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Keywords

International Law: History, States, International Court of Justice, History

THE 1979 UNITED STATES-IRAN HOSTAGE CRISIS REVIEWED FROM AN ISLAMIC INTERNATIONAL LAW PERSPECTIVE

MUHAMMAD-BASHEER .A. ISMAIL*

I. INTRODUCTION

Almost all Muslim states¹ signed and ratified the two international diplomatic and consular legal frameworks: the 1961 Vienna Convention on Diplomatic Relations (“VCDR”)² and the 1963 Vienna Convention on Consular Relations (“VCCR”).³ The Islamic Republic of Iran, a party to the VCDR and the VCCR, is expected to uphold these conventional principles of diplomatic immunities and international law in all its diplomatic interactions with other states. Three decades ago, the Islamic Republic of Iran seized the United States of America’s embassy and its staff. The United States brought a case against Iran in the International Court of Justice (“I.C.J.”) for violating diplomatic immunity and international obligations. Although the Iranian government was not represented throughout the proceedings before the I.C.J., it sent, through the Iranian Ministry of Foreign Affairs, two letters dated December 9, 1979, and March 16, 1980, to the I.C.J.⁴ These letters summarized the reasons why the Iranian government felt that the case brought by the United States should not be recognized and considered by the

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1. “Muslim state” in this article refers to country that has a majority Muslim population. It also includes states that specifically declare themselves as “Islamic Republics” and those states that declare Islam, in their Constitutions, as the state’s religion. 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 majority Muslim population. See MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* 8 (2003); see also HASAN MOINUDDIN, *THE CHARTER OF THE ISLAMIC CONFERENCE AND THE LEGAL FRAMEWORK OF ECONOMIC CO-OPERATION AMONG ITS MEMBER STATES* 10-12 (1987).

2. Vienna Convention on Diplomatic Relations, Apr. 18 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964) [hereinafter VCDR].

3. Vienna Convention on Consular Relations, Apr. 24 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967) [hereinafter VCCR].

4. See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. 3, ¶ 10 (May 24).

I.C.J.⁵ After considering the facts of the case and all the evidence adduced, the I.C.J. found the Iranian government guilty.⁶ The judgment of the I.C.J. would have been more convincing to the Islamic Republic of Iran had the United States further predicated its arguments on Islamic law.

Considering this background, it may be necessary to reappraise the 1979 seizure of the American embassy in Tehran by examining Islamic law's implication on the entire incidence. The purpose is to ascertain whether the Iranian authorities made adequate provisions for the protection of the American diplomatic personnel within the territory of Iran in accordance with Islamic *siyar*, otherwise known as Islamic international law.⁷ It is crucial to mention here, that not much has been mentioned concerning the position of Islamic *siyar* on the 1979 Iranian invasion of the United States embassy. The only major work that was written in respect of the position of Islamic law concerning the Iranian invasion of the United States embassy in 1979 was by Professor M. Cherif Bassiouni in 1980 while the invasion of the embassy was still ongoing.⁸ This article will, therefore, be evaluating facts surrounding i) the 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 justification for detaining the United States diplomats, if any, under Islamic *siyar*; iv) the violation of diplomatic immunity under Islamic *siyar*; and, v) the implication of Iran's violation of the United States diplomatic immunity under Islamic international law. This article then concludes that the general finding of Islamic *siyar* with regards to the Iranian hostage case may not be different from that of the findings of the I.C.J.

II. SEIZURE OF THE UNITED STATES EMBASSY

On November 4, 1979, a group of Iranian Muslim students, known as the *Muslim Student Followers of the Imam's Policy*,⁹ invaded the American embassy in Tehran and held fifty-two of its personnel hostage for 444 days. The action of the students was said to be in protest against the decision of the United States in October 1979 to admit the former Shah of Iran, Mohammed Reza Pahlavi, into the United States under the pretext of a life-saving medical treatment.¹⁰ The hostage takers threatened that unless the Shah was extradited along with his wealth, they

5. *See id.*; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Request for the Indication of Provisional Measures, 1979 I.C.J. 7, ¶ 8 (Dec. 15).

6. *United States Diplomatic and Consular Staff in Tehran*, Judgment, 1980 I.C.J. ¶ 95.

7. The word '*siyar*' has been used as a rough equivalent of Islamic international law. THE OXFORD DICTIONARY OF ISLAM 297 (John L. Esposito ed., 2003). It is generally used by jurists to mean the conduct of state relationship with other communities and nations. *Id.* Islamic international law and Islamic *siyar* will be used interchangeably in this article.

8. M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609, 609, 618-20 (1980).

9. B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 119 (3rd rev. ed. 1988).

10. Amir Rafat, *The Iran Hostage Crisis and the International Court of Justice: Aspects of the Case Concerning United States Diplomatic and Consular Staff in Tehran*, 10 DENV. J. INT'L L. & POL'Y 425, 426 (1981).

would not hesitate to put the hostages on trial for the offense of espionage.¹¹ But the fact remained that under Section 3181(a) of the United States Code, the United States would not have extradited the Shah due to the absence of any extradition treaty with the Islamic Republic of Iran.¹² That being the case, the United States was legally incapable of extraditing the Shah of Iran. Aside from the thirteen female and African-American hostages that were released within the first month,¹³ and later another hostage that was released due to illness,¹⁴ the rest of the members of the diplomatic and consular staff of the United States were not released until January 20, 1981.¹⁵

The United States made “innumerable pleas, resolutions, declarations, special missions, and even sanctions” towards securing the release of the hostages without success.¹⁶ The United States then instituted a legal action against the Islamic Republic of Iran at the I.C.J., the judicial arm of the United Nations, on November 29, 1979.¹⁷ The I.C.J., in its unanimous decision on December 15, 1979, gave an interim order directing Iran to restore the diplomatic mission to the United States government and to release the hostages by giving them full diplomatic protection with freedom to leave Iran.¹⁸ On May 24, 1980, the I.C.J. issued its final judgment on the merits and found Iran to be in contravention to its obligations under international conventions and long-established rules of general international law.¹⁹ The Islamic Republic of Iran was also ordered to make reparation to the United States.²⁰ Both the interim order and the final judgment of the I.C.J. were defied by Iran.²¹

It is important to mention that throughout the entire proceedings at the I.C.J., the United States hinged their legal arguments mainly on well-acknowledged

11. *Id.* at 427-28.

12. 18 U.S.C. § 3181 (2012); see Richard Falk, Editorial, *The Iran Hostage Crisis: Easy Answers and Hard Questions*, 74 AM. J. INT'L L. 411, 411-12 (1980).

13. It was reported that a woman and two African-American men were released on November 18, 1979. Jonathan C. Randal, *Iran Releases 10 More U.S. Hostages*, WASH. POST, Nov. 20, 1979, at A1. Another four white females and six African-American male hostages were released on November 19, 1979. *Id.*

14. Paul Lewis, *Richard I. Queen, 51, Hostage Freed Early by Iranians in '80*, N.Y. TIMES, Aug. 21, 2002, <http://www.nytimes.com/2002/08/21/us/richard-i-queen-51-hostage-freed-early-by-iranians-in-80.html>.

