

# HEINONLINE

Citation: 74 Am. J. Int'l L. 609 1980



Content downloaded/printed from [HeinOnline](#)

Wed Nov 23 18:53:07 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

# PROTECTION OF DIPLOMATS UNDER ISLAMIC LAW

By M. Cherif Bassiouni\*

## I. SOURCES OF THE LEGAL PROTECTION OF DIPLOMATS

The International Court of Justice has examined the seizure and detention of United States diplomats and members of their staff by a group of militant "students" in Tehran from the point of view of international law.<sup>1</sup> But it is also of interest to inquire into the legal status of these acts under Islamic law, which the Islamic Republic of Iran adopted with its Constitution of 1979, and under Islamic international law, which is used here to mean that aspect of the *Shari'a*<sup>2</sup> and its practice by Islamic countries toward other countries.

The *Quran* (Koran) and the *Sunnah* (Sunna), the two principal sources of Islamic law,<sup>3</sup> and the consistent practice of Muslim heads of state (*Khalifas*), a secondary source, clearly establish the privileges and immunities of diplomats in Islamic law and practice. The Koran and the Sunna contain numerous references to the protection and immunity of diplomats (referred to in these sources, as well as in the writings of scholars, as emissaries, envoys, deputations, delegations, and embassies) their staff, and accompanying persons. Throughout these sources of Islamic law diplomats are entitled to

\* Professor of Law, DePaul University College of Law; Secretary-General, International Association of Penal Law; Dean, International Institute of Higher Studies in Criminal Sciences.

This article was written while the author was a consultant to the Department of State, and a special counsel to the Lawyers' Committee For Civil Rights Under Law, but the views expressed herein are solely those of the author, who acknowledges the support of Roberts B. Owen, Legal Adviser, Department of State, and John B. Jones, Jr., cochairman of the Lawyers' Committee. In connection with the research, the author obtained the assistance of the following scholars, to whom he acknowledges his gratitude: Sheikh Dr. Zakaria el-Berri, Professor and Chairman, Department of Sharia, The University of Cairo Law Faculty and Minister of Islamic Waqfs; Sheikh Dr. Hassan el-Shazli, Professor of Sharia and Associate Dean, Sharia Faculty, Al-Azhar University; Dr. Gaafar Abdel-Salam, Associate Professor of International Law, Sharia Faculty, Al-Azhar University; Dr. A. F. Sorour, Professor and Chairman, Department of Criminal Law, The University of Cairo, Faculty of Law; Dr. A. Mahdi, Associate Professor and Chairman, Department of Criminal Law, Mansourah University, Faculty of Law; Dr. Y. Aly, Professor and Chairman, Department of Criminal Law, The University of Ein-Shams, Faculty of Law.

<sup>1</sup> Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Order of Dec. 15, 1979, [1979] ICJ REP. 7, *reprinted in* 74 AJIL 266 (1980); Judgment of May 24, 1980, *reprinted infra* at p. 746. For the U.S. position, see Memorial of the Government of the United States of America to the International Court of Justice, January 1980.

<sup>2</sup> This term is synonymous with Islamic law.

<sup>3</sup> Bassiouni, *Islam: Concept, Law and World Habeas Corpus*, 1 RUT.-CAM. L.J. 163 (1969) [hereinafter cited as Bassiouni, *Islam*]. References to the Sunna are not always cited because they appear in so many diverse sources. The most widely recognized source is AL-BUKHARI, but its many editions in Arabic make it difficult to give a useful cite to the reader. The cites from the Sunna are all certain or *Moakada*, and there is no dispute over its authoritativeness.

immunity from prosecution, freedom from arbitrary arrest and detention, and proper care and treatment.

In addition, Islamic law permits the head of state (the *Khalifa* or Imam) to enter into treaties binding the Islamic state. In this context, the 1961 Vienna Convention on Diplomatic Relations<sup>4</sup> and the 1963 Vienna Convention on Consular Relations<sup>5</sup> extend to diplomats absolute immunity from arrest, detention, and prosecution. Nothing under Islamic law precludes immunity by treaty, and Iran as a signatory to these conventions is bound by their terms not only under international law, but also under the *Shari'a*.

The Koran contains several references to the concept of *Aman*, or safe conduct, which is in part the basis of diplomatic immunity. 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 benefiting from the *Aman* is also the beneficiary of other forms of legal protection and privileges. While, in the view of some commentators, there is an exception to the concept of the absolute immunity of diplomats for their commission of *Hudud* crimes,<sup>6</sup> there is no specific statement in the Koran or Sunna of that exception. In any event, *Hudud* crimes are not at issue in this case, and therefore the immunity of the detainees is, to the extent stated above, unqualified under the Koran and the Sunna.

The Koran in *Surat al-Naml* (27:23–44) supports that proposition in its description of the exchange of envoys between the prophet Sulaiman (Solomon) (992–952 B.C.) and Bilqis, Queen of Sheba. Bilqis is described as having sent a delegation bearing gifts to Sulaiman, who considered it an insult (an attempt to bribe him). Sulaiman rejected the gifts and sent the delegation back. In the same *Surat*, it is stated (by Bilqis):

But I am going to send him a present, and wait to see with what answer my ambassadors return. [27:35.]

[the response of Sulaiman]

Go back to them, and be sure we shall come to them with such haste as they will never be able to meet: we shall expel them from there in disgrace, and they will feel humiliated. [27:37.]

These verses clearly indicate that emissaries were contemplated as the ordinary means of diplomatic communications between Muslim and non-Muslim heads of state, and 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. Thus, even when Sulaiman was offended, he did nothing against the emissaries but send them back whence they came.

There is therefore a dual Koranic mandate that no Muslim state may transgress: protection must be granted to envoys, and expulsion is the only

<sup>4</sup> 500 UNTS 95, 23 UST 3227, TIAS No. 7502 [hereinafter referred to as the 1961 Diplomatic Convention].

<sup>5</sup> 596 UNTS 261 [hereinafter referred to as the 1963 Consular Convention].

<sup>6</sup> See *infra* pp. 623–25, and A. OUDA, *infra* note 46, vol. 1, pp. 324–25.

sanction to be taken against them. These mandates also are clearly expressed in the Sunna, which will be discussed below.

The Treaty of Hudaibiya was signed between Prophet Muhammad and the Quraish tribe of Mecca in A.D. 628. In the course of the negotiations, the Prophet used two emissaries who went to Mecca on successive occasions to establish a basis for the treaty. One of them was Othman ibn Affan, who later became the third *Khalifa* (after the Prophet), succeeding Omar ibn al-Khattab. When word reached the Prophet that Othman had been killed, notwithstanding the fact that as an emissary he should have been secure in all respects, the negotiations were deemed broken and the Islamic forces readied to attack. It was deemed a *casus belli*. The Quraishis made it known that Othman was safe and that his person as an emissary was inviolate. This news resulted in the reopening of the negotiations. The Quraishis then sent to the Prophet their negotiator, Suhayl, who was treated as an inviolate ambassador. The Treaty of Hudaibiya was signed by the Prophet and Suhayl. It is noteworthy that Ali ibn Abi-Taleb, who was the scrivener of the treaty, also signed it as a witness. Ali became the fourth *Khalifa* after the Prophet and is the person the Shiite Muslims (who predominate in Iran) most revere and believe to be the legitimate heir to the Prophet.<sup>7</sup>

The Treaty of Hudaibiya and its negotiating history demonstrate the sanctity of emissaries, that a violation of an ambassador's immunity is a *casus belli*, and that no ambassador may be detained or harmed. That these events were witnessed by Ali ibn Abi-Taleb makes them of greater significance to the Shias. The treaty and its negotiated history also establish that in Islam the principle of *pacta sunt servanda* is recognized and has been faithfully adhered to in practice.<sup>8</sup>

Subsequent to the Treaty of Hudaibiya, when the Prophet went to war against the Quraishis in Mecca, the Islamic precedent of sanctuary, similar to that of modern embassies, was established. Before attacking Mecca, the Prophet announced:

O Quraish! This is Muhammad, who has come to you with a force you cannot resist. He who enters Abu-Sufyan's house is safe and he who locks himself up is safe and he who enters the Mosque is safe.

(The Prophet then declared amnesty for all Meccans who had fought and opposed him.)

After the taking of Mecca, many emissaries and deputations went to the city, and others were sent by the Prophet and his successors to non-Muslim rulers. The deputations received by the Prophet between A.D. 630 and 631 enjoyed not only immunity but preferred treatment, which applied to the

<sup>7</sup> See *infra* pp. 617-19.

