haykal, op. cit., p. 354.
111. M. Hamidullah, op. cit. (1961), p. 102.
112. See footnotes 78, 79, 80, and 81 of this chapter confirming that the Islamic Republic of Iran was indeed a signatory to the following treaties: VCDR; VCCR; 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; and 1955 Treaty of Amity, Economic Relations, and Consular Rights.
113. M. C. Bassiouni, op. cit. (1980), p. 615.
114. Qur'an 8:58.
115. Article 41 of the VCDR provides that "[w]ithout prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving States. They also have a duty not to interfere in the internal affairs of that State."
116. L. H. Legault, op. cit. (1980–1981), p. 359.
117. J. C. Barker, op. cit. (2006), p. 8.
118. A. Adib-Moghaddam, *The International Politics of the Persian Gulf: A Cultural Genealogy* (Oxon: Routledge, 2006), p. 25.
119. R. Falk, op. cit. (1980), p. 411.
120. L. A. Bsoul, "Islamic Diplomacy: Views of the Islamic Jurists," in M. Frick and A. T. Muller (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (Leiden: Martinus Nijhoff Publishers, 2013), p. 134.
121. M. Hamidullah, op. cit. (1961), p. 147.
122. M. C. Bassiouni, op. cit. (1980), p. 618.
123. See generally Qur'an 27:35–37.
124. M. C. Bassiouni, op. cit. (1980), p. 610.
125. Ibid., pp. 610–611.

126. J. Rehman, op. cit. (2005), p. 117.
127. Ibn Hisham, *As-Seeratu-n-Nabawiyyah*, Vol. 4 (Al-Monsurah: Darul Gadd al-Jadeed, 2005), p. 192.
128. H. M. Zawati, op. cit. (2001), p. 80.
129. Imam Hafiz Abu Dawud Sulaiman ibn Ash'ath, *English Translation of Sunan Abu Dawud* (Trans. Yaser Qadhi), Vol. 3 Hadith No 2758 (Riyadh: Darussalam, 2008), p. 352Also available at: http://www.muslimaccess.com/sunnah/hadeeth/abudawud/014.html [accessed December 29, 2011].
130. Ibid.
131. Article 3 (16), 1979 Constitution of the Islamic Republic of Iran.
132. *New Zealand Herald*, "Death to Britain"—Embassy Stormed in Iran," November 30, 2011, http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10769789 [accessed January 16, 2012]; *Daily Telegram,* December 1, 2011, p. 29, para. 8.
133. "Iranian Protesters Attack British Embassy" *The New York Times,* November 29, 2011 available at http://www.nytimes.com/2011/11/30/world/middleeast/tehran-protesters-storm-british-embassy.html?_r=0 [access January 30, 2012].
134. *Guardian*, "Iran Protesters Attack UK Embassy in Tehran—Tuesday 29 November," November 29, 2011, http://www.guardian.co.uk/world/blog/2011/nov/29/iran-protesters-attack-uk-embassy-tehran-live#block-1 [accessed January 16, 2012].
135. See S. Habachy, op. cit., p. 451. See also *Saudi Arabia v. Arabian American Oil Company* (ARAMCO), *ILR* 27 (1963), p. 117, cited in S Habachy, op. cit., p. 452.
136. *Guardian*, "Iran Protesters Attack UK Embassy in Tehran—Tuesday 29 November," November 29, 2011, http://www.guardian.co.uk/world/blog/2011/nov/29/iran-protesters-attack-uk-embassy-tehran-live#block-1.
137. *Case Concerning United States Diplomatic and Consular Staff in Tehran,* Judgment (1980) ICJ Reports, p. 5, para. 5.
138. Ibid., p. 8, para. 10.
139. Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*), Order of December 15, 1979, [1979] ICJ Reports, pp. 10–11.
140. Ibid.
141. *Case Concerning United States Diplomatic and Consular Staff in Tehran,* Judgment (1980) ICJ Reports, para 10, pp. 8–9.
142. Ibid.
143. Ibid., para. 73, p. 34.
144. See J. Rehman, op. cit. (2005), p. 119.
145. M. C. Bassiouni, op. cit. (1980), p. 610.
146. *Case Concerning United States Diplomatic and Consular Staff in Tehran,* Judgment (1980) ICJ Reports, p. 34, para. 73.
147. These are offenses that are not specifically mentioned in the Qur'an and the *Sunnah,* but the Islamic penal system empowers the state and judges to impose punishments on these forbidden acts, which are accordingly designated as *ta'azir.* By reason of its flexibility, offenses that are most likely to fall under *ta'azir* have been considered to be much wider in scope than those of *huduud* or *qisaas.* See R. Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: CUP, 2005), p. 65.