15. William Branigin, *Ordeal Ends on 444th Day*, WASH. POST, Jan. 20, 1981, at A1.

16. L.H. Legault, *Hostage-Taking and Diplomatic Immunity*, 11 MAN. L.J. 359, 359 (1981).

17. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 1 (May 24). See also Don Oberdorfer, *U.S. Takes Case to World Court*, WASH. POST, Nov. 30, 1979, at A1.

18. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Request for the Indication of Provisional Measures, 1979 I.C.J. 7, ¶ 47 (Dec. 15) (granting provisional measures).

19. *United States Diplomatic and Consular Staff in Tehran*, Judgment, 1980 I.C.J. ¶ 90.

20. *Id.* ¶ 95.

21. *Id.* ¶ 75. See also JOHN F. MURPHY, *THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE: A LEGAL AND POLITICAL ANALYSIS* 120 (1983).

principles of diplomatic immunity,²² which are viewed and understood from the Western legal perspective. The United States could have further argued from the viewpoint of Islamic law by relying on the Qur'anic, prophetic, and various Muslim juristic pronouncements on the principles of diplomatic immunity. Such arguments would have strengthened the United States case against the Islamic Republic of Iran. Judge Weeramantry rightly argues that Islamic international law, which is equally "rich in principles relating to the treatment of foreign embassies and personnel," would possibly have had a three-fold effect on Iran if the United States had availed itself the opportunity of canvassing it before the Justices of the I.C.J.²³ The three-fold effect, according to Weeramantry, is that "[1] its persuasive value would have been immensely greater; [2] it would have shown an appreciation and an understanding of Islamic culture; and [3] it would have induced a greater readiness on the Iranian side to negotiate from a base of common understanding."²⁴

We must also not forget the general references made by two of the Judges of the I.C.J. (Judge Waldock and Judge Tarazi) to the contribution of Islamic jurisprudence to the body of diplomatic immunity and inviolability. In his view, Judge Waldock, in the lead judgment, maintains "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, to the evolution of which the traditions of Islam made a substantial contribution."²⁵ Similarly, Judge Tarazi, while delivering a dissenting opinion, cited with approval a 1937 lecture delivered by Professor Ahmed Rechid of the Istanbul law faculty, confirming the respect conferred on diplomatic personnel under Islamic law, when Professor Rechid says that "[i]n 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."²⁶

The Iranian authority, particularly, Imam Ayatollah Khomeini²⁷ has been generally accused of backing and directly endorsing the entire actions of the students regarding the seizure of the United States embassy.²⁸ Not only did the Iranian government cooperate with the student demonstrators by not preventing them from invading the United States embassy, it also gave a mark of approval to and showered an unconditional encomium on the hostage takers.²⁹ A representative of the Iranian Foreign Ministry, for example, was recalled as saying

22. Memorial of United States, *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. Pleadings 121, at 124 (Jan. 12, 1980).

23. C. G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* 166 (1988).

24. *Id.*

25. *United States Diplomatic and Consular Staff in Tehran*, Judgment, 1980 I.C.J. ¶ 86.

26. *Id.* at 59 (dissenting opinion of Judge Tarazi).

27. Ayatollah Khomeini was the Supreme Leader of the Islamic Republic of Iran, a position he held until his death on June 3, 1989. Patrick E. Tyler, *Iran's Ayatollah Khomeini is Dead*, WASH. POST, June 4, 1989, at A1.

28. Rafat, *supra* note 10, at 427.

29. *United States Diplomatic and Consular Staff in Tehran*, Judgment, 1980 I.C.J. ¶ 71.

that “[t]oday’s move by a group of our compatriots is a natural reaction to the United States 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.”³⁰ He further said that “[i]f 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.”³¹ A pronouncement attributed to the then Iranian Foreign Minister, Mr. Ibrahim Yazdi, that the students’ action “enjoys the endorsement and support of the government, because America herself is responsible for this incident,” was also regarded as a general ratification of the entire hostage crisis.³²

The then-President of the United States, Jimmy Carter, decided to explore the possibility of resolving the imbroglio through diplomatic process by instructing his Attorney-General, Ramsey Clark, accompanied by the chief counsel for the Senate Select Committee on Intelligence, William Miller, to go and deliver a message to Imam Ayatollah Khomeini requesting the release of the hostages.³³ Imam Khomeini and members of the Revolutionary Council refused to meet with the envoys sent by the United States. While Clark was en route, Tehran Radio broadcasted the speech made by Ayatollah Khomeini on November 7, 1979, forbidding any member of the Revolutionary Council from holding any discussion with the two emissaries from the United States, while also maintaining that:

the U.S. 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.³⁴

The major position of the Iranian government, which explains the approval of the students’ seizure of the United States embassy was Imam Khomeini’s vital remark that “those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect.”³⁵ Imam Khomeini’s declaration that “[t]he noble Iranian nation will not give permission for the release

30. *Tehran Students Seize U.S Embassy and Hold Hostages*, N.Y. TIMES, Nov. 5, 1979, at A1.

31. *Id.*

32. *United States Diplomatic and Consular Staff in Tehran*, Judgment, 1980 I.C.J. ¶ 70.

33. LUCIEN S. VANDENBROUCKE, *PERILOUS OPTIONS: SPECIAL OPERATIONS AS AN INSTRUMENT OF U.S. FOREIGN POLICY* 116-17 (1993). 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. *Id.*; see also JAMES A. PHILLIPS, *IRAN, THE UNITED STATES AND THE HOSTAGES: AFTER 300 DAYS 13* (1980), available at http://s3.amazonaws.com/thf_media/1980/pdf/bg126.pdf. According to James A. Phillips, a policy analyst, the U.S. rested their trust on 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. PHILLIPS, *supra* note 33, at 13.

34. *United States Diplomatic and Consular Staff in Tehran*, Judgment, 1980 I.C.J. ¶ 26.

35. *Id.* ¶ 73.

of the rest of [the hostages]. Therefore, the rest of [the hostages] will be under arrest until the American government acts according to the wish of the nation,"³⁶ depicted, in an obvious fashion, the lucid intent of the Iranian government in ratifying the acts perpetrated by the Iranian demonstrators.

The likely legal implication of the Iranian official statements in this scenario is that hostage takers are agents of Iranian authority. It would seem difficult for the Iranian government to claim lack of responsibility just because it did not officially carry out or direct the seizure of the United States embassy and the detention of its personnel. The Iranian authorities can, at best, be described according to the remark of Professor Rafat as "wholehearted participants in the violation of international law that had occurred."³⁷ According to a principle laid down in Islamic law, an act may be deemed validly constituted by an unauthorized agent, provided that such an act is eventually ratified by the principal.³⁸ This follows the legal maxim that says "[s]ubsequent ratification has the same effect as a previous authorization to act as an agent."³⁹ Therefore, it would not be out of place for the Iranian government to take responsibility for the acts perpetrated by the Iranian demonstrators based on the various pronouncements made by the Iranian spiritual leader, Ayatollah Khomeini, and other government officials.