<sup>8</sup> See also the earlier treaty of the Prophet with the Jewish tribes of Yathrib-Medina of A.D. 625, in IBN-KHALDUN, MUQUADDIMAT IBN KHALDUN (Prolegomenon) 126 (1858); and see IBN KHALDUN, KITAB AL-IBAR WA-DIWAN AL-MUBTADA WA-IKHBAR; AYYAM AL-ARAB, etc. (ed. Nasr al-Hurini, 7 vols., 1867). Ibn Khaldun's approach to the philosophy of law is discussed in M. MAHDI, IBN KHALDUN'S PHILOSOPHY OF HISTORY (1964). See further M. WATT, MUHAMMAD AT MEDINA 221-25 (1956).

envoys and to their staff and servants. They were not to be molested, mistreated, imprisoned, or killed.<sup>9</sup>

Envoys also enjoyed freedom of religion, as is demonstrated by the delegation of Christians of Najran who held their services in a mosque.<sup>10</sup> Tabari, in his encyclopedic study *History (Tarikh)*, recounts that only under extraordinary circumstances may envoys be detained and imprisoned, and that would be in the form of specific reprisals in kind. The case in point is the Prophet's detention, but without physical harm, of the envoys of Mecca during the negotiations on the Treaty of Hudaibiya because the Meccans had detained his emissaries. He did so only to secure the release of the detained emissaries, and when they were released, the Meccans were, too.<sup>11</sup> In fact, so great was the Prophet's belief in the immunity of envoys that during that period when Abu-Ra'fi, the emissary of Quraish, wanted to convert to Islam, the Prophet admonished him:

I do not go back on my word and I do not detain envoys [you are an ambassador]. You must, therefore, go back, and if you still feel in your heart as strongly about Islam as you do now, come back [as a Muslim].

These practices were followed by the Prophet at a time when inviolability of envoys was ill recognized in the Arabian Peninsula. The Prophet also followed these practices in the case of Wahshi, the Abyssinian ambassador who had previously killed one of the Prophet's uncles. When Wahshi presented his credentials, the Prophet made it known that non-Muslims would judge Islam by its treatment of foreign envoys, and consequently foreign envoys should be accorded the same treatment as Muslim envoys.

Diplomatic immunity also is exemplified by the Prophet's reception and treatment of the Taif delegation in A.D. 631. In earlier times, when he had gone there to propagate Islam, the Prophet had been ill treated by the people of Taif, but his treatment of their delegation was a further affirmation that envoys were to be received in accordance with their privileged status. Irrespective of the sending country or past relations with its people, envoys remained inviolate, even in the case of a people and its leaders who had earlier wronged Islam and the Prophet himself.

Other examples are the delegations from Bani-Saad, Bani-Tayyi, and Bani-Tamim. The latter, notwithstanding their paganism and frivolity during the negotiations, were treated with deference and courtesy, and remained inviolate.

The deputation from Bani-Hanifa is another landmark case. Its leader was Musailima bin Habib, a notorious liar nicknamed *al-Kadhab* (the Liar), but the Prophet ordered that he be treated as an equal. During the negotiations, Musailima sent the Prophet a message through two emissaries to the effect that he, Musailima, and not Muhammad, was the true Prophet of God.

<sup>9</sup> See further, discussion hereinafter at pp. 612-17, and for a history of the privileges of envoys, SHAMS-EL-DIN EL-SARAHSY, *AL-MABSUT* 320 (n.d.) and *SIRAT AL-RASUL* (The Annals of the Prophet) (n.d.); ABDUL-RAHMAN AL-TABARI, *TARIKH* (History or Annals) (n.d.) [hereinafter referred to as *TABARI*]; A. IQBAL, *DIPLOMACY IN ISLAM* (1965); and M. HAMIDULLAH, *CORPUS DES TRAITÉS ET LETTRES DIPLOMATIQUES D'ISLAM À L'ÉPOQUE DU PROPHÈTE ET DES CALIFES ORTHODOXES* (1935).

<sup>10</sup> KORAN 41:5.

<sup>11</sup> *TABARI, supra* note 9.

Upon its receipt, the Prophet asked the emissaries whether they agreed with the content. They replied that they did and the Prophet responded:

By God, were it not that messengers are not to be killed, I would behead the both of you.<sup>12</sup>

This response clearly establishes the inviolability of even those envoys who commit transgressions.

Two more deputations deserve note, that of the Kings of Himyar, who were polytheists, and that of Kinda, which is reported to have come with 80 armed riders to the Prophet while he was in the mosque in Mecca; they were treated with regard despite having come in such an offensive manner.

The Prophet's sayings and practices clearly establish the principle of diplomatic immunity and do not in any way place a limit on it, which is in keeping with the Koran.

Probably the most telling statement of the Prophet on the importance attached by Islamic law to the immunity of diplomats is one in which he characterized the seizure of a diplomat as a *casus belli*. In that *Hadith*, which contains the Prophet's message to the people of Asqof Aylah, he said:

If you want the land and the sea to believe, then obey God and His Prophets, and if you reject them [the emissaries sent] but do not return them, I will not accept anything from you until I fight you [emphasis added].<sup>13</sup>

The writings of many noted scholars indicate that envoys, ambassadors, deputations, delegations, and emissaries to and from the world of Islam have been numerous throughout its history. These diplomats enjoyed immunity for themselves, and for their families, staff, and servants. M. Hamidullah states: "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."<sup>14</sup>

That practice has been continued by Muslim states in their contemporary international relations and certainly without exception since their acceptance of the two Vienna Conventions of 1961 and 1963 on diplomatic and consular relations.

### *The Extent of Aman and Immunity in Time of Peace*

The principle of diplomatic immunity, and its extent, is derived from the Koran and the Sunna. It is also implicit in the concept of *Aman* (safe conduct, which is guaranteed in the Koran for non-Muslims). While *Aman* contains limits on what the *Musta'min* may and may not do, there is nothing

<sup>12</sup> SIRAT AL-RASUL, *supra* note 9, at 649.

<sup>13</sup> AL RAWD AL-NADIR 301. For a contemporary position relying on traditional precedents, see G. ABDEL-SALAM in 2 AL-WASIT FI AL-QANUN AL-DAWLI AL-AM 18 (A Manual of Public International Law) (1979). See also, e.g., M. HAMIDULLAH, CORPUS, *supra* note 9, and CONDUCT, *infra* note 14.

<sup>14</sup> M. HAMIDULLAH, MUSLIM CONDUCT OF STATE 139 (4th ed. 1961) [hereinafter referred to as HAMIDULLAH, CONDUCT]. A major historical source is TABARI, *supra* note 9. See generally IBN AL-FARRA, KITAB RUSUL AL-MULUK (The Book of the Envoys of the Kings) (Salah el-din al-Munajjid ed., n.d.); ABOUL-FEDA'S HISTORY: TARIKH ABOUL-FEDA (I. Washington trans., 1965).

in the Koran or Sunna to indicate that diplomatic immunity is anything less than absolute. A distinction must therefore be drawn between the *Musta'min's* rights and the diplomat's immunity. The former is not immune from the criminal jurisdiction of the state, while the latter is.<sup>15</sup> The *Musta'min* may be prosecuted for all crimes, including *Taazir* offenses, but the diplomat may not, especially for *Taazir* offenses<sup>16</sup> (as is discussed below).

Specifically, the *Koran* states in *Surat al-Nissaa* 4:58:

*God commands you to render back your trusts to those to whom they are due, and to be just when you judge between man and man [emphasis added].*

*Aman* is a trust and it must not be breached. The duty is to return the person (or object) in question to the status quo ante. This position is also made clear in other Koranic mandates. Among these is *Surat al-Tawba* 9:6:

*If a pagan asks you for asylum, grant it to him, so that he may hear the word of God, and then escort him to where he can be secure [emphasis added].*

Thus, security must be given to the asker, and safe return must follow.

The Prophet also referred to this principle in many sayings (*Hadith*) in the Sunna, as well as through his deeds. In one such *Hadith* he stated:

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

An even more affirmative position is taken by authoritative Shiite sources referring to the practice and sayings of Ali ibn Abi-Taleb that a non-Muslim who repudiates his treaty or pledge with Muslims should not be killed, but should be returned to where he can be secure. In addition, respect for the life, security, and property of non-Muslims who have *Aman* is binding on all Muslims, as is their safe return.<sup>17</sup>

### *The Islamic International Law of Diplomatic Immunity*

Islamic law recognizes the binding nature of treaties in accordance with the maxim *pacta sunt servanda*.<sup>18</sup> Nothing is clearer than the following words of the Koran in *Surat al-Israa* 17:34:

<sup>15</sup> See generally *Siyar al-Shaybani*, translated as *THE ISLAMIC LAW OF NATIONS* (Khadduri ed. & tr., 1966); M. KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* (1955); *LAW IN THE MIDDLE EAST* 36 (Khadduri & Liebesny, eds., 1955); HAMIDULLAH, *supra* note 14. See also J. SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 130-31 (1965). But see A. OUDA, *infra* note 46, vol. 1, at 324-25.

<sup>16</sup> According to some scholars, the diplomat is immune from the jurisdiction of the state except for *Hudud* crimes. See *infra* pp. 623-25 and accompanying text. This category of offenses is irrelevant to the case of the American detainees since their alleged offense is "spying," which is a *Taazir* offense subject to diplomatic immunity. See also A. F. BAHNASI, *AL-JARA'IM FIL-FIQH AL-ISLAMI* (Crimes in the Jurisprudence of Islam) 245-55 (A.H. 1388, A.D. 1968).