148. M. C. Bassiouni, op. cit. (1980), pp. 623–624.
149. These are crimes for which punishments are specified and decreed by the Qur'an and the *Sunnah* of the Prophet, otherwise known as *'uquubaat muqaddarah*. See S. H. Ibrahim, "Basic Principles of Criminal Procedure under Islamic Shari'a," in M. A. Abdel Haleem et al. (eds.), *Criminal Justice in Islam: Judicial Procedure in the Shari'a* (London: I. B. Tauris London, 2003), p. 18.
150. Unlike *huduud* offenses that in the main are considered to involve the rights of God (*huquq-llaah*), *qisaas* offenses, also referred to as retaliation, concern the rights of man. The offenses that fall under the *qisaas* are five, (a) murder (b) voluntary killing (c) involuntary killing (d) intentional physical injury or maiming, and (e) unintentional physical injury or maiming. See M. Tamadonfar, "Islam, Law, and Political Control in Contemporary Iran," *Journal for the Scientific Study of Religion* 40 (2001), p. 212.
151. G. Benmelha, "Ta'azir Crimes," in M. C. Bassiouni (ed.), *The Islamic Criminal Justice System* (London: Oceana Publications, 1982), pp. 211–225 at p. 212.
152. Ibid.
153. J. Rehman, op. cit. (2005), p. 123.
154. *Time*, January 7, 1980, p. 27.
155. Ibid.
156. J. T. Southwick, "Abuse of Diplomatic Privilege and Immunity: Compensatory and Restrictive Reforms," *Syr. J. Int'l L. & Com.* 15 (1988), p. 83.
157. L. Dembinski, op. cit. (1988), p. 201.
158. The 1973 encounter between the Iraqi embassy, Islamabad, and the Pakistani authorities. See L. Dembinski, op. cit., p. 194; J. Rehman, op. cit., pp. 126–127; see also generally R. Khan, *The American Papers: Secret and Confidential Indian-Pakistani-Bagladeshi Documents 1965–1973* (Karachi: OU, 1999). On the case of an Israeli diplomatic agent who was found drugged and sealed in a diplomatic bag by the Egyptian embassy in Rome in 1964, see D. J. Harris, *Cases and Materials on International Law,* 5th ed. (London: Sweet & Maxwell, 1998), pp. 355–356. On the Umaru Dikko case, in which the Nigerian High Commission, London, was involved in an attempt to smuggle him out of London by dumping him into a crate designated for the Ministry of External Affairs, Federal Republic of Nigeria, but without any official markings or seal as required by Article 27 of the VCDR, see "Mr. Umaru Dikko (Abduction)" *Hansard,* July 6, 1984 vol. 63 also available at: http://hansard.millbanksystems.com/commons/1984/jul/06/mr-umaru-dikko-abduction [access February 22, 2012]. See also Apple, R. W., "London Holding 9 in Nigerian Drama," *The New York Times*, July 7, 1984 also available at: http://www.nytimes.com/1984/07/07/world/london-holding-9-in-nigerian-drama.html [accessed July 01, 2012]; A. M. Farahmand, "Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses," *Journal of Legislation* 16 (1989), p. 98.
159. J. Rehman, op. cit., p. 126.
160. Article 41(1) of the 1961 VCDR provides that "[w]ithout prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State."
161. A. M. Farahmand, op. cit. (1989), p. 97. See also L. S. Farhangi, "Insuring against Abuse of Diplomatic Immunity," *Stanford Law Review* 38 (1986), p. 1523, in which he broadly categorized abuses of diplomatic immunity into

two parts: a) the use of the diplomatic bag to smuggle illegal goods into or out of the receiving state, and b) crimes committed by the diplomats themselves.