III. THE IRANIAN VIOLATION OF INTERNATIONAL TREATIES

The Islamic Republic of Iran and the United States mutually agreed to abide by international obligations to respect and protect diplomatic missions. These international obligations are variously contained in the VCDR;⁴⁰ VCCR;⁴¹ the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;⁴² and the 1955

36. *Id.*

37. Rafat, *supra* note 10, at 427.

38. See MUHAMMAD AYUB, UNDERSTANDING ISLAMIC FINANCE 348 (2007).

39. LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 187 (Majid Khadduri & Herbert J. Liebesny eds., The Lawbook Exchange, LTD. 2008) (1955) (footnote omitted).

40. VCDR, *supra* note 2. The VCDR was ratified by the Islamic Republic of Iran on February 3, 1965, and also ratified by the United States of America on November 13, 1972. United Nations, Multilateral Treaties Deposited with the Secretary-General, *Vienna Convention on Diplomatic Relations* (Apr. 18, 1961), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en (last visited Mar. 1, 2014).

41. VCCR, *supra* note 3. The VCCR was ratified by the Islamic Republic of Iran on June 5, 1975, and also ratified by the United States of America on November 24, 1969. United Nations, Multilateral Treaties Deposited with the Secretary-General, *Vienna Convention on Consular Relations* (Apr. 24, 1963), https://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=iii-6&chapter=3&lang=en (last visited Mar. 1, 2014).

42. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167. This Convention was ratified by the Islamic Republic of Iran on July 12, 1978, and also ratified by the United States of America on October 26, 1976. United Nations, Multilateral Treaties Deposited with the Secretary-General, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* (Dec. 14, 1973),

Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran.⁴³ Sovereign nations have been able to interact peacefully and maintain regular connection among themselves due to the age-long international legal method in the form of treaties and covenants. The United States alleged that the Islamic Republic of Iran was in gross violation of international obligations stipulated in these treaties by failing to safeguard and protect the safety and inviolability of the United States diplomatic mission and personnel in Iran.⁴⁴ In other words, the Islamic Republic of Iran and the United States have unanimously agreed to respect and discharge the following obligations:

- a. Protect the inviolability of the diplomatic premises and the correspondence and archives;⁴⁵
- b. Safeguard the inviolability of diplomats and protect them from arrest and detention;⁴⁶
- c. Guarantee diplomatic and consular immunity from criminal prosecution;⁴⁷
- d. Ensure immunity from criminal prosecution of the administrative and technical personnel of the mission;⁴⁸
- e. Guarantee the freedom of movement of the diplomatic and consular staff;⁴⁹
- f. Co-operate in the prevention of crimes against internationally protected persons;⁵⁰ 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.⁵¹

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-7&chapter=18&lang=en (last visited Mar. 1, 2014).

43. Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 900, 284 U.N.T.S. 93 (entered into force June 16, 1957) [hereinafter 1955 Treaty of Amity].

44. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 8 (May 24). See also Rafat, *supra* note 10, at 425-426.

45. VCDR, *supra* note 2, arts. 22, 24, 27; VCCR, *supra* note 3, arts. 31, 33.

46. VCDR, *supra* note 2, art. 29; VCCR, *supra* note 3, art. 40.

47. VCDR, *supra* note 2, art. 31; VCCR, *supra* note 3, art. 43; 1955 Treaty of Amity, *supra* note 43, art. XVIII.

48. VCDR, *supra* note 2, art. 37.

49. VCDR, *supra* note 2, art. 26; Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes art. 34, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 (entered into force Mar. 19, 1967). This Optional Protocol has been ratified by Islamic Republic of Iran on June 5, 1975, and initially ratified by the United States of America on November 24, 1969, however, it withdrew its ratification on March 7, 2005. United Nations, Multilateral Treaties Deposited with the Secretary-General, *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes* (Apr. 24, 1963), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3&lang=en (last visited Mar. 1, 2014) (while the United States has withdrawn from the treaty, it was in force during the relevant time of the conflict of which this article is focused).

50. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, *supra* note 42, arts. 2, 4, 7.

In addition to its obligations under international law, the Islamic Republic of Iran cannot pretend to be oblivious to the significance of covenants in Islamic jurisprudence. Even though Iran is known to have an overwhelming majority following the *Shi'a Imamiyyah* sect of Islam,⁵² the fact remains true that in the *Sunni*⁵³ and *Shi'a* schools of law, the religious importance and the legal binding nature of international treaties (known within Islamic legal parlance as *mu'āhadāt*) are well pronounced.⁵⁴ Islamic jurisprudence attaches great value to the concept of agreements. Contracts, in Islamic law, are not only considered legally binding, they are equally held with great sense of religiosity. The maxim "*Al Muslimūn 'inda shurūtihim* (Muslims are bound by their stipulations)" is generally accepted as traditional rule of Islamic jurisprudence by all the *madhāhib*—Muslim schools of law.⁵⁵ In Islamic law, a binding contract could be in the form of an individual's obligation to Allah; a contract of marriage between two parties of opposite sexes; a political arrangement which encompasses treaty obligations between two or more states; or a commercial contract.⁵⁶ They are generally considered agreements, or pacts, which must be fulfilled once entered into either individually or collectively.⁵⁷

An agreement, be it between an individual Muslim and the Muslim state or between a Muslim state and a non-Muslim state, remains sacrosanct. The Imam of a Muslim state is particularly under a duty to discharge his covenants to the Muslims and non-Muslims alike.⁵⁸ According to the tradition of Prophet Muhammad (pbuh) quoted by the Hanbali jurist, Ibn Taymiyyah (d.1328), that:

For everyone who has committed a breach of faith there shall be a flag [of disgrace]. On the day of judgment it will be hoisted. Its height will

51. 1955 Treaty of Amity, *supra* note 43, art. II(4).

52. The *Shi'a Imamiyyah* otherwise known as *al-Ithna-Ashariyyah*, the Twelvers, is the predominant sect in the Islamic Republic of Iran, although there are numerous denominations within the *Shi'a* sect. See Shahrouh Akhavi, *Shiite Theories of Social Contract*, in SHARI'A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT 137, 139-40, 143-46 (Abbas Amanat & Frank Griffel eds., 2007).

53. The *Sunni*, 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*, forms the largest group in Islam. THE OXFORD DICTIONARY OF ISLAM 306 (John L. Esposito ed., 2003).

54. See LABEED AHMED BSOU, INTERNATIONAL TREATIES (*MU'ĀHADĀT*) IN ISLAM: THEORY AND PRACTICE IN THE LIGHT OF ISLAMIC INTERNATIONAL LAW (*SIYAR*) ACCORDING TO ORTHODOX SCHOOLS 107-112 (2008). See also Saba Habachy, *Property, Right, and Contract in Muslim Law*, 62 COLUM. L. REV. 450, 452 (1962); Muhammad-Basheer Adisa Ismail, *Islamic Diplomatic Law and International Diplomatic Law: A Quest for Compatibility*, at 263 (Nov. 2012) (unpublished Ph.D. thesis, University of Hull), available at <https://hydra.hull.ac.uk/assets/hull:7135a/content> [hereinafter Ismail, *Islamic Diplomatic Law and International Diplomatic Law*].

55. Habachy, *supra* note 54, at 459.

56. Noor Mohammed, *Principles of Islamic Contract Law*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 95, 96 (Hisham M. Ramadan ed., 2006).