<sup>17</sup> See the Jaafari jurisconsult, Sheikh Abul-Quasem Negm-el-din Jaafar ibn-al-Hassan el-Helli (d. A.H. 676) in *AL-MUHTASSAN AL-NAFEH* (The Approved and the Useful) 112 (n.d.), and his *SHARA'I AL-ISLAM*, 4 vols. (n.d., ed. Abdel-Husayn Ali, a noted Shiite authority).

<sup>18</sup> Among the many contemporary authorities, see generally T. AL-GHUNAIMI, *THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH* (1968); HAMIDULLAH,

And perform your Covenant [promises]; verily the Covenant shall be enquired of [you shall be responsible for it].

Also:

You who believe fulfill all obligations.

And *Surat al-Maeda* 5:1 states:

Fulfill the contracts you have made, . . . such are the people of truth who fear God.

*Surat al-Baqara* 3:177 denounces the breach of covenants and observes at 3:100:

Every time they make a Covenant, some party among them throws it aside. Why, most of them are faithless.

The Prophet also said in that respect in a *Hadith*:

The Muslims are bound by their obligations, except an obligation that renders the lawful unlawful, and the unlawful lawful.

The Prophet applied that principle in his international relations when he entered into the treaties discussed above.

While a treaty may not derogate from the *Shari'a*, it can and does have precedence over all laws except the Koran and the Sunna. Treaties concerning the protection of diplomats are therefore within the *Shari'a*, and a Muslim state like Iran, which is signatory to the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, is bound by these treaties under Islamic international law. Thus, the *Shari'a* makes these treaties binding and they become applicable in themselves (self-executing).

The Vienna Conventions provide absolute immunity to diplomats and prohibit their arrest, detention, and prosecution. Iran is bound by these treaties under contemporary conventional international law as well as under Islamic international law, which requires fulfillment of treaty obligations as stated above.

The immunities provided in the 1961 Convention on Diplomatic Relations are, *inter alia*:

- (1) Article 29, the inviolability of diplomats, including their arrest and detention;
- (2) Article 31, immunity from criminal prosecution of the diplomats;
- (3) Article 37, immunity from criminal prosecution of the administrative and technical personnel of the mission; and
- (4) Articles 22, 24, and 27, on the inviolability of the diplomatic premises and the correspondence and archives.

---

CONDUCT, *supra* note 14; N. ARMANAZI, L'ISLAM ET LE DROIT INTERNATIONAL (1929); Reshid, *L'Islam et le droit des gens*, 60 RECUEIL DES COURS 4-30 (1937 II); Draz, *Le Droit international public de l'Islam*, 5 REV. EGYPTIENNE DROIT INT'L 17 (1949); Majid, *The Moslem International Law*, 28 L. REV. Q. 89 (1912); Rabbath, *Pour une théorie du droit international musulman*, 6 REV. EGYPTIENNE DROIT INT'L 1 (1950).



The 1963 Convention on Consular Relations in Articles 41 and 43 grants immunity to consular officers and employees for acts performed within the course of their duties. To emphasize the importance of these immunities and protections, the 1961 Convention on Diplomatic Relations requires a signatory state under Article 29 to take "all appropriate steps" and to use "all practical means" to protect diplomats. These provisions of the conventions are compatible with Islamic law and binding upon Iran. Their violation constitutes a violation not only of conventional international law but also of Islamic international law. Other sources of binding international law are discussed below in section V.

### *Permissible Sanctions Against Diplomats in Islamic Law*

A diplomat's immunity under Islamic law precludes his arrest or detention, except perhaps for *Hudud* crimes, a possibility acknowledged by some scholars but not specifically by the Koran and Sunna.<sup>19</sup> *Hudud* crimes, however, do not include spying or any related crimes allegedly committed by the detainees in Iran.

A diplomat's functions, as stated and practiced in the Sunna, are very much like those of today, except for differences brought about by modern technology. This similarity is evidenced by the Prophet's frequent practice of sending off diplomatic delegations during his 10 years as Islam's leader. His directives to his emissaries were "to work patiently, avoid harshness toward others, give good tidings to other people, [and] not to incite hostility toward themselves or their mission."<sup>20</sup> These directives are very much in keeping with traditional diplomacy throughout the world. It might be argued that activities outside that scope are not considered diplomatic, and the question therefore arises as to the appropriate sanctions. In such cases a diplomat's immunity is terminated and he is expelled.

In the cases described above, notwithstanding transgressions by the emissaries, no action was taken against them except expulsion. There are cases of detention of diplomats as reprisals against the seizure of Muslim diplomats by the sending state, but these are not analogous to the Iranian case. There is no known case in the records of the first four decades of the Islamic state concerning a spying diplomat.<sup>21</sup> This does not mean that they did not exist, but only that if caught they would have been expelled.

As stated above, the nondiplomat having *Aman* may be expelled, and thus restored to security or the status quo ante. If, however, there is an existing

<sup>19</sup> See *infra* pp. 623–25. *Musta'min*: Imam Abu-Hanifa held that a *Musta'min* could not be prosecuted for a crime involving the rights of God or society except for a *Had* crime, but only for transgressions against the rights of individuals for which *Diya* or compensation was the appropriate remedy. See IBN HUMAN, 4 SHARH FATH EL-QUADIRE 152–56 (1st ed. A.H. 1313) (an explanation of Islamic jurisprudence according to the Hanafi school on which the Shias rely heavily); and KASANI, *infra* note 42, vol. IV, at 131–33.

<sup>20</sup> See SIRAT AL-RASUL, *supra* note 9, at 647–48, 655–57.

<sup>21</sup> See Hamidullah's annotated compilation in *Corpus*, *supra* note 11, of the treaties and diplomatic correspondence at the time of the Prophet and the first four Caliphs, including the Caliphate of Ali ibn Ali-Tabi, whom the Shias consider the most authoritative source after the Prophet.

treaty between the state of nationality of the *Must'amin* and the Muslim state, the expulsion must be preceded by a renunciation of the treaty, and no treachery must be involved on the part of the Muslims. Thus, the Koran states in *Surat al-Anfal* 8:58:

If you fear treachery from any group, throw back their Covenants to them, so as to be on equal terms, for God does not like the treacherous.

Ali ibn Abi-Taleb repeatedly emphasized the odiousness of treachery and his unconditional adherence to the sanctity of obligation, especially *Aman* in keeping with the Koran and Sunna. He stressed that treacherous persons, particularly envoys, can only be expelled.

The sanction of expulsion is also the permissible sanction under the two Vienna Conventions. Because no other sanction is permissible under Islamic law, Islamic international law, or conventional international law, the continued holding of the detainees is clearly an impermissible and unlawful act.

## II. THE SHIITE DOCTRINE OF DIPLOMATIC IMMUNITY AND THE SHARI'A

The *Imamiyah Shi'a* is the majority sect in Iran.<sup>22</sup> Its philosophical views, though different from those of the Sunni and even other Shias, do not depart in any substantial respects from the *Shari'a* as interpreted by the Sunni.<sup>23</sup> These Shias are also sometimes called *al-Ithna-Ashariya* (the Twelvers) because they believe that twelve Imams, counting Ali as the first, appeared on earth and that the last, Muhammad ibn al-Hassan al-Askari, who is called *al-Mahdi* (the Guided), entered an underground chamber in a hill in the year A.H. 260 and disappeared. According to Shiite belief, he is to reappear at the end of time and will fill the earth with justice.<sup>24</sup> While the last Imam remains occulted, his agents, the *mujtahedeen*, are expected by their *ijtihad* (supreme effort and endeavor) to arrive at a complete knowledge of the Koran and the Sunna. (The Sunnis, however, have not relied on *ijtihad* since the ninth century.)

This sect of Islam is also known as *al-Shi'a al-Imamiyah* because it believes in the infallibility of the Imam and in the coming of *al-Mahdi*.

The essential distinction between the Shiite and Sunni doctrines lies in the claim to the *Khilafa* (the succession) and the powers of the Imam. The Shias claim that Ali ibn Abi-Taleb, cousin and son-in-law of the Prophet, had a more legitimate claim to the *Khilafa* than all the others and that it should have been inherited by the heirs of the Prophet, thus Ali and his descendants. Disagreement between Sunnis, who believe in an elective *Khalifa*, and

<sup>22</sup> A. MASSIGNON, *ANNUAIRE DU MONDE MUSULMAN* 24, 38 (1929).

<sup>23</sup> See generally H. CORBIN, *EN ISLAM IRANIEN* (1972). The sources of Islamic law presented in this discussion are the Koran and the Sunna, which are unquestionable sources in Shiite doctrine. As for the Sunna, reference is made only to the *Sunnah Moakada* (affirmed), related through descendants of the Prophet as *al-Akhbar* (The News or Annals), which is required by all schools of the Shiite sect. There is therefore nothing in the sources and authorities from the Koran and the Sunna cited in section I *supra* that is not accepted and binding on Iran's Shias.