162. R. Higgins, "Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience," *AJIL* 79 (1985), p. 642.
163. On February 18, 1984, some so-called revolutionary committees took over the affairs of the Libyan Embassy and had it renamed as the Libyan People's Bureau with the alleged support of Colonel Muammar Gaddafi. See R. Higgins, op. cit., p. 643. See also Y. Ronen, "Libyan Conflict with Britain: Analysis of Diplomatic Rupture," *Middle Eastern Studies*, 42(2) (2006), p. 272; "The Foreign Affairs Committee Reports, *ICLQ* 34 (1985), p. 610.
164. Colonel Gaddafi was determined to crush any opposition against his regime, which he strongly believed must survive. On April 16, 1984, two students from Tripoli University were killed by public hanging for engaging in "antirevolutionary activity." See Y. Ronen, op. cit., p. 274.
165. *Feder, B. J. "British Break off Libyan Relations Over London Siege" The New York Times, April 23, 1984.*
166. W. E. Smith, "Libya's Ministry of Fear," *Time*, April 30, 1984, p. 36.
167. R. Higgins, op. cit. (1985), p. 643. Also see J. S. Beaumont, "Self-Defence as a Justification for Disregarding Diplomatic Immunity," *Can. Y.B. Int'l L.* 29 (1991), p. 393.
168. See J. C. Sweeney, "State Sponsored Terrorism: Libya's Abuse of Diplomatic Privileges and Immunities," *Dick. J. Int'l L.* 5(1) (1986), p. 135; S. L. Wright, "Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts," *B. U. Int'l L. J.* 5 (1987), pp. 179–180; A. M. Farahmand, op. cit. (1989), p. 98; J. Rehman, op. cit. (2005), p. 127; A. J. Goldberg, "The Shoot-Out at the Libyan Self-Styled People's Bureau: A Case of State Supported International Terrorism," *S. D. L. Rev.* 30 (1984), p. 1.
169. See J. C. Barker, *International Law and International Relations* (London: Continuum, 2000), p. 160. See also "Foreign Affairs Committee Reports," *ICLQ* 34 (1985), p. 610.
170. "Foreign Affairs Committee Reports," *ICLQ* 34 (1985), p. 610.
171. Ibid., p. 614; J. C. Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil* (Aldershot: Dartmouth, 1996), p. 4.
172. A. J. Goldberg, op. cit., p. 1.
173. See particularly chapter 4 of this book.
174. It was adopted by the Seventh Islamic Conference of Foreign Ministers, held in Istanbul, Republic of Turkey, from Jamad Al-Awal 13–16, 1396H (May 12–15, 1976).
175. Article 41(1) of the 1961 VCDR.
176. Article 41(3) of the 1961 VCDR.
177. C. G. Weeramantry, op. cit. (1988), at p. 141.
178. For instance, the Egyptian government acted quickly in rescuing the Israeli embassy from attacks at the hands of demonstrators in 2011. The said rescue earned the Egyptian authorities a beautiful remark from the Israeli Deputy Ambassador: "'[t]hat the government of Egypt ultimately acted to rescue our people is noteworthy and we are thankful." See *Guardian*, "Israel Evacuates Ambassador to Egypt after Embassy Attack," September 10, 2011, http://www.guardian.co.uk/world/2011/sep/10/egypt-declares-state-alert-embassy?INTCMP=ILCNETTXT3487 [accessed on January 25, 2012].