57. See *id.*

58. Habachy, *supra* note 54, at 451. "The duty of loyalty and respect for contract weighs more heavily on the *Imam* and on everyone who wields authority in the Muslim community than it does on an ordinary individual." *Id.* at 463.

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 covenant.⁵⁹

In fact, a Muslim state is expected to be a model for its citizens in discharging all contractual obligations it has granted to any foreign country.⁶⁰

Generally, in Islamic law, a covenant has its authority rooted in the two prime sources of Islamic jurisprudence, the Qur'an and *Sunnah*.⁶¹ When the Qur'an says: "O you who have believed, fulfill [all] contracts,"⁶² 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."⁶³ Particularly relevant to this discussion is the verse of the Qur'an that categorically forbids any violation of treaties between Muslims and non-Muslims. "Exempted 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]."⁶⁴ 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. Allah is very clear in describing those who violate covenants as those who are faithless.⁶⁵

Prophet Muhammad (pbuh) was recorded to have entered into a treaty with the non-Muslims of Makkah, which was known as the *Treaty of Hudaibiyyah* (AD 628), and he tenaciously observed the terms of the treaty to the letter.⁶⁶ That treaty, according to Muslim jurists, later became a paradigm that authenticates the validity of all forms of legal instruments between the Muslim and non-Muslim states.⁶⁷ In the same vein, there are numerous statements by Prophet Muhammad (pbuh) giving authority to the validity of covenants and treaties in Islamic law, especially if such treaties do not jeopardize the interest of the Muslims or contain

59. *Id.* at 463 (footnote omitted) (quoting the Muslim jurist Ibn Taymiyyah).

60. *See id.* at 451.

61. The *Sunnah*, being the second source of Islamic law, is the Prophetic traditions and constitutes the sayings, actions, and tacit approval of Prophet Muhammad (pbuh). THE OXFORD DICTIONARY OF ISLAM 305 (John L. Esposito ed., 2003).

62. Qur'an 5:1.

63. J. N. D. Anderson & N. J. Coulson, *The Moslem Ruler and Contractual Obligations*, 33 N.Y.U. L. REV. 917, 923 (1958). *See also* P. Nicholas Kourides, Comment, *The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts*, 9 COLUM. J. TRANSNAT'L L. 384, 394 (1970).

64. Qur'an 9:4.

65. *See* Qur'an 2:100 ("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.")

66. This treaty, otherwise known as '*Sulh al-Hudaibiyyah*,' was signed in March AD 628 at a place called al-Hudaibiyyah, which was on the edge of the sacred territory of Makkah. *See* W. MONTGOMERY WATT, MUHAMMAD AT MEDINA 46-52 (1956).

67. *See* GENE W. HECK, WHEN WORLDS COLLIDE: EXPLORING THE IDEOLOGICAL AND POLITICAL FOUNDATIONS OF THE CLASH OF CIVILIZATIONS 170 (2007).

any stipulations that run contrary to the Islamic teachings.⁶⁸ In fact, Islamic law will encourage a Muslim ruler or any of his representatives not to hesitate in concluding an agreement once such an agreement neither negates Islamic teachings nor is inimical to the general interests of the Muslims.⁶⁹ Prophet Muhammad (pbuh) is reported to have said that “The Muslims are bound by their obligations, except an obligation that renders the lawful unlawful, and the unlawful lawful.”⁷⁰ 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 the other party is a non-Muslim.⁷¹ Prophet Muhammad (pbuh) was very blunt in informing Abu Jandal that “[w]e have entered with the Quraysh into a treaty of peace and we have exchanged with them a solemn pledge that none will cheat the other”⁷² when he requested to join the Muslims in Madinah immediately after signing the famous *Treaty of Hudaibiyyah* in AD 628.⁷³

In a similar vein, the third Caliph in Islam, Uthman Ibn ‘Affan (d. AD 656), was said to have entered into a treaty with the people of Nubia promising not to wage war against them or attack them on basis of the treaty that binds the two of them.⁷⁴ The Caliph was reported to stand firmly by the terms of the treaty.⁷⁵

It is not in doubt that the Islamic Republic of Iran, being a signatory to all these treaties, is legally committed and intended to observe the terms of the treaties.⁷⁶ It will also be right to assume that the objects and terms of these treaties are not in any way contradictory to the core objectives of the *Shari’ah* (*maqāsid al-shari’ah*).⁷⁷ In other words, these treaties, both under conventional international law and Islamic international law, must be observed to the letter since they have

68. See Wilson B. Bishai, *Negotiations and Peace Agreements Between Muslims and Non-Muslims in Islamic History*, in *MEDIEVAL AND MIDDLE EASTERN STUDIES* 50, 51-54 (Sami A. Hanna ed., 1972).

69. Labeeb Ahmed Bsoul, *Islamic Diplomacy: Views of the Classical Jurists*, in *ISLAM AND INTERNATIONAL LAW: ENGAGING SELF-CENTRISM FROM A PLURALITY OF PERSPECTIVES* 127, 134 (Marie-Luisa Frick & Andreas Th. Müller eds., 2013).

70. M. CHERIF BASSIOUNI, *THE SHARI’A AND ISLAMIC CRIMINAL JUSTICE IN TIME OF WAR AND PEACE* 153-54 (2014) (footnote omitted) [hereinafter ‘BASSIOUNI, SHARI’A AND ISLAMIC CRIMINAL JUSTICE’].

71. Habachy, *supra* note 54, at 460.

72. MUHAMMAD HUSAYN HAYKAL, *THE LIFE OF MUHAMMAD* 354 (Isma‘īl Rājī A. al Fārūqī trans., 8th ed. 1976).

73. It is the treaty that was signed between the state of Madinah 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. See WATT, *supra* note 66, at 46-52 (it is also known as ‘*Sulh al-Hudaibiyyah*’).

74. M. H. HAMIDULLAH, *MUSLIM CONDUCT OF STATE* 291-92 (2d ed. 1945).

75. See 13 *THE HISTORY OF AL-TABARĪ: THE CONQUEST OF IRAQ, SOUTHERN PERSIA AND EGYPT* 175-76 (Gautier H.A. Juynboll trans., 1989).

76. See generally *supra* notes 40-43.

77. The primary purposes and objectives of Islamic law, which must remain preserved, according to the Muslim jurists, are: religion (*ad-din*), life (*an-nafs*), progeny (*an-nasl*), intellect (*al-‘aql*), and wealth (*al-māl*). M. UMER CHAPRA, *THE FUTURE OF ECONOMICS: AN ISLAMIC PERSPECTIVE* 118 (2000). These objectives are meant to “promote the well-being of *all* mankind” and “[w]hatever ensures the safeguard of these five serves public interest and is desirable.” *Id.*

become applicable in themselves.⁷⁸ The failure of the Iranian government to provide adequate security to the United States embassy and its personnel, especially on November 4, 1979, when the latter desperately needed it from the incursion of the demonstrators, definitely constituted a breach of these international obligations both under Islamic international law and conventional international law.