<sup>24</sup> H. CORBIN, note 23 *supra*. For two noted Shiite authors, see MUHAMMAD JAWAD MAGHNIYAH, *FIQH AL-IMAM JAA'FAR AL-SADIQ* (1965) (The Legal Science of Imam Jaa'far al-Sadiq); and RUSHDI ALYAN, *AL-AQL IND AL-SHIA* (1973) (Legal Reasoning in Shia).

the Shias, who believe in succession, was therefore mainly political and has remained so throughout the history of Islam. Otherwise, there are basically few differences between the two schools as to the sources of Islamic law and the interpretation of the Koran.

The sources of law, according to the *Imamiyah Shi'a* school, are: (1) the Koran; (2) the Sunna (the tradition of the Prophet); (3) *Ijma* (consensus); and, to some, (4) *Ijtihad* (analogy).<sup>25</sup>

With respect to the Sunna, the Shias accept only those traditions whose source of authority can be traced to the family of the Prophet. They call such traditions *al-Akhbar* (the news or narratives).<sup>26</sup> The Shias only accept *Ijma* (consensus) if it emanates from the family of the Prophet or if the *Ulema* (learned theologians) who reached it received the approval of the infallible Shiite Imam. Consensus to them "is the consensus which embodies the views of the infallible *Imam* and not merely the agreement of the *Ulema* on an opinion."<sup>27</sup> As regards *Ijtihad* (analogy), it is forbidden according to the *Akhbariyan* sect but accepted by the *Usuliyyun* sect.<sup>28</sup>

The *Imamiyah* school is attributed to the Imam Jaa'far al-Sadiq (A.H. 80 or 83–148) and thus is called *al-Madhab al-Jaa'fari*. It is the largest of the Shiite sects and most of its followers are in Iran. It has been the official school of the Iranian state since the beginning of the reign of the Safavid dynasty in A.H. 907 (A.D. 1501).<sup>29</sup> Its concept of diplomatic immunity is the same as the Sunni concept discussed above, because it is predicated on clear and repeated enunciations in the Koran and the Sunna.

As to the writings of scholars, one of the Shias' influential sources is the Sunni Imam Abu-Hanifa (who died in Baghdad in A.D. 766). His principal disciple in jurisprudence was Shaybani (d. A.D. 805), whose *Siyars* (case studies) clearly state that diplomats are entitled to immunity.<sup>30</sup> Another authoritative source supporting the same proposition is Mawardi, who compiled a record of Islamic rulings and practices and was an eminent judge and scholar in Baghdad. His major work is *Al-Ahkam al-Sultaniya* (A.D. 1058).<sup>31</sup> Mawardi also sets forth the principles and practices of diplomatic immunity adhered to by the Shias. In addition, a more contemporary author is Tusi, whose works are still studied in Iran's Shiite school of Islamic *Fiqh*. He holds the same position, *i.e.*, that *Aman* or safe conduct is a binding obligation and to break it is a sin.<sup>32</sup> Thus, the *Aman* given United States diplomats in Iran could not be broken, but since it was, a sin was committed, and sins are also crimes in Islam. In the *Al-Mabsut*, Tusi makes the same point:

<sup>25</sup> SHAHRASTANI, *AL-MILAL WAL-NIHAL* (The Sects and their Divisions) (printed on the margin of) 2 *IBN HAZM'S AL-FISAL* (The Principles of Judgment) (A.H. 1347–48).

<sup>26</sup> M. BAQUIR, *HAL AL-'UQL* 44 (n.d.); M. M. AL-KAZIMI, 2 *ANAWIN AL-USUL* (The Headings of Principles) 7 (A.H. 1342).

<sup>27</sup> See A. FYZEE, *Shi'i Legal Theories* in Khadduri & Liebesny, eds., *supra* note 15, at 112.

<sup>28</sup> AL-HILLI, *AL-MUHAQQIQ*, 1 *TADHKIRAT AL-FUQQAHA* (Recollections of the Philosophers) (n.d.); and *supra* note 17.

<sup>29</sup> H. CORBIN, *supra* note 23.

<sup>30</sup> The *Siyars* were translated by M. Khadduri as *The Muslim Law of Nations* and published in 1966.

<sup>31</sup> This book was translated into French by Z. Fagnan in 1915.

<sup>32</sup> SHEIKH AL-TAYEFEH AL-TUSI, 1 *AN-NIHAYA* (The Ending or the Conclusion) 30 (A.H. 1342).

It is the tradition of followers of our [*i.e.*, the Shi'ite] school of law that if unbelievers seek the protection of Muslims and the Muslims say: "We do not grant you protection," and the unbelievers [mistakenly] presume that they have safe conduct, a Muslim will not place any obstacle in their way; on the contrary, they should be returned to places where they are secure. . . .<sup>33</sup>

The same principle applies in time of both war and peace, and even in cases of error or mistake. Tusi states:

If a Muslim has not intended to give a guarantee of safe conduct, [his words] do not constitute such a guarantee; except that, if unbelievers should have confidence that such statements have been made to them, and enter the territory of the Muslims, no obstacle will be placed in their way because it was an error based on a reasonable presumption. They will be returned to places where they are secure, becoming [again part of the] non-Muslim foe. The same principle applies if a Muslim should make to an unbeliever some sign that causes the unbeliever to imagine that he has been granted a safe conduct and the unbeliever has then relied on this [imagined sign] and entered the territory of Islam. In such a case, the principle discussed above is [also] applied.<sup>34</sup>

Additional support is given by Professor R. Mottahedeh, who states:

Shi'ite Islamic Law agrees with Roman and common law traditions on a significant number of points; and many Shi'ite jurists, in their treatment of one aspect of diplomatic immunity, are more generous to diplomatic personnel than are some Western jurists (and some jurists of non-Shi'ite Islamic legal traditions). All Islamic legal schools believe in the sanctity of *aman*, the guarantee of safe conduct which, given orally, or in writing, had been the basis of diplomatic relations between the Islamic and non-Islamic world since the time of the Prophet. Many Shi'ite jurists also argue that non-Muslims who have entered Islamic territory on the misunderstanding that safe conduct has been granted them should be given safe conduct back to places of security among their own people even in times of war between Muslims and non-Muslims.<sup>35</sup>

In summary, nothing in Shi'ite doctrine contradicts the Sunni doctrine on diplomatic immunity, as formulated by Ibn al-Hassan al-Tunsi in his books *An-Nihaya* and *Al-Mabsut*, which are among the most authoritative contemporary writings followed by Iran's Shias. In addition, diplomatic immunity, as interpreted and applied in Shi'ite doctrine, is recognized in the same manner as in Sunni doctrine, and the only sanction for the transgression of diplomatic immunity is expulsion of the transgressing diplomat. Thus, the seizure of the Embassy of the United States, and the arrest and detention of United States diplomats and personnel of the Embassy and Consulate, is in clear violation of Islamic law as established in the Koran, practiced by the Prophet, followed by the successive *Khalifas*, agreed upon in the writings of the most distinguished and recognized scholars throughout Islam's history, and practiced by contemporary Muslim states.

<sup>33</sup> SHEIKH AL-TAYEFEH AL-TUSI, 2 *AL-MABSUT* 14-15 (1967).

<sup>34</sup> *Id.* at 15.

<sup>35</sup> N.Y.L.J., January 14, 1980, Letters to the Editor, at 2, col. 6. See also Mottahedeh, *Iran's Foreign Devils*, 38 *FOREIGN AFF.* 19, 31-32 (1980).

## III. ISSUES RAISED BY THE SEIZURE UNDER THE SHARI'A

*The Theory of Reprisals*

While it is uncontroverted that under conventional international law, no theory of reprisals may justify a breach of diplomatic immunity, the issue must be dealt with in light of the allegation by the "students" who seized the U.S. hostages and other Iranian public officials that it is warranted under Islamic law.

The precedent discussed above of the Prophet's preventing the departure of Quraish's envoy because of the rumor that his envoy Othman had been killed, is a case in point.<sup>36</sup> If the prevention of an envoy's departure is ever warranted as reprisals in kind, it is because the envoy's counterpart has been treated likewise (or detained) in violation of diplomatic immunity. No action against a diplomat for any other reason finds support or precedent either in the Koran or the Sunna.

The allegation that the seizure of the Embassy and the arrest and detention of the hostages are a form of pressure to secure the return by the United States of the former Shah, Reza Pahlavi, is no justification. The use of diplomats as "hostages" to secure the return of a person wanted for prosecution finds no support in Islamic law. The protection of diplomats is unrelated to other events. As shown above, even when offending diplomats were concerned, according to the Sunna and thereafter Ali's practice, the most that was done was to expel them. Otherwise, they were held inviolate and not personally accountable for the acts of their governments. The very idea of holding diplomats "hostage" to accomplish a political objective is contrary to Islam.<sup>37</sup>

There are two additional arguments that reveal the impropriety and inapplicability of any "reprisals" theory, even if, *arguendo*, such a theory could be found. The first is that it would no longer be valid after the former Shah's departure from the United States in January 1980. The second is that, in accordance with valid international practice and in conformity with the Constitution and laws of the United States, the Government of the United States could not without a valid, lawful process and by force seize the former Shah and deliver him to whatever de facto Iranian authority would be willing to accept him. Under title 18 of the United States Code, section 3181, no extradition can take place without a treaty between the United States and the requesting state.<sup>38</sup> There can be no deviation from that requirement in a country where the rule of law prevails. Iran has no extradition treaty with the United States, has not requested that one be entered into, and has not even made a formal request to the United States Government for extradition of the former Shah.