6 Terrorist Attacks on Diplomatic Institutions: Jihad and Islamic Law Viewpoints

1. B. Zagaris and D. Simonetti, "Judicial Assistance under U.S. Bilateral Treaties" in M. C. Bassiouni (ed.), *Legal Responses to International Terrorism: U.S. Procedural Aspects* (London: Kluwer Academic Publishers, 1988), p. 219.
2. B. M. Jenkins, *Diplomats on the Front Line* (Santa Monica, CA: Rand Corporation, 1982), p. 1.
3. J. Rehman, op. cit. (2005), p. 71.
4. D. A. Schwartz, "International Terrorism and Islamic Law," *Columbia Journal of Transnational Law* 29 (1991), p. 630.
5. See D. Muhlhausen and J. B. McNeil, "Terror Trends: 40 Years' Data on International and Domestic Terrorism" (Heritage Special Report), p. 1, May 20, 2011, available on http://report.heritage.org/sr0093 [accessed on 01/02/2012].
6. Ibid., p. 2.
7. *Annex of Statistical Information 2012,* National Consortium for the Study of Terrorism and Responses to Terrorism, A Department of Homeland Security Science and Technology Centre of Excellence Based at the University of Maryland, May 2013, p. 9.
8. John L. Esposito, *Unholy War: Terror in the Name of Islam* (New York: Oxford University Press, 2002), p. 151. See also Schwartz, "Terrorism and Islamic Law," p. 630.
9. Khadduri (spelled as Elie Kedourie), "Political Terrorism in the Muslim World," in Benjamin Netanyahu (ed.), *Terrorism: How the West Can Win* (New York: The Jonathan Institute, 1986), p. 70.
10. See Randall D. Law, *Terrorism: A History* (Cambridge: Polity Press, 2009), pp. 1 and 5.
11. Niaz A. Shah, *Self-Defense in Islamic and International Law: Assessing Al-Qaeda and the Invasion of Iraq* (New York: Palgrave Macmillan, 2008), p. 47.
12. Muslim States are states that are predominantly Muslim majority, which also include states that specifically declare themselves as "Islamic Republics" and those states that declare Islam, in their constitutions, as the states' religion. See M. A. Baderin, *International Human Rights and Islamic Law* (Oxford: OUP, 2003), p. 8.
13. See Ben Golder and George Williams, "What Is 'Terrorism'? Problem of Legal Definition," *UNSW Law Journal* 27(2) (2004), p. 270. See also Jonathan Weinberger, "Defining Terror," *Seton Hall J. Dipl. & Int'l Rel.* 4, (2003), p. 63.
14. E. Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism," *AJIL* 97 (2003), p. 334.
15. A. Cassese, "The Multifaceted Criminal Notion of Terrorism in International Law," in K. L. H. Samuel and N. D. White, *Counter-Terrorism and International Law* (Hampshire: Ashgate Publishing, 2012), p. 46.
16. This was in a speech delivered by the former British Ambassador to the UN, Sir Jeremy Greenstock, following the pathetic incident of September 11, 2001. See J. Collins, "Terrorism," in J. Collins and R. Glover (eds.), *Collateral*

Language: A User's Guide to America's New War (New York: New York University Press, 2002), pp. 167–168.

17. In 1937, the League of Nations, which later became known as the UN, made an attempt to define the word terrorism following the assassination of King Alexander I of Yugoslavia in 1934. See B. Saul, "The Legal Response of the League of Nations to Terrorism," *J Int'l Criminal Justice* 4 (2006), p. 79; G. Gullaume, "Terrorism and International Law," *ICLQ* 53 (2004), p. 538.
18. The Convention for the Prevention and Punishment of Terrorism was signed on November 16, 1937 with twenty-four States as signatories, while India was the only country that ratified it. See *League of Nations Official Journal* 19 (1938), p. 23. See also J. Borricand, "France's Responses to Terrorism," in R. Higgins and M. Flory (eds.), op. cit., p. 145.
19. That was when a working group was formed by the UN General Assembly following the incident of September 11, 2001, charged with the task of developing a comprehensive convention on international terrorism.
20. Measure to Eliminate International Terrorism: Report of the Working Group, U.N. GAOR 6th Comm., 55th Sess., Agenda Item 164 at 39, U.N. Doc. A/C.6/55/L.2 (2002).
21. G. Guillaume, "Terrorism and International Law," *ICLQ* 53 (2004), p. 539.
22. S. P. Subedi, "The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law," *International Law Forum du droit International* 4 (2002), p. 163.
23. Article 2 (a) of the Convention of the OIC on Combating International Terrorism provides that "[p]eoples struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime."
24. See J. Friedrichs, "Defining the International Public Enemy: The Political Struggle Behind the Legal Debate on International Terrorism," *Leiden Journal of International Law* 19 (2006), p. 75. See also N. Rastow, "Before and After: The Changed UN Response to Terrorism Since September 11th," *Cornell Int'l L.J.* 35 (2002), p. 488.
25. S. P. Subedi, op cit., p. 163.
26. Sami Zeidan, "Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism," *Cornell Int'l L. J.* 36 (2004), p. 492.
27. Rehman, *Islamic State Practices*, p. 71.
28. Alex P. Schmid, "Frameworks for Conceptualising Terrorism," *Terrorism and Political Violence* 16(2) (2004), p. 197.
29. Rehman, *Islamic State Practices*, p. 73.
30. Ibid., 74.
31. See Hall Gardener, *American Global Strategy and the "War on Terror"* (Hampshire: Ashgate Publishing, 2005), p. 74. See also Omer Elagab, *International Documents Relating to Terrorism* (London: Cavendish, 1995), p. iii.
32. Levitt, "Worth Defining," p. 109.
33. Rosalyn Higgins, "The General International Law of Terrorism," in Rosalyn Higgins and Maurice Flory (eds.), *Terrorism and International Law* (London: Routledge, 1997), p. 16.