It is worthwhile to mention that assuming the Iranian government was right in its allegation of espionage against the United States, it could 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."⁷⁹

In addition, such refusal would have also received legal justification from Article 60(2)(b) of the Vienna Convention on the Law of Treaties ("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.⁸⁰

The Islamic Republic of Iran can 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 United States government of its intention to withdraw all diplomatic commitments it had with United States due to the espionage activities of the United States within the Islamic Republic of Iran. This position has received approval from the pronouncement of Prophet Muhammad (pbuh) 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."⁸¹ The Prophet also added that "[b]ehave not treacherously, even towards those who are treacherous to you."⁸² Hilmi Zawati rightly concluded when he said that "[i]n committing any prohibited acts, which might disturb the peace and security of *dār al-Islām*, like engaging in espionage . . . an envoy will be declared *persona non grata* and expatriated safely to his state of origin."⁸³

It thus appears that the Iranian government did not expressly declare its intention to sever diplomatic ties with the United States due to the espionage activities of the United States, which it found to be a gross violation of Article 41

78. Bassiouni, *supra* note 8, at 615.

79. Qur'an 8:58.

80. Vienna Convention on the Law of Treaties art. 60(2), May 23, 1969, 1155 U.N.T.S 331.

81. ISLAM HOUSE, KNOW THY PROPHET 33 (2008), available at http://d1.islamhouse.com/data/en/ih_books/single/en_know_prophet.pdf.

82. ISLAM HOUSE, THE PROPHET'S BIOGRAPHY 186 (2006), available at http://d1.islamhouse.com/data/en/ih_books/single/en_The_Biography_of_the_Prophet.pdf.

83. HILMI M. ZAWATI, IS JIHAD A JUST WAR? WAR, PEACE, AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW 80 (2001).

of the VCDR.⁸⁴ There is no evidence that such step was taken by the Islamic Republic of Iran since it did not “employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains.”⁸⁵ Having said this, the Iranian government cannot be justified in their action towards the United States and, as such, would be held liable to the United States under Islamic law and international law for invading the United States embassy and detaining its diplomatic personnel.

IV. VIOLATION OF DIPLOMATIC IMMUNITY

The protection of diplomatic envoys has been known and practiced since the ancient times through the present era of modern states.⁸⁶ We cannot also doubt the fact that there have been series of cases involving the violation of diplomatic inviolability ranging from kidnap, arrest and detention, to even killing of diplomatic personnel. It is, however, doubtful if there is any violation of diplomatic immunity that can be likened to the taking of the United States embassy and detaining its diplomatic personnel by Iran as occurred on November 4, 1979. It is not surprising when Professor 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.”⁸⁷ The occupation of the United States embassy by the Iranian 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.”⁸⁸ Richard Falk has also alluded to this submission in 1980 when he said that “Ayatollah Khomeini’s refusal to honor the rules of international law relating to diplomatic immunity is among the most serious charges brought against its leadership. Even Hitler, it is alleged, never violated the diplomatic immunity of his enemies.”⁸⁹

It seems clear that the seizure of the United States embassy in Iran could not have been permissible under the Islamic legal system. If one is to place the Iranian acts of forceful entry into the United States embassy; the acts of detaining personnel of the United States embassy; the acts of seizing and searching the documents and archives of the United States embassy; and the acts of restriction imposed on the freedom of movement of the United States diplomatic personnel on the platform of Islamic law, a legal system officially proclaimed to be adopted by

84. Article 41 of the VCDR provides 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. They also have a duty not to interfere in the internal affairs of that State.” VCDR, *supra* note 2, art. 41.

85. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 87 (May 24).

86. Legault, *supra* note 16, at 359.

87. J. CRAIG BARKER, THE PROTECTION OF DIPLOMATIC PERSONNEL 8 (2006).

88. ARSHIN ADIB-MOGHADDAM, THE INTERNATIONAL POLITICS OF THE PERSIAN GULF: A CULTURAL GENEALOGY 25 (2006).

89. Falk, *supra* note 12, at 411.

the Islamic Republic of Iran, it will not be a surprise that Iran would have been held liable were it to be prosecuted under the Islamic legal system. The reason, of course, is obvious following the view of Professor 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.”⁹⁰ It is apparent that under Islamic *siyar*, diplomatic envoys must not only be respected, but must actually be protected from all forms of molestation or maltreatment. This principle of Islamic *siyar* was further buttressed by Dr. Muhammad Hamidullah that “[diplomatic] [e]nvoys, 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.”⁹¹ Coincidentally, this represents the general position of how the diplomatic personnel should be treated according to the *Shiite* school of Islamic jurisprudence.⁹² Before discussing the implication of the Iranian acts under Islamic law, it may be necessary to consider the legal authority of the principles of diplomatic immunity in Islamic jurisprudence.

A. Legal Authority of Islamic Diplomatic Immunities

The Islamic concept of diplomatic immunity derives its legal authority first from the Qur’an, which is the primary source of Islamic jurisprudence. The Prophetic traditions also establish the validity of diplomatic immunities in Islamic law as indicated by several statements of Prophet Muhammad (pbuh). “Likewise, the practices of the Muslim Caliphs, starting from the period of the first four caliphs, up to the present Muslim [states] confirm the legitimacy of diplomatic [immunity].”⁹³ For the purpose of clarity, each of these legal sources will be briefly considered.

1. Text from the Qur’an

The incident that validates the exchange of emissaries and further confirms diplomatic immunity is, according to Professor Bassiouni, cited in Qur’an 27:23-44.⁹⁴ It occurred when Bilqees bint Sharahil, the Queen of Saba’,⁹⁵ in response to the letter of Prophet Sulayman (992-952 BC), sent emissaries with gifts to be presented to Prophet Sulayman.⁹⁶ Qur’an 27:35 recounts the incident when Bilqees said: “But indeed, I will send to them a gift and see with what [reply] the

90. Bsoul, *supra* note 69, at 134.

91. HAMIDULLAH, *supra* note 74, at 139 (footnote omitted).

92. Bassiouni, *supra* note 8, at 618.

93. M.B.A. Ismail, *Justifications and Principles of Diplomatic Immunity: A Comparison between Islamic International Law and International Law*, J. ISLAMIC PRAC. INT’L L., Issue 1 2013, at 60, 75 [hereinafter Ismail, *Justifications and Principles of Diplomatic Immunity*].

94. Bassiouni, *supra* note 8, at 610.

95. Saba’ is also known as Himyar and according to Ibn Katheer, it was a dynasty in Yemen. See ABU AL-FIDA ISMAIL IBN KATHIR, 7 TAFSIR IBN KHATIR 314 (Shaykh Safiur-Rahman Al-Mubarakpuri ed., 2d ed. 2003).

96. See Qur’an 27:22-35.

messengers will return.”⁹⁷ “While declining the gifts which were considered as a sort of bribery, Prophet Sulayman restrained himself from visiting his annoyance . . . on the envoys, because he understood the importance of their personal inviolability.”⁹⁸ Prophet Sulayman then sent the emissaries of Bilqees back with their gifts saying: “Do you provide me with wealth? But what Allah has given me is better than what He has given you. . . . Return to them”⁹⁹ There is no doubt that Prophet Sulayman had the power of detaining and punishing the emissaries of Bilqees for their offense, but rather he chose to let them go, believing that it is sacrilegious to harm or detain the envoys of another sovereign.