<sup>36</sup> See text at notes 7-9 *supra* and notes 8 and 9.

<sup>37</sup> See HAMIDULLAH, CORPUS, *supra* note 9, on the history of Islamic diplomacy under the Prophet and the first 4 *Khalifas*, among which was Ali, the highest authority after the Prophet in Shiite doctrine.

<sup>38</sup> On these and other related questions of extradition, see generally M. C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER (1974).

There is no basis under the Islamic law of diplomatic immunity for any reprisal theory applicable to the present case, nor is there any such basis under conventional international law. The very proposition of legitimate "reprisals" is spurious because it is legally impossible for the United States Government to have considered an extradition request (though none was made) in the absence of a treaty, or to request that United States courts, which are the competent authority to certify a person as extraditable, arrest and transfer the former Shah to Iran in this case.<sup>39</sup> Even if the Government of the United States had revoked the former Shah's entry visa for medical reasons, it could not have delivered him to any foreign authority without violating the U.S. Constitution and the Immigration and Naturalization Act of 1965 (8 U.S.C. §244) which permit him "voluntary departure" to a destination of his choice. In any event, the former Shah would have had the right to file a petition for a writ of habeas corpus in a federal district court, which would have barred any such unlawful attempt at his forcible delivery to anyone.

#### *The Nonretroactivity of Criminal Law and Punishment*

The principle in Islam that criminal laws and punishment shall not be applied retroactively is considered a "basic principle" or *Quaeda Usulia*, and finds express support in the Koran.

In *Surat al-Israa* (17:15) it is stated:

And nor shall we be punishing until we had sent them an Apostle.

This statement means that the accused must first be given the opportunity to know the law, and thus that no punishment shall be imposed without prior law. Similarly, in *Surat al-Qesas* (28:59) it is stated:

Nor was your Lord the one to destroy a population until we had sent to it an Apostle who shall divulge upon them our signs [commands].

In *Surat al-Nissaa* (4:165) one finds:

We have sent them . . . Apostles who gave good news as well as warnings, so that mankind after the coming of the Apostles should have no plea against God.

And in *Surat al-Maeda* (5:98):

God forgives what is past.

Seldom does one find more unequivocal texts in the Koran confirming the same principle so emphatically. There can be no retroactive application of penal laws in Islam.<sup>40</sup>

No Islamic tribunal may apply Islamic law to persons who by that very law are not subject to it because at the time of the alleged offense Islamic law was not declared applicable. There is specific application of this principle in

<sup>39</sup> *Id.* at 511-34.

<sup>40</sup> For the view of a contemporary author, see A. MAHDI, *SHARH AL-QUAWAED AL-AMA LI-QUANUN AL-UQUBAT* (Explanation of the General Principles of Criminal Law) 37-40 (1979).

the Koran in connection with marriage. Men are prohibited from marrying certain women such as their mothers and sisters, and also from marrying two sisters (unrelated to them) at the same time. But since in the pagan pre-Islamic days marrying two sisters was permitted, the Koran held that this prohibition would not be retroactive. Thus, it is stated in *Surat al-Nissaa* (4:22):

*except for what was done in the past; for your Lord is forgiving and merciful [emphasis added].*

Nonretroactivity was also the subject of the Prophet's "Final Pilgrimage" *Hadith* (A.H. 9), in which he said:

[T]here is prescription for blood crimes spilled [committed] in the days of ignorance [before Islam was revealed]. . . .

Again the nonretroactivity of laws applicable to crimes and punishment before the promulgation of Islamic law is affirmed.

The Iranian Islamic revolution was proclaimed by the Ayatollah Khomeini in February 1979, but it was not until December 3, 1979, that Iran voted a Constitution declaring Iran to be an "Islamic state." The U.S. detainees were first seized on November 4, 1979, and may not be charged under Islamic law with any crimes whatsoever committed before December 3, 1979. For crimes committed prior to December 3, 1979, they would be subject to the secular Iranian criminal laws and procedures existing at that time, and other laws such as the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, both of which provide for absolute diplomatic immunity. No prosecution can therefore take place against these U.S. citizens for any alleged crimes or offenses against Islamic law or law promulgated by Iran for acts that were purportedly committed before December 3, 1979.<sup>41</sup> Consequently, no detention can be alleged to be valid pending a presumed trial. Since December 3, 1979, the detainees, of course, have been in no position to "spy."

### *The Presumption of Innocence*

The "presumption of innocence" is a basic principle of Islamic criminal justice.<sup>42</sup> The Prophet said, "avoid using circumstantial evidence in *Hudud*,"<sup>43</sup> which are the most serious of all crimes since they are specified in the Koran. Aicha, the wife of the Prophet, referring to the *Hadith* just quoted, reported that he also stated:

Avoid condemning the Muslim to *Hudud* whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favor of innocence [pardon] than in favor of guilt [punishment].

<sup>41</sup> See text at note 61 *infra*.

<sup>42</sup> See IMAM ALAA EL-DIN ABU-BAKR MAS'UD AL-KASANI, 7 BADAEE AL-SANAEE FI TARTIB AL-SHARI'A (The Brilliant Workings of the Shari'a's Structure) 67 (1st ed. A.H. 1327-1328). See also A. F. SOROUR, AL-WASIT FI QANUN AL-IGRAAT AL-GINAIA (A Manual of Criminal Procedure) 71-73 (1980).

<sup>43</sup> For *Hudud* crimes, see *infra* pp. 623-24.

These words speak for themselves. It is also a well-established principle in *Qesas* crimes<sup>44</sup> that circumstantial evidence favorable to the accused is to be relied upon, while if unfavorable to him it is to be disregarded (though considered only for purposes of *Diya* or victim compensation, subject, however, to other conditions of *Diya*).

The presumption of innocence applies to the lesser *Taazir* offenses (discussed below) as well. In his "Final Pilgrimage" *Hadith*, the Prophet said:

Your lives, your property, and your honor are a burden upon you until you meet your Lord on the Day of Resurrection.

This passage is interpreted to mean that the duty to protect life, property, and honor cannot be abridged without positive proof of a crime.<sup>45</sup>

Nothing can be found in the *Shari'a* to justify the indiscriminate arrest and detention of U.S. diplomats and embassy personnel on the post hoc alleged grounds of suspicion of espionage, since it violates the presumption of innocence. The presumption of innocence precludes their arrest and detention even if these individuals had no special status, which, however, they do by virtue of their diplomatic capacity and in accordance with applicable conventions and Islamic law.

Furthermore, the allegation that some of the diplomats engaged in espionage clearly admits on its face that others are not so accused, particularly nondiplomatic embassy staff and personnel. Thus, the continued detention of all the hostages is clearly in violation of the *Shari'a* on grounds of failure to apply the presumption of innocence. The Iranian authorities' failure to act to free the detainees is in violation of this basic tenet of Islamic criminal justice and of their duty under the *Shari'a* to do what is just.

### *The Crime of Espionage*

There are three categories of crimes in Islam: *Hudud*, *Qesas*, and *Taazir*.<sup>46</sup> There are no Koranic crimes and no punishment other than those specifically prescribed as *Hudud*.

The alleged offense of some U.S. diplomats held among other diplomats and embassy personnel is that of espionage. Espionage is a *Taazir* offense and not a *Hudud* or *Qesas* crime. That fact is crucial to the illegality of the detention.

*Hudud* crimes are punishable by a *Had*, which means that the penalty for them is established in accordance with "God's rights" and is prescribed by the Koran. Prosecution and punishment for such crimes are mandatory, as opposed to *Taazir* offenses for which they are discretionary. The seven *Hudud* crimes, none of which apply to the detainees, are: (1) adultery, (2) defamation (also referred to as slander), (3) alcoholism (which also refers to drinking alcoholic beverages), (4) theft, (5) brigandage (also re-

<sup>44</sup> For *Qesas* crimes, see *infra* pp. 624-25. <sup>45</sup> See, e.g., *supra* note 42.

<sup>46</sup> See A. OUDA, *AL-TASHRI AL-JINAI AL-ISLAMI* (Islamic Criminal Justice), 2 vols. (2d ed. 1969); and M. ABU-ZAHRA, *AL-GARIMA WAL-UQUBA FIL ISLAM* (Crimes and Punishment in Islam) (n.d.).



ferred to as highway robbery), (6) apostasy, and (7) rebellion and corruption of Islam (also referred to as transgression of Islam).