34. R. Baxter, "A Skeptical Look at the Concept of Terrorism," *Akron Law Review* 7 (1974), p. 380.
35. Rosalyn Higgins, "The General International Law of Terrorism," in Rosalyn Higgins and Maurice Flory (eds.), *Terrorism and International Law* (New York: Routledge, 1997), p. 28.
36. James M. Lutz and Brenda J. Lutz, *Global Terrorism,* 2nd ed. (New York: Routledge, 2008), p. 14.
37. UN General Assembly, *Measures to Eliminate International Terrorism, The Secretary-General's Report*, A/48/267/Add.I, September 21, 1993, p. 2.
38. J. L. Esposito, "Political Islam: Beyond the Green Menace" (originally published in the journal *Current History*, January 1994), available at http://islam.uga.edu/espo.html [accessed March 11, 2012].
39. N. A. Shah, op cit. (2008), p. 13.
40. M. Cappi, *A Never Ending War* (Victoria: Trafford Publishing, 2007), p. 138. David Bukay also claims that Islam and most especially jihad is the root cause of terrorism as "[a]ll Muslims suicide bombers justify their actions" by referring to it. D. Bukay, "The Religious Foundations of Suicide Bombing: Islamist Ideology," *Middle East Quarterly* 13 (2006), p. 27, [article online] available at http://www.meforum.org/1003/the-religious-foundations-of-suicide-bombings [accessed March 14, 2012].
41. S. C. King, *Living with Terrorism* (Bloomington: Authorhouse, 2007), pp. 70–71. Also, Robert Pape, a renowned authority on suicide terrorism, asserts that "suicide terrorism is mainly the product of foreign military occupation…It is not, as the conventional wisdom holds, mostly a product of religious extremism independent of political circumstances." R. A. Pape, "Methods and Findings in the Study of Suicide Terrorism," *American Political Science Review* 102 (2008), p. 275.
42. R. Mushkat, "Is War Ever Justifiable? A Comparative Survey," *Loyola L. A. Int'l & Comp. L. J.* 9 (1987), pp. 302–303.
43. For instance, see Abu al-Hasan al-Mawardi, *al-Ahkaam al-Sultaaniyyah wal-Wilayaat al-Diniyyah* (Cairo: Dar al-Fikr Lil-Tiba'a wal-Nashr, 1983), pp. 32–58; Abu al-Walid Muhammad Ibn Rushd, *Bidaayat al-Mujtahid wa Nihaayat al-Muqtasid,* 2 vols (Beirut: Dar al-Ma'rifa, 1986), pp. 380–407; Abu Ya'la al-Farraa', *al-Ahkaam al-Sultaaniyyah* (Cairo: Matba'at Mustafaa al-Baabi al-Halabi, 1938), pp. 23–44; 'Alaa al-Din al-Kaasaani, *Kitaab Badaa'i al-Sanaa'i fi Tartib al-Sharaa'i,* 7 vols. (Cairo: al-Matba'a al-Jamaaliyyah, 1910), pp. 7: 97–142.
44. See H. M. Zawati, op cit. (2001), p. 13.
45. M. Khadduri, op cit. (1966), p. 15.
46. R. Peters, *Jihad in Mediaeval and Modern Islam* (Leiden: E. J. Brill, 1977), p. 4.
47. J. Badawi, "Muslim/Non-Muslim Relations: An Integrative Approach," *J. Islamic L. & Culture* 8 (2003), p. 38.
48. Ibid. See also H. M. Zawati, op cit. (2001), pp. 13–14; S. Mahmassani, op. cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I* (Leiden: Martinus Nijhoff Publishers, 1968), p. 280; N. A. Shah, op. cit. (2008), p. 14; J. Rehman, "Islamic Criminal Justice and International Terrorism: A Comparative Perspective into Modern Islamic State Practices," *J. Islamic St. Prac. Int'l L.* 2 (2006), p. 21; N. Mohammad, "The Doctrine of