2. The Sunnah

The *Sunnah* has established the fundamental principles of privileges and immunities that are granted to diplomatic envoys under Islamic *siyar* in numerous places.¹⁰⁰ This is as a result of the exchange of diplomatic envoys between Prophet Muhammad (pbuh) and other nations. History has it that Prophet Muhammad (pbuh) sent different emissaries to various places including Makkah, Byzantium, Egypt, Persia, and Ethiopia either for religious or political reasons.¹⁰¹ He equally warmly received delegations and embassies in his mosque at a place designated as *ustuwānat al-wufūd* (the pillar of embassies).¹⁰² He so much held the respect and inviolability accorded foreign ambassadors in high esteem to the extent that while he was on his deathbed he was reported to have instructed his successor to award gifts to envoys as he himself used to do during his lifetime.¹⁰³ Prophet Muhammad (pbuh) was known to be very kind towards his guests to the extent that he attached the string of belief in Allah and the Last Day to the kind treatment of guests by saying that: “Who[ever] believes in Allah and the Last Day, should serve his guest generously.”¹⁰⁴ Meaning that, as a Muslim, you are required to be hospitable to your guest, be that person a Muslim or non-Muslim.

3. Consistent Practice of Muslim Heads of State

Flowing from the two divine sources, the generality of the Muslim heads of states (the Caliphs, Sultans, and the current heads of the Muslim countries) also establish diplomatic immunity through their international transactions.¹⁰⁵ Just like in the time of Prophet Muhammad, the era of his foremost successors, generally referred to as the rightly guided caliphs, also recorded some diplomatic relations

97. Qur'an 27:35.

98. Ismail, *Justifications and Principles of Diplomatic Immunity*, *supra* note 93, at 75.

99. Qur'an 27:36-37.

100. See Bassiouni, *supra* note 8, at 613.

101. See MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 241 (1955). See also Bsoul, *supra* note 69, at 130.

102. ZAWATI, *supra* note 83, at 77.

103. HAMIDULLAH, *supra* note 74, at 138.

104. ISLAMIC HADITH: ENGLISH TRANSLATION ¶ 8.156 (Kaitlyn Chick trans., 2013).

105. Bsoul, *supra* note 69, at 134-36.

with foreign potentates.¹⁰⁶ In strict adherence to the teachings of Prophet Muhammad (pbuh), Abu-Bakr (d. AD 634), the first Caliph after Prophet Muhammad (pbuh), was reported to have instructed Yazid Ibn Abu Sufyan (d. AD 640), when the later was leading an expedition to Syria, in the following words: “in case envoys of the adversary come to you, treat them with hospitality.”¹⁰⁷ This era witnessed tremendous exchange of envoys between the Muslims and non-Muslim states. For instance, in AD 651 a diplomatic mission headed by Sa’d bin Abi Waqqas was sent to the Chinese Emperor, Gaozong of Tang, under the overall leadership of Uthman Ibn ‘Affan, the third Caliph.¹⁰⁸

The diplomatic intercourse of the then Islamic empire with neighboring kingdoms, according to Hilmi Zawati, attained the height of sophistication during the period of the Umayyad and especially during the era of the Abbasid dynasty.¹⁰⁹ The large amount of peace treaties conclusively negotiated with other kingdoms at that time attest to the diplomatic successes achieved by these early Muslim states.¹¹⁰ The period of the Abbasid has 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.¹¹¹ No wonder 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.¹¹²

It is no surprise, therefore, that the generality of the Muslim states under the auspices of the Organisation of Islamic Cooperation came together to recognize the inviolability and immunities of the diplomatic personnel of individual state members.¹¹³ They did this in addition to becoming parties to the 1961 Vienna Convention on Diplomatic Relations and 1963 Vienna Convention on Consular Relations.¹¹⁴ Thus, Islamic law recognizes and observes certain immunities and privileges when dealing with diplomatic envoys.

B. Implication of Iran’s Contravention of Diplomatic Immunity Under Islamic Siyar

The historical narration of the incidence between Prophet Sulayman and Bilqees (the Queen of Saba’) contained in the Qur’an is quite instructive in this regard.¹¹⁵ The decision of Prophet Sulayman to send the emissaries of Bilqees

106. ZAWATI, *supra* note 83, at 78.

107. Ismail, *Islamic Diplomatic Law and International Diplomatic Law*, *supra* note 54, at 88.

108. See JONATHAN N. LIPMAN, *FAMILIAR STRANGERS: A HISTORY OF MUSLIMS IN NORTHWEST CHINA* 25, 29 (1997).

109. ZAWATI, *supra* note 83, at 78.

110. *See id.*

111. SEN, *supra* note 9, at 5.

112. *See* PHILIP K. HITT, *MAKERS OF ARAB HISTORY* 82 (1968).

113. Convention of the Immunities and Privileges of the Organisation of the Islamic Conference, May 15, 1976, O.I.C. Doc. IS/CM/D.20/FINAL, *available at* <http://www.oicun.org/uploads/files/convention/AGREEMENT%20ON%20IMMUNITIES%20En.pdf>.

114. Bassiouni, *supra* note 8, at 613.

115. *Id.* at 610.

back along with their gifts, which were considered as bribery and an insult to his personality, exhibited the kind of respect he had for foreign messengers.¹¹⁶ He declared them as *persona non grata*. Hence, the Qur'anic narration, according to Professor 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."¹¹⁷ He further concludes that "expulsion is the only sanction to be taken against them."¹¹⁸ Therefore, the Islamic Republic of Iran would have acted within the confines of Islamic international law by expelling the diplomatic personnel of the United States or closing down the entire diplomatic mission of the United States on the ground of espionage following the example of Prophet Sulayman in the Qur'an.

The Prophetic traditions further elaborated the Qur'anic injunctions regarding the way diplomatic envoys should be treated. One incidence was the case of the two emissaries sent to Prophet Muhammad (pbuh) by Musaylimah, who also claimed to be a prophet of God.¹¹⁹ In spite of the annoying message the envoys of Musaylimah brought to Prophet Muhammad (pbuh), which could have led to their incarceration or even execution, Prophet Muhammad (pbuh) said to them: "By [Allah], were it not that messengers are not to be [slain], I would behead the both of you!"¹²⁰ He uttered those words in recognition of the fact that the two envoys of Musaylimah were considered ordinary means of diplomatic communication, and as such possessed diplomatic immunity. Also relevant in this context is the case of Wahshi, the one who murdered Hamzah, the uncle of Prophet Muhammad (pbuh), in the battle of Uhud.¹²¹ He was accorded diplomatic immunity when he visited Prophet Muhammad (pbuh) as an ambassador of the people of Taif.¹²² The generous reception that Wahshi received from Prophet Muhammad (pbuh) led to his acceptance of Islam.¹²³ In the words of Saif, "[t]he Prophet, stressing the diplomatic immunity of ambassadors, did not hold their earlier antagonism against them," but instead he cheerfully received and welcomed them into the newly found faith of Islam.¹²⁴

116. See Qur'an 27:35-37.

117. Bassiouni, *supra* note 8, at 610.

118. *Id.* at 610-11.