A *Had* crime must be complete, and acts deemed preparatory to it, or solicitation, attempt, and conspiracy, are not included in this category of crimes but are deemed *Taazir* offenses.<sup>47</sup>

A *Had* crime is not punishable unless it continues in fact and those who engage in it do not stop. If they stop, they are not to be punished. This is expressed in the *Surat al-Hujurat* (49:9) of the Koran:

If two groups among the believers fight each other, make peace between them; but if they are transgressors [commits aggression] against the other, then fight the transgressor until compliance with the command of God; *but if they comply, then make peace between them with justice and fairness for God loves those who are fair [and just]* [emphasis added].

It is relevant that this *Sura* was revealed in Medina in the so-called Year of Delegations (A.H. 9), when the Prophet received many foreign delegations seeking to find out about and eventually embrace Islam.

Considering the above, it follows a fortiori that individuals who are alleged to have committed a *Taazir* offense, *i.e.*, espionage (which is subject to discretionary prosecution and thus waivable, and which in any event is deemed to be waived by diplomatic immunity), at most may be expelled and not detained. Without a basis for prosecution, there is none for detention.

*Qesas*, the second category, are not always given a specific and mandatory criminal definition or penalty in the Koran. They are: (1) murder, (2) voluntary homicide (manslaughter), (3) involuntary homicide (manslaughter), (4) intentional crimes against the person, and (5) unintentional crimes against the person. The latter two categories are equivalent to the crimes of assault, battery, mayhem, and other infringements of the person and bodily integrity of an individual that do not result in death. Since espionage is not included in this list of offenses, they are inapplicable to this case.

*Taazir* offenses are those that are not encompassed by any of the above two categories but that result in tangible individual or social harm and for which the penalty is to be rehabilitative (the meaning of *Taazir*). Such a penalty could be imprisonment, the infliction of physical punishment, or the imposition of compensation in accordance with the principle of rehabilitation. The penal action and penalty for those crimes are discretionary and are based on the social opportunities, meaning the social interest in prosecuting the case, rehabilitating the offender, and meeting the claims of the aggrieved party (*i.e.*, victim compensation).<sup>48</sup>

Espionage is a *Taazir* offense. It is a *Haram*, or a less serious prohibition for which the Koran provides no penalty or mandatory prosecution as in the case of *Hudud* crimes, or even *Qesas*. The prohibition of engaging in espionage is stated in the *Surat al-Baqara* (2:188):

[A]nd do not spy.

<sup>47</sup> See A. OUDA, *supra* note 46, and A. AL-MAWARDI, *AL-AHKAM AL-SULTANIYA* (The Proclamations of the Sultans) 233–39 (A.D. 1058).

<sup>48</sup> See generally A. OUDA and M. ABU-ZAHRA, *supra* note 46.

The *Shari'a* relies on what today would be the state's legislative process to enact laws and penalties for *Taazir* on the basis of the principle of proportionality and the concept of rehabilitation (and not retribution as in the case of *Hudud* and *Qesas* crimes).

The principle of proportionality of crime and punishment is established in many Koranic verses.<sup>49</sup> In *Surat al-Maeda* (17:45), it is stated:

and to he who has committed aggression upon you, you may commit the same aggression upon him.

And in *Surat al-Baqara* (3:194):

and if you punish, punish equivalently to the punishment [harm] you have incurred.

*Taazir* offenses are discretionary and as such are waivable and de jure waived by diplomatic immunity. That immunity, whether under Islamic law in itself or under Islamic international law, which recognizes the binding effect of treaties, has the unequivocal effect of waiving prosecution for *Taazir* offenses. Thus, no arrest or detention can be justified on the alleged grounds that the offense in question has been committed, let alone on the grounds that it is under investigation, because a *Taazir* offense could not be the basis for prosecuting diplomats and embassy and consular staff and personnel benefiting from diplomatic immunity.

Some scholars believe diplomatic immunity does not apply under Islamic law with respect to *Hudud* crimes because they are the "right of God"<sup>50</sup> and cannot be waived by treaty (a treaty cannot render lawful that which under the law of God is unlawful). Therefore, to the extent that a diplomat has committed a *Had* crime, he or she may be subject to prosecution and punishment. But since none of the acts or crimes alleged (espionage or any derivative aspects of it) fall or can fall within the meaning of any of the *Had* crimes listed above, even that arguable and questionable exception does not apply to the present case.<sup>51</sup>

In addition, no *Taazir* offenses were enacted or declared before December 3, 1979, the date of promulgation of Iran's Islamic Constitution; because of the principle of nonretroactivity discussed above, their detention is unlawful on that basis. The only remedy or sanction available to Iran is expulsion.<sup>52</sup>

### *The Concept of Due Process*

The dignity of man is foremost in Islam. The Koran states in the *Surat al-Israa* (17:7):

Surely we have accorded dignity to the Sons of Adam.

That dignity applies without distinction to all humankind who are the descendants of Adam.

<sup>49</sup> *Surat al-Baqara* 3:179; *Surat al-Nahl* 16:126.

<sup>50</sup> See A. OUDA, *supra* note 46, at 81-82.

<sup>51</sup> See *id.* at 324-25 and A. F. BAHNASI, *supra* note 16.

<sup>52</sup> See *supra* pp. 613-17, and also *Surat al-Tawba* 9:118.

As for the concept of justice:

The Qurân and Sunnâ are full of words that oblige people to be just and to practise justice. The Qurân forbids persecution, and threatens to punish any one who contemplates using it. If we read the Qurân we find that the word "justice" and all its derivatives in that sense are mentioned more than twenty times. The word "persecution" and its derivatives are mentioned about 299 times. The word "aggression" is mentioned 8 times while the words "attack" or "violate" are mentioned twenty times.<sup>53</sup>

An illustration of the adherence of Muslim states (those who declare themselves to be Islamic) to these principles can be found in their constitutional provisions: they uphold the concept of the rule of law, require "due process" in criminal proceedings, and prohibit "arbitrary arrest and detention."<sup>54</sup> The concept of due process in criminal proceedings is found in early and recent writings of Muslim scholars and they are all in agreement on it.<sup>55</sup>

The rights of individuals in a Muslim state to the protection of life, liberty, honor, and property is embodied in the Prophet's "Final Pilgrimage" *Hadith*:

Your lives, your property, and your honor are a burden upon you until you meet your Lord on the Day of Resurrection.

The Prophet in this *Hadith* emphasized the need to uphold due process of law whenever the life, freedom, honor, and property of individuals

<sup>53</sup> M. MOUSSA, *ISLAM AND HUMANITY'S NEED OF IT* 236-37 (2d. rev. ed. 1960). See also Bassiouni, *Islam*, *supra* note 3. See generally HAMIDULLAH, *CONDUCT*, *supra* note 14; Nawaz, *The Concept of Human Rights in Islamic Law*, 11 *HOW. L. REV.* 325 (1965); Ahmad, *Islamic Civilization and Human Rights*, 12 *REV. EGYPTIENNE DROIT INT'L* 1 (1956).

<sup>54</sup> For the constitutional texts, see *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Blau-stein & Flanz, eds., 1971- ); for a specific analysis of constitutional principles of "due process," see A. MAWDUDI, *ISLAMIC LAW AND CONSTITUTION* (3d ed. 1967); K. FARUKI, *ISLAMIC CONSTITUTIONS* (1953); and Hussain, *Due Process in Modern Constitutions and the Process of Sharia*, 7 *KARACHI L.J.* 57 (1971).

<sup>55</sup> See, e.g., A. OUDA, *supra* note 46; TUSI, *supra* notes 32 and 33; A. F. SOROUR, *supra* note 42; A. MAHDI, *supra* note 40; M. HAMIDULLAH, *USUL AL-TASHRI AL-ISLAMI* (The Principles of Islamic Jurisprudence) (1977); A. Gamal el-Din, *Al Shari'a wal-Ijraat al-Jinaiia* (The Shari'a and Criminal Procedure), 16 *MEJALLAT AL-ULUM AL-QUANOUNIA WAL IQTISADIA* (Review of Legal and Economic Studies) 359 (1974); S. RAMADAN, *ISLAMIC LAW, ITS SCOPE AND EQUITY* (1961); and the consensus of Muslim scholars in the 1976 Conference on Islamic Criminal Justice in Riyadh, in *AL-NADWA AL-ILMIYA LI DERASAT TATBIK AL-TASHRII AL-JINAII AL-ISLAMI WA ATHAROHA FI MOKAFAHAT AL-GARIMA FIL-MAMLAKA AL-ARABIA AL-SAUDIA* (The Scientific Conference on the Study of the Application of Islamic Criminal Justice and its Influence on Combating Crime in the Kingdom of Saudi Arabia) (2 vols. 1977). It was also the consensus of the participants in the First International Conference on the Protection of Human Rights in the Islamic Criminal Justice System held at the International Institute for Higher Studies in Criminal Sciences in Siracusa, Sicily, in May 1979. For its final resolution, see p. 628 *ff. infra*; the resolution also appeared in Bassiouni, *Iran's Revolutionary Justice is not Islamic*, *Christian Science Monitor*, Oct. 16, 1979, at 26. Some of the papers presented were published in Arabic in *AL-MEJALLA AL-ARABIA LIL-DIFAA AL-IJTIMII* (The Arab Review of Social Defense), October 1979.