Jihad: An Introduction," *Journal of Law and Religion* 3 (1985), p. 385; D. A. Schwartz, op. cit. (1991), pp. 641–642.

49. J. Badawi, op. cit. (2003), p. 39. See also P. Ahmed, "Terror in the Name of Islam-Unholy War, Not Jihad," *Case Western Reserve Journal of International Law* 39 (2007/2008), p. 769.
50. J. Rehman, op cit. (2006), p. 19. See also M. C. Bassiouni, "Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime Change Political Violence," *Chi. J. Int'l. L.* 8 (2007–2007), pp. 122–123.
51. S. Mahmassani, op. cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I* (Leiden: Martinus Nijhoff Publishers, 1968), p. 280.
52. Al-Kaasaani, op cit., vol. 7, p. 97.
53. Qur'an 61: 10–11.
54. J. L. Esposito, op. cit., in L. Richardson (ed.), *The Roots of Terrorism* (Oxon: Routledge, 2006), p. 149.
55. N. A. Shah, op. cit. (2008), p. 14.
56. Ibid.
57. Ibid. See also D. E. Arzt, "The Role of Compulsion in Islamic Conversion: Jihad, Dhimma and Ridda," *Buff. Hum. Rts. L. Rev.* 8 (2002), p. 20.
58. M. Khadduri, op. cit. (1955), p. 56.
59. P. Ahmed, op. cit. (2007–2008), p. 770.
60. See Ali b. Uthman al-Jullabi al-Hujwiri, *The Kashf al-Mahjub (the Oldest Persian Treatise on Sufism by al-Hujwiri)*, trans. R.A. Nicholson (London: Luzac, 1976), p. 200. Also cited in A. A. An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse, NY: Syracuse University Press, 1990), p. 145; P. Ahmed, op. cit. (2007–2008), p. 770.
61. 'Azzam vehemently criticized this narration, "which people quote on the basis that it is a hadith, is in fact a false, fabricated hadith that has no basis. It is only a saying of Ibrahim Ibn Abi 'Abalah, one of the Successors, and it contradicts textual evidence and reality." He also quoted Ibn Taymiyyah as saying that "[t]his hadith has no sources and nobody whomsoever in the field of Islamic knowledge has narrated it." See A. 'Azzam, *Ilhaq bil Qalifah—Join the Caravan* (1988), pp. 26–27, available at http://www.hoor-al-ayn.com/Books/Join%20the%20Caravan.pdf [accessed March 26, 2012]. See D. E. Streusand, "What Does Jihad Mean?", *Middle East Quarterly* 4(3) (1997), pp. 9–17, available on line at http://www.meforum.org/357/what-does-jihad-mean?iframe=true&width=100%&height=100% [accessed March 26, 2012]; See generally A. McGregor, "'Jihad and the Riffle Alone': 'Abdullah 'Azzam and the Islamic Revolution," *Journal of Conflict Studies* 23(2) (2003). Also available at http://journals.hil.unb.ca/index.php/JCS/article/viewArticle/219/377 [accessed March 26, 2012].
62. Cited in A. A. An-Na'im, op. cit. (1990), p. 145, quoting from Al-Kaya Al-Harasiy, *Ahkam al-Qur'an* (Beirut: Al-Maktaba al-'Ilmiya, 1983).
63. P. Ahmed, op. cit. (2007–2008), p. 770.
64. See H. M. Zawati, op. cit. (2001), p. 12; S. S. Ali and J. Rehman, "The Concept of Jihad in Islamic International Law," *Journal of Conflict & Security Law* 10 (2005), p. 331.
65. Shams al-Islam Ahmad Ibn Taymiyyah, "Qaa'ida fi Qitaal al-Kuffaar," in Muhammad Haamidal-Faqi, *Majmu'at Rasaa'il Ibn Taymiyyah* (Cairo: Matba'at al-Sunnah al-Muhammadiyyah, 1949), pp. 116–117.