119. BASSIOUNI, SHARI'A AND ISLAMIC CRIMINAL JUSTICE, *supra* note 70, at 187-88. His full name was Musaylimah ibn Habib. *Id.* He was one of those who laid false claim to prophethood almost around the same time with Prophet Muhammad. *Id.* He was given the nickname "*al-kadhhab*" (the liar) by Prophet Muhammad. *See id.*

120. *Id.*

121. *The Battle of Uhud*, AL-ISLAM, <http://www.al-islam.org/restatement-history-islam-and-muslims-sayyid-ali-ashgar-razwy/battle-uhud> (last visited Nov. 7, 2013). This is the second major battle Prophet Muhammad and the Muslims fought against the Makkans in AD 625. *Id.*

122. See *Sahih Bukhari Volume 005, Book 059, Hadith Number 399*, HADITH COLLECTION, <http://hadithcollection.com/sahihbukhari/92/5656-sahih-bukhari-volume-005-book-059-hadith-number-399.html> (last visited Feb. 26, 2014).

123. *See id.*

124. Ahmed Abdelkareem Saif, *Taif*, in CITIES OF THE MIDDLE EAST AND NORTH AFRICA: A HISTORICAL ENCYCLOPEDIA 342, 343 (Michael R. T. Dumper & Bruce E. Stanley eds., 2007).

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 honour and respect and granted immunities to them *inter alia* from imprisonment and death, however, hostile was their behaviour and threatening their language.”¹²⁵

The detention of foreign envoys was specifically discouraged by Prophet Muhammad (pbuh).¹²⁶ It was narrated by Abu Rafi’ who was designated as the Makkans’ envoy to Prophet Muhammad (pbuh) in Madinah immediately after the battle of Badr, and upon seeing Prophet Muhammad (pbuh), Islam was cast into his heart straight away to the extent that he requested never to return to Makkah.¹²⁷ The Prophet blatantly rejected his request by 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.”¹²⁸ The request of Abu Rafi’ was rejected by Prophet Muhammad (pbuh) on the basis of diplomatic inviolability as he was, then, an ambassador of the Makkans, he deserved not to be detained in Madinah. Perhaps, if Prophet Muhammad had acceded to the request of Abu Rafi’ by allowing him to remain in Madinah, it would have amounted to him detaining a Makkan envoy. It was further reported that Abu Rafi’ later came back, not as diplomatic envoy, but as a Muslim emigrant.¹²⁹

It is precisely clear from the foregoing authorities in 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. 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,¹³⁰ it is also expected that Iran will be totally committed to the principles of diplomatic immunity as contained under Islamic international law. Islamic international law imposes a duty on the Islamic Republic of Iran to provide adequate protection against the invasion and seizure of the United States embassy.

V. COMPARING THE RECENT ATTACK ON THE BRITISH EMBASSY IN TEHRAN WITH THE 1979 INVASION OF THE AMERICAN EMBASSY

The November 29, 2011, attack on the British embassy by some angry demonstrators can be distinguished from the 1979 United States embassy

125. *In re* Islamisation of Laws Public Notice No. 3 1983, (1985) 37 PLD (FSC) 344, 354 (Pak.); see also Ismail, *Justifications and Principles of Diplomatic Immunity*, *supra* note 93, at 81.

126. HAMIDULLAH, *supra* note 74, at 147-48.

127. See *Abu Dawud Book 0008, Hadith 2752*, HADITH COLLECTION, <http://www.hadithcollection.com/abudawud/240-Abu%20Dawud%20Book%20008.%20Jihad/16836-abu-dawud-book-008-hadith-number-2752.html> (last visited Feb. 26, 2014).

128. *Id.*

129. See *id.*

130. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 3(16).

invasion.¹³¹ The protestors, mostly students, went into the British embassy, shattering windows, ransacking offices, setting ablaze the embassy vehicle, looting and damaging embassy properties, 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.¹³³ They eventually stormed the British embassy, mainly to protest the United Kingdom's decision to cut off all dealings with the Iranian Central Bank in response to the Iranian nuclear program.¹³⁴

In this particular incidence, the Iranian government quickly condemned the attack by saying that: "The foreign ministry regrets the protests that led to some unacceptable behaviours[.] We respect and we are committed to international regulations on the immunity and safety of diplomats and diplomatic places."¹³⁵ 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 they done that, Iran would have been vindicated and seen by the international community to have 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 individuals and states are strictly bound by the terms of the treaties they made to other individuals and states, be they Muslims or non-Muslims.¹³⁶ 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."¹³⁷

VI. DOES IRAN HAVE ANY LEGAL JUSTIFICATION FOR INVADING THE AMERICAN EMBASSY UNDER ISLAMIC INTERNATIONAL LAW?

The Iranian government claimed the invasion of the United States embassy by the demonstrating students on November 4, 1979, was justified. But then, there is

131. See Robert F. Worth & Rick Gladstone, *Iranian Protesters Attack British Embassy*, N.Y. TIMES, Nov. 29, 2011, http://www.nytimes.com/2011/11/30/world/middleeast/tehran-protesters-storm-british-embassy.html?_r=0.

132. See *id.*

133. Julian Borger & Saeed Kamali Dehghan, *Storming of British Embassy in Tehran Worsens Bilateral Relations*, GUARDIAN, Nov. 29, 2011, <http://www.theguardian.com/politics/2011/nov/29/british-embassy-attack-iran-uk-relations>.

134. See Worth & Gladstone, *supra* note 131 ("Britain's new economic sanctions require all contacts to be severed with the Iranian Central Bank, a step that the United States had already taken.")

135. 5:20 PM GMT/12:20 PM EST—*Iran Protesters Attack UK Embassy in Tehran—Tuesday 29 November*, GUARDIAN, <http://www.theguardian.com/world/blog/2011/nov/29/iran-protesters-attack-uk-embassy-tehran-live#block-19> (last visited Feb. 26, 2014).

136. See Habachy, *supra* note 54, at 451-52; see also *Saudi Arabia v. Arabian Am. Oil Co. (Aramco)*, 27 I.L.R. 117, 195 (1963).

137. 6:10 PM GMT/1:10 PM EST—*Iran Protesters Attack UK Embassy in Tehran—Tuesday 29 November*, GUARDIAN, <http://www.theguardian.com/world/blog/2011/nov/29/iran-protesters-attack-uk-embassy-tehran-live#block-24> (last visited Feb. 27, 2014).

a need to critically evaluate the Iranian government's justification under Islamic law. It is also noteworthy that the Iranian government neither put up appearance nor filed any Counter-Memorial before the I.C.J. Iran never participated in the entire judicial proceedings, but rather, sent two letters, dated December 9, 1979, and March 16, 1980, from the Minister for Foreign Affairs of Iran to the I.C.J.¹³⁸ These letters, which were similar in contents, contained the reasons why the Iranian government felt that "the Court cannot and should not take cognizance of the case" brought by the United States.¹³⁹

The December 9, 1979 letter, 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; any examination of the numerous repercussions thereof is a matter essentially and directly within the national sovereignty of Iran."¹⁴⁰ As far as the Islamic Republic of Iran is concerned, the entire question before the I.C.J.

only represents a marginal and secondary aspect of an overall 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.¹⁴¹

The letter further mentioned that the dispute between the governments of Iran and the United States is 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."¹⁴² Therefore, according to Iran, it will be improper for the I.C.J. 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."¹⁴³

In addition, the then spiritual leader of the Islamic Republic of Iran, Imam Ayatollah Khomeini, issued a decree on November 17, 1979, which may be considered as an approval and justification for taking over the United States embassy by saying that: "the American Embassy was 'a centre of espionage and conspiracy' and that 'those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respects.'"¹⁴⁴

138. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. 3, ¶ 10 (May 24).