are at stake.<sup>56</sup> The Sunna is replete with examples in which personal freedom is upheld against the abuse of those who retain power.<sup>57</sup>

A. Mawdudi explains the Islamic concept of the right to justice as follows:

This is a very important and valuable right which Islam has given to man as a human being. The Holy *Quran* has laid down: "Do not let your hatred of a people incite you to aggression" (5:3). "And do not let ill-will towards any folk incite you so that you swerve from dealing justly. Be just; that is nearest to heedfulness" (5:8). Stressing this point the *Quran* again says: "You who believe stand steadfast before God as witness for [truth and] fairplay" (4:135). This makes the point clear the Muslims have to be just not only with ordinary human beings but even with their enemies. In other words, the justice to which Islam invites her followers is not limited only to the citizens of their own country, or the people of their tribe, nation or race, or the Muslim community as a whole, but it is meant for all the human beings of the world. Muslims, therefore, cannot be unjust to anyone. Their permanent habit and character should be such that no man should ever fear injustice at their hands, and they should treat every human being everywhere with justice and fairness.<sup>58</sup>

As to the security of personal freedom, Mawdudi states:

Islam has also laid down the principle that no citizen can be imprisoned unless his guilt has been proved in an open court. To arrest a man only on the basis of suspicion and to throw him into a prison without proper court proceedings and without providing him a reasonable opportunity to produce his defense is not permissible in Islam. It is related in the *Hadith* that once the Prophet was delivering a lecture in the Mosque, when a man rose during the lecture and said: "O Prophet of God, for what crime have my neighbours been arrested?" The Prophet heard the question and continued his speech. The man rose once again and repeated the same question. The Prophet again did not answer and continued his speech. The man rose for a third time and repeated the same question. Then the Prophet ordered that the man's neighbours be released. The reason why the Prophet had kept quiet when the question was repeated twice earlier was that the police officer was present in the Mosque and if there were proper reasons for the arrest of the neighbours of this man, he would have got up to explain his position. Since the police officer gave no reasons for these arrests the Prophet ordered that the arrested persons should be released. The police officer was aware of the Islamic law and therefore he did not get up to say: "the administration is aware of the charges against the arrested men, but they cannot be disclosed in public."

<sup>56</sup> See Bassiouni, *Islam*, *supra* note 3, at 23-24; A. MAWDUDI, *supra* note 54, at 339.

<sup>57</sup> See A. QUTB, *ISLAM: THE MISUNDERSTOOD RELIGION* 249 (6th ed. 1964), who quotes Imam Khattabi on the fact that there can be no detention without an order of a court of law, a position that is uniformly accepted among Muslim scholars as being in keeping with the *Shari'a*; and Bassiouni, *Islam*, *supra* note 3, at 36.

<sup>58</sup> A. MAWDUDI, *HUMAN RIGHTS IN ISLAM* 19 (1977) [hereinafter cited as MAWDUDI, *HUMAN RIGHTS*]. The taking and detention of the hostages and the failure by the Iranian Government to secure their release also threaten the right to security of life and property under Islamic law. This principle is made evident in the works of Tusi cited at notes 32 and 33.

If the Prophet would inquire about their guilt *in camera* I would enlighten him." If the police officer had made such a statement, he would have been dismissed then and there. The fact that the police officer did not give any reasons for the arrests in the open court was sufficient reason for the Prophet to give immediate orders for the release of the arrested men. The injunction of the Holy *Quran* is very clear on this point. "Whenever you judge between people, you should judge with (a sense of) justice" (4:58). And the Prophet has also been asked by God: "I have been ordered to dispense justice between you." This was the reason why the Caliph Umar said: "In Islam no one can be imprisoned except in pursuance of justice." The words used here clearly indicate that justice means due process of law. What has been prohibited and condemned is that a man be arrested and imprisoned without proof of his guilt in an open court and without providing him an opportunity to defend himself against those charges. If the Government suspects that a particular individual has committed a crime or he is likely to commit an offense in the near future then they should give reasons of their suspicion before a court of law and the culprit or the suspect should be allowed to produce his defense in an open court, so that the court may decide whether the suspicion against him is based on sound grounds or not and if there is good reason for suspicion, then he should be informed of how long he will be in preventive detention. This decision should be taken under all circumstances in an open court, so that the public may hear the charges brought by the Government, as well as the defense made by the accused and see that the due process of law is being applied to him and he is not being victimized.<sup>59</sup>

Ali ibn Abi-Taleb also adhered to this position in his dealings with the Kharijites who opposed him and even threatened to kill him. He held that they could not be arrested so long as they lived in peace.<sup>60</sup> The Koran in *Surat al-Ma'eda* (17:9) states:

You who believe stand out firmly for God as witnesses to fairness, and let not the hatred of others make you swerve to wrong and depart from justice. Be just, which is next to piety, and fear God, for God is well acquainted with all that you do.

These statements are clear in Islamic jurisprudence. They mean that a duty equal to that of piety and belief is to uphold "fairness" and fair dealing, and that injustice is one of the gravest wrongs against God, as well as man. Thus, the violation of due process, the arbitrary arrest and detention of the detainees, and the suffering imposed upon them and their families are an injustice, which is among Islam's gravest wrongs.

This conclusion was confirmed by the group of distinguished Muslim scholars and experts in criminal law at the First International Conference on the Protection of Human Rights in the Islamic Criminal Justice System, which was held in Siracusa, Italy, from May 28 to 31, 1979. They unanimously adopted the following resolution:

<sup>59</sup> MAWDUDI, *HUMAN RIGHTS* *supra* note 58, at 25-26.

<sup>60</sup> See *supra* notes 17, 32, and 33.

WHEREAS it has been established to the satisfaction of all participants from both Islamic and non-Islamic nations that the letter and spirit of Islamic Law on the subject of the protection of the rights of the criminally accused are in harmony with the fundamental principles of human rights under international law as well as in harmony with the respect accorded to the equality and dignity of all persons under most constitutions and laws of Muslim and non-Muslim nations of the world;

WHEREAS the basic human rights reflected in the spirit and principles of Islamic Law include the following rights of the criminally accused, *inter alia*:

- (1) the right of freedom from arbitrary arrest, detention, torture, or physical annihilation;
- (2) the right to be presumed innocent until proven guilty by a competent and impartial tribunal in accordance with the Rule of Law;
- (3) the application of the Principle of Legality which calls for the right of the accused to be tried for crimes specified in the Qu'ran or other crimes whose clear and well-established meaning and content are determined by Shariah Law (Islamic Law) or by a criminal code in conformity therewith;
- (4) the right to appear before an appropriate tribunal previously established by law;
- (5) the right to a fair and public trial;
- (6) the right not to be compelled to testify against oneself;
- (7) the right to present evidence and to call witnesses in one's defense;
- (8) the right to counsel of one's own choosing;
- (9) the right to a decision on the merits based upon legally admissible evidence;
- (10) the right to have the decision in the case rendered in public;
- (11) the right to benefit from the spirit of Mercy and the goals of rehabilitation and resocialization in the consideration of the penalty to be imposed; and
- (12) the right of appeal;

WHEREAS the aforementioned rights of due process of law contained in Islamic Law are in complete harmony with the prescriptions of the International Covenant on Civil and Political Rights which has been signed or ratified by many nations including a significant number of Muslim and Islamic nations and which reflects generally accepted principles of international law contained in the Universal Declaration of Human Rights of 1948, and the U.N. Declaration on the Standard Minimum Rules for the Treatment of Offenders;

NOW THEREFORE the participants of the Conference in their individual capacities, desirous of upholding the aforementioned principles and the values they embody, and desirous of ensuring that the practices

and procedures of Islamic and Muslim nations conform thereto, solemnly declare that:

Any departure from the aforementioned principles would constitute a serious and grave violation of Shariah Law, international human rights law, and the generally accepted principles of international law reflected in the constitutions and laws of most nations of the world.<sup>61</sup>

#### IV. FURTHER OBLIGATIONS OF THE IRANIAN GOVERNMENT

##### *Provisions of the 1979 Constitution*

The Constitution of December 1979 stipulates in Articles 4 and 72 that the "laws and regulations" of Iran must be in conformity with Islam, and therefore requires Islamic due process of law. Article 169 recognizes the Islamic principle of nonretroactivity<sup>62</sup> by providing that no act shall be deemed a crime before a law is passed that prohibits it. Article 3(14) states that men and women are entitled to a "just judicial system . . . everyone is equal under law." Article 22 provides that "people's honor, life, property, rights, domicile and profession shall be immune from attack unless otherwise authorized by law." Article 33 states, "no one shall be arrested unless it is carried out in conformity with the law and in a manner prescribed therein."