66. That was on September 9, 622 AD, when Prophet Muhammad and his followers migrated from Makkah to Madinah in order to escape from the Makkans' persecution.
67. J. L. Esposito, *What Everyone Needs to Know about Islam* (Oxford: OUP, 2002), p. 120.
68. S. S. Ali and J. Rehman, op. cit. (2005), pp. 331–332.
69. Ibid., p. 332.
70. Qur'an 22:39–40.
71. A. L. Silverman, "Just War, Jihad, and Terrorism: A Comparison of Western and Islamic Norms for the Use of Political Violence," *J. Church & St.* 44 (2002), p. 78.
72. S. C. Tucker (ed.), *The Encyclopaedia of Middle East Wars: The United States in the Persian Gulf, Afghanistan, and Iraq Conflicts,* vol. 1 (Santa Barbara: ABC-CLIO, 2010), p. 653.
73. Qur'an 2:190.
74. His full name was Abu Al-Fidaa' Isma'il ibn Katheer. He was the author of the famous commentary on the Qur'an entitled 'Tafseer al-Qur'an al-'Azeem'.
75. Abu Fidaa' Isma'il ibn Katheer, *Tafseer al-Qur'an al-'Azeem,* Vols. 1 and 2 (Beirut: Dar al-Marefah, 1995), pp. 233 and 235 respectively.
76. Qur'an 2:256.
77. J. Badawi, op. cit. (2003), p. 40.
78. N. A. Shah, op. cit. (2008), p. 17.
79. Qur'an8:61.
80. M. Khadduri, op. cit. (1966), p. 13.
81. Qur'an 60:8.
82. N. A. Shah, op. cit. (2008), p. 15.
83. J. L. Esposito, op. cit. (2002), p. 121.
84. Qur'an 9:5.
85. M. Munir, op. cit. (2003), p. 375.
86. See M. Munir, op. cit., p. 378, who also cited W. Zuhayli, *Al-'Alaqaat Al-Dawliyyah fi Al-Islaam* (1984), p. 94.
87. M. H. Kamali, op. cit. (1991), p. 111.
88. Abu Al-Fidaa' Isma'il Ibn Katheer, *Tafseer Al-Qur'an Al-'Azeem*, Vol. 1 (Beirut: Dar Al-Ma'rifah, 1995), p. 233.
89. Qur'an 9:36.
90. Abu Al-Fidaa' Isma'il Ibn Katheer, op. cit., p. 233.
91. J. L. Esposito, op. cit. (2002), p. 35.
92. Sayyid Qutb was an Egyptian author, Islamic theorist, and a leading member of the Egyptian Muslim Brotherhood. He was executed by hanging on August 29, 1966, by Egyptian president Gamal Abdel Nasser.
93. Sayyid Qutb, *In the Shade of the Qur'an*, Vol. 8, Surah 9, available at http://archive.org/details/InTheShadeOfTheQuranSayyidQutb [accessed April 5, 2013].
94. A. Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (New York: Palgrave Macmillan, 2011), p. 48.
95. Qur'an 9:29.
96. See S. Qutb, *Fi Zilaal al_Qur'an,* vol. 3 (Cairo: Daar al-Shuruq, 1417/1996), pp. 1619–1650.
97. O. Bakircioglu, "A Socio-Legal Analysis of the Concept of Jihad," *International & Comparative Law Quarterly* 59(2) (2010), p. 432.

98. See ibid., p. 65. See also Abu Al-Fidaa' Isma'il Ibn Katheer, op. cit., Vol. 2, pp. 360–361; H. A. Adil, *Muhammad, the Messenger of Islam: His Life and Prophecy* (Washington, DC: Islamic Supreme Council of America, 2002), pp. 533–537.
99. M. Munir, op. cit. (2003), p. 378.
100. N. A. Shah, op. cit. (2008), p. 20.
101. Ibid.
102. O. Bakircioglu, op. cit. (2010), p. 427.
103. A. A. Sachedina, "The Development of *Jihad* in Islamic Revelation and History," in J. T. Johnson and J. Kelsay (eds.), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood, 1990), p. 43.
104. Qur'an 60:8.
105. H. M. Zawati, op. cit. (2001), p. 15; S. Mahmassani, op. cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I* (Leiden: Martinus Nijhoff Publishers, 1968), p. 281; R. H. Salmi et al., *Islam and Conflict Resolution: Theories and Practices* (Lanham: University Press of America, 1998), p. 71.
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107. Qur'an 9:122.
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7 Conclusion

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5. It refers to the 1979 seizure of the US Embassy by the Islamic Republic of Iran.
6. Referring to the 1986 killing of a British woman police officer, Yvonne Fletcher, by an alleged diplomat from the Libyan Embassy, London (popularly known as the Libyan People's Bureau).
7. See Article 41 (1) and (3) of the 1961 VCDR.
8. See para. 3 of the preamble to the 1961 VCDR.
9. See Article 1(4) of the Charter of the UN, http://www.un.org/en/documents/charter/chapter1.shtml [accessed on the December 30, 2009].
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11. Ibid., p. 1.
12. Ibid.

Glossary of Selected Arabic Terms

'Ilmul-hadith	Science of hadith
'Umrah	Lesser pilgrimage
'Urf	Custom
Ahl al-qitaal	Combatants
Ahlul-Kitaab	Adherents to faith who have revealed scripture
Aman	Safe conduct
Asl	(pl. Usuul) Root or source
Daleel	Proof indication or evidence
Dar al-harb	Abode of war
Dar al-hiyad	Abode of neutrality
Dar al-Islaam	Abode of peace
Dar as-sulh	Abode of treaty
Daruriyyaat	Indispensable interests
Dhimmi	Non-Muslim under the protection of Islamic law
Diyat	Blood money
Faqih	(Pl. Fuqahaa') Muslim jurist
Ghayr ahl al-qitaal	Noncombatants
Haajiyyaat	Things needed for effective functioning of the community
Haraam	Things declared prohibited in the Qur'an and the *Sunnah*
Hijrah	Migration of Prophet Muhammad (pbuh) from Makkah to Madinah
Hiraabah	Highway robbery or the act of terrorism
Huduud	Prohibitions ordained by the Qur'an and the *Sunnah*
Hukmu	Islamic ruling
Ijmaa'	Consensus opinion
Ijtihaad	Independent reasoning
Istihsaan	Juristic preference
Istishaabul-haal	Presumption of continuity of a rule
Jihad	Legal warfare according to Islamic law
Jizyah	Poll tax levied on non-Muslims
Madhhab	(Pl. Madhaahib) School of Islamic jurisprudence
Maqaasid al-shari'ah	Objectives of the sharia
Maslahah	Public interest
Mu'aahadaat	Treaties or contracts between states
Mu'aamalaat	Commercial or civil dealings in Islamic law
Mu'aamalaat	Interhuman relations

Muhaaribun	Those who terrorize innocent people
Mujtahid	Qualified legal scholar
Musta'min	non-Muslim who has safety passage within an Islamic state
Muwaada'a/ Muhaadana	Peace treaty
Nass	An explicit statement in the Qur'an or Hadith
Qaadi al-Qudaat	Chief Justice
Qadhf	False accusation of unlawful sexual intercourse
Qat'ii	Definitive texts of the Qur'an
Qisaas	Retribution
Qiyaas	Deduction of legal opinion from the Qur'an or Hadith by analogical reasoning
Rasul	Messenger of Allah. Generally it means a herald
Ridda	Apostasy
Saafir	A diplomatic envoy
Saddudh-dharii'ah	Blocking lawful means to an unlawful end
Sariqah	The offense of theft
Shrub al-khamr	Drinking of alcohol or any intoxicating substance
Siyar	Generally refers to Islamic international law
Sunnah	Prophetic tradition
Ta'azir	Crimes that are categorized as discretionary
Tahsiniyyaat	Complementary things to perfect community condition
Taqrir	Tacit approval
Ummah	Muslim community
Ustuwanaat al-Wufuud	The pillars of embassies
Zanni	Speculative texts of the Qur'an
Zinah	Unlawful sexual intercourse

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