Clearly, these constitutional mandates are relevant and applicable to the detention of the hostages, who were not detained by court order or under any lawful process and who have no access to justice or any lawful process as provided by the Constitution and Islamic due process.

##### *The Duty to Protect the Detainees*

The duties of Muslims and their rulers are defined by the Koran. They are bound by it and its observance. The Koran is replete with mandates and commands to act according to its dictates and observe its laws. In *Surat al-Maeda* (5:45), it is stated:

And those who so will not judge in accordance with the revelation of God, then those are the nonbelievers [transgressors].

*Surat al-Gathia* (45:18) says:

We have made you ruler by the *Shari'a* so follow it and do not follow the whims of those who do not know.

Thus, there is not only a duty to act, but also a clear duty to act against those "who do not know," namely, those who do not follow the mandates of the *Shari'a*. The Muslim rulers of Iran, its Government, and its public officials cannot claim to be powerless to act, nor is there any excuse for failing to act against the "students" who detained the hostages. They have repeatedly

<sup>61</sup> See note 55 *supra*.

<sup>62</sup> See *supra* note 42 and text accompanying notes 40-42.

stated that they would obey the Ayatollah Khomeini, at first the de facto Imam, and since the promulgation of the Constitution the *Faqih* with supreme authority, who therefore has the unquestionable duty to act or delegate others to act.

Furthermore, that duty is incumbent upon all Muslims, particularly those who have the power to act in their official capacity. *Surat al-Maeda* (5:1) requires all believers to abide by their obligations, whether or not they are rulers:

O Believers! Be faithful to your engagements.

In a *Hadith*, the Prophet said:

Those of you who see a wrong must redress it; with your hand [by action] if you can, if not then with your tongue [by words], if not then with your gaze, or within your heart, and this is the least of all faith.

Thus, the duty to redress the wrong of unlawful detention is unquestionable.

In addition, under Islamic international law, the Islamic Republic of Iran is bound by its treaty obligations under the two Vienna Conventions. These engagements are clear and unequivocal under both Islamic law as such and Islamic international law.<sup>63</sup> Furthermore, the duty to protect diplomats under Article 29 of the 1961 Vienna Convention on Diplomatic Relations is unequivocal; it has been breached in addition to Islamic law and the 1979 Iranian Islamic Constitution.

## V. CONCLUSIONS

The seizure and continued detention of the detainees are in violation of Islamic law, Islamic international law, and conventional international law. Their detention also constitutes a crime under Islamic criminal law because there is no legal justification for it, which makes it a *Qesas* crime.<sup>64</sup>

Moreover, the seizure constituted a crime under the then prevailing Iranian Criminal Code, which was presumably still applicable at the time of writing, as it had not been formally abrogated by the competent legislative authority. The seizure and detention of diplomats and persons entitled to diplomatic immunity constitute an international crime under the provisions of the 1972 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.<sup>65</sup> The detention violates the principles embodied in the 1978 draft Convention on the Prevention and Suppression of Torture.<sup>66</sup> The Iranian authorities have the duty to prevent and suppress such crimes, and their failure to do so

<sup>63</sup> See section I *supra*.

<sup>64</sup> See A. OUDA, *supra* note 46.

<sup>65</sup> GA Res. A/3166 (XXVIII), Feb. 5, 1974. See M. C. BASSIOUNI, *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* 285-310 (1975).

<sup>66</sup> UN Doc. E/CN.4/NGO/213, Feb. 1, 1978. See also GA Res. 3452 (XXX) 1975; and Bassiouni, *An Appraisal of Torture in International Law and Practice: The Need For an International Convention for the Prevention and Suppression of Torture*, 48 REV. INT'L DROIT PENAL 17 (1977).



constitutes a violation of Islamic criminal law under the 1979 Constitution<sup>67</sup> and of international criminal law.<sup>68</sup>

Iran is a member of the international community, a member of the United Nations, and thus a signatory of its Charter, and a signatory of various international conventions on the protection of human rights, including the 1948 Universal Declaration of Human Rights<sup>69</sup> and the 1966 International Covenant on Civil and Political Rights.<sup>70</sup> These instruments prohibit states from committing "arbitrary arrest and detention," and require them to protect basic human rights. These and other obligations are binding on Iran under conventional international law, and under Islamic international law without distinction as to whether the state is engaging in commission or intentional omission.

Finally, mention should be made of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran,<sup>71</sup> which places upon the Iranian Government certain obligations that have been violated by the continued holding of the detainees.<sup>72</sup> Insofar as the Vienna Conventions and the Treaty of Amity between the United States and Iran are still in force, the United States and its citizens are deemed to be *Hulafaa*, which means allies. In that respect, the Prophet said:

whoever enters into a pact with a people should neither release its terms nor tighten them until it expires or it be returned to them on terms of equality.

The citizens of *Hulafaa* or allies are thus entitled to the fulfillment of the terms of any treaty in force and cannot be subjected to treatment contrary to it, even after the treaty's abrogation or renunciation so long as they have not been safely returned to their country of origin.<sup>73</sup>

Based on this discussion of the Islamic criminal justice system, which applies to Iran, and of Iran's obligations under international law and the law

<sup>67</sup> As discussed in the text at notes 53–63 *supra*.

<sup>68</sup> See, e.g., M. C. BASSIOUNI & V. P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW, 2 vols. (1973); Bassiouni, *An Appraisal of the Growth and Development of International Criminal Law*, 45 REV. INT'L DROIT PENAL 405 (1974); and M. C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980).

<sup>69</sup> Universal Declaration of Human Rights, GA Res. 217A (III), Dec. 10, 1948. For contemporary writers upholding the applicability of internationally protected human rights under Islam, see S. H. TABANDEH, A MUSLIM COMMENTARY ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (Gouldin trans. 1970); see also Ishaque, *Human Rights in Islamic Law*, INTERNATIONAL COMMISSION OF JURISTS, THE REVIEW, June 1974, at 30; M. Z. KHAN, ISLAM AND HUMAN RIGHTS (1970) and his *Foreword* to Bassiouni's *Islam*, *supra* note 3, at 160–61; Said, *Human Rights in Islamic Perspective* in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (eds. Pollis & Schwab, 1970); Nawaz, *The Concept of Human Rights in Islamic Law*, 11 HOW. L.J. 325 (1965); M. AL-GAZHALI, HUKUK AL-INSAN FI-TAALIM AL-ISLAM (Human Rights in the Teachings of Islam) (1962); Khalafallah, *Islamic Law, Civilization and Human Rights*, 12 REV. EGYPTIENNE DROIT INT'L 1 (1956); and A. KHALIFA, FUNDAMENTAL HUMAN RIGHTS IN ISLAM (1952). See also A. H. HAIRI, SHIISM AND CONSTITUTIONALISM IN IRAN (1977).

<sup>70</sup> International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), Dec. 16, 1966.

<sup>71</sup> 284 UNTS 93, 8 UST 899, TIAS No. 3853.

<sup>72</sup> See *supra* note 1, Memorial of the United States of America to the International Court of Justice, at 45.

<sup>73</sup> AL-HINDI, 2 KANZ AL-ULAMAA FI SUNAN AL-AQWAL WA-AL AF'AL 299 (A.H. 1211).

of internationally protected human rights, the following conclusions may be made:

(1) Islamic law as such, based on the Koran and the Sunna, provides for diplomatic immunity.

(2) The alleged offense of which some of the detainees are accused, namely espionage, is a *Taazir* offense in Islamic criminal law, a discretionary crime whose prosecution is waivable; persons accused of espionage are subject to diplomatic immunity under Islamic law, Islamic international law, and conventional international law.

(3) Espionage in any of its possible meanings is a *Taazir* offense and does not fall within the purview of *Hudud* crimes, which some scholars consider subject to mandatory prosecution and punishment under Islamic criminal law.

(4) The detention of United States citizens enjoying the privileged status of diplomatic immunity is violative of Islamic law without relevant exception.

(5) The only sanction against diplomats, whether under Islamic law as such, Islamic international law, or conventional international law, is expulsion.

(6) Islamic law postulates a basic principle of nonretroactivity of criminal laws and punishment, but Iran became an Islamic state subject to the *Shari'a* in December 1979, after the detainees were in custody. Therefore, no aspect of Islamic law applied to them prior to that date, and allegations of prior acts of espionage are subject to the then prevailing Iranian laws and treaties, which provided for absolute diplomatic immunity. The 1979 Iranian Constitution states the same principle.

(7) The 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, to which Iran is signatory, are binding under conventional international law and under Islamic international law. These instruments provide for diplomatic immunity.

(8) These conventions are in conformity with Islamic law, which also makes them binding on Iran under Islamic international law.

(9) The continued holding of the detainees is a crime under Islamic law, Iranian criminal law, and international criminal law. Iran's failure to protect the hostages by commission or omission constitutes a breach of its international obligation and a violation of international conventions on the protection of human rights to which it is signatory.

(10) Nothing in Shiite doctrine is contrary to any of the conclusions stated here or in the body of this discussion.