139. *Id. See also United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Request for the Indication of Provisional Measures, 1979 I.C.J. 7, ¶ 8 (Dec. 15).

140. *United States Diplomatic and Consular Staff in Tehran*, Request for the Indication of Provisional Measures, 1979 I.C.J. ¶ 8.

141. *United States Diplomatic and Consular Staff in Tehran*, Judgment, 1980 I.C.J. ¶ 35.

142. *Id.* ¶ 10.

143. *Id.*

144. *Id.* ¶ 73.

It can be inferred from the above statement that since the United States embassy had been used as a place to spy on and conspire against the Islamic Republic of Iran, Iran was then justified to detain its diplomatic and consular staff and therefore, seize the entire embassy. In a nutshell, one could say that the Iranian government relied on the following justifications as the basis for its action: first, 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;¹⁴⁵ and second, the use of the United States embassy as a 'centre of espionage and conspiracy' against the Islamic Republic of Iran.¹⁴⁶

Regarding the first justification, there are impressive examples in the Qur'an and the *Sunnah* of Prophet Muhammad (pbuh), which made it abundantly clear that it will amount to violating the immunity of diplomatic envoys if the diplomats should be subjected to punishment or detention by the host country for any offense they might have allegedly committed.¹⁴⁷ Moreover, the Iranian government never brought any criminal charges alleging the commission of espionage or any other offenses against any of the United States diplomats. Rather, the diplomats should be seen as ordinary means of facilitating diplomatic interactions between the Islamic Republic of Iran and the United States.¹⁴⁸

The second justification by the Iranian government is that the United States 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 respects.¹⁴⁹ Truly, according to Islamic law of 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* (discretionary) category¹⁵⁰ of crimes as it is not categorically considered *harām* (prohibited) under Islamic criminal law.¹⁵¹ It does not fall under the *hudūd* (determined)¹⁵² and *qisās* (retaliation) offenses.¹⁵³ As for

145. *Id.* ¶ 10.

146. *Id.* ¶ 73.

147. See JAVAD REHMAN, ISLAMIC STATE PRACTICES, INTERNATIONAL LAW AND THE THREAT FROM TERRORISM: A CRITIQUE OF THE 'CLASH OF CIVILIZATIONS' IN THE NEW WORLD ORDER 119 (2005).

148. See Bassiouni, *supra* note 8, at 610.

149. *United States Diplomatic and Consular Staff in Tehran*, Judgment 1980 I.C.J. ¶ 73.

150. These are offenses that are not specifically mentioned in the Qur'an and the *Sunnah*, but the Islamic penal system empowers the state and the judges to impose punishments on these forbidden acts which are accordingly designated as *ta'azir*. See RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 65-66 (2005). 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 *hudūd* or *qisās*. See *id.*

151. Bassiouni, *supra* note 8, at 623-24.

152. These are crimes whose punishment are specified and decreed by the Qur'an and the *Sunnah* of the Prophet otherwise known as "*uquubaat muqaddarah*." See Saeed Hasan Ibrahim, *Basic Principles of Criminal Procedure Under Islamic Shari'a*, in CRIMINAL JUSTICE IN ISLAM: JUDICIAL PROCEDURE IN THE SHARI'A 17, 18 (Muhammad Abdel Haleem et al. eds., 2003).

153. Unlike *hudūd* offenses, which are considered to involve the rights of God (*huquq-illaah*), *qisās* offenses also referred to as retaliation concern the rights of man. See Mehran Tamadonfar, *Islam, Law,*

the *hudūd* and *qisās* offenses, there are fixed penalties for them in the Qur'an and the *Sunnah* of Prophet Muhammad (pbuh).¹⁵⁴

It is clear in Islamic law that *ta'azir* offenses, being discretionary in nature, could generally be waived, particularly, by diplomatic immunity.¹⁵⁵ In other words, since espionage is classified as one of the *ta'azir* offenses, it therefore, follows that any detention or arrest of internationally protected person for the commission of espionage will be rendered nugatory. The Iranian government would have contravened Islamic international law by detaining the United States diplomats for allegedly committing the offense of espionage. Even if the United States 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 also compatible with the provisions of Article 9(1) of the VCDR which provides that:

The 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.¹⁵⁶

The purported justifications put forward by the Islamic Republic of Iran can, at best, be described, according to Professor Rehman, as “national, political and economic grievances,” which may not constitute an arguable legal defense under Islamic *siyar* and conventional international law.¹⁵⁷ For instance, Imam Ayatollah Khomeini lamented: “What kind of law is this? It permits the U.S. government to exploit and colonize peoples all over the world for decades. But it does not allow the extradition of an individual who has staged great massacres in Iran. Can you call it law?”¹⁵⁸ However, this in itself does not provide legal justification for invading the United States embassy. Professor Rehman further stresses that although “there was a sense of unfairness, injustice and exploitation perpetuated by successive United States governments,” the relevance of the Iranian claims to Islamic international law remains very much doubtful.¹⁵⁹ Meanwhile, the

and Political Control in Contemporary Iran, 40 J. FOR SCI. STUDY RELIGION 205, 212 (2001). The offenses that fall under the *qisās* are five, namely: (a) murder, (b) voluntary killing, (c) involuntary killing, (d) intentional physical injury or maiming, and (e) unintentional physical injury or maiming. *Id.* See also Bassiouni, *supra* note 8, at 623-24.

154. Ghaouti Benmelha, *Ta'azir Crimes*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 211, 212 (M. Cherif Bassiouni ed., 1982).

155. *Id.* at 212, 222. See also Bassiouni, *supra* note 8, at 623-24.

156. VCDR, *supra* note 2, art. 9(1).

157. REHMAN, *supra* note 147, at 123.

158. *An Interview with Khomeini: Harsh Words, in a Soft Voice, About the Shah, Carter and America*, TIME, Jan. 7, 1980, at 26, 27.

159. REHMAN, *supra* note 147, at 123.

justifications canvassed by the Iranian government, though not legally viable, surely indict the international law of its "arbitrariness and one-sidedness," which call for a critical attention.¹⁶⁰

VII. CONCLUSION

It can be gleaned from this article that Islamic diplomatic law, in the same spirit with international diplomatic law, condemns the 1979 seizure of the United States embassy in Tehran. One may submit therefore, that if Iran were to be brought before a court that dispenses Islamic law, the judgment would not have been different from that of the I.C.J., regardless of the fact that Iran officially follows the *Shi'a Imamiyyah* sect of Islam. The Islamic Republic of Iran has a duty, under Islamic law, to fulfill all contractual obligations it has entered into with the United States, provided they are not contradictory to the core objectives of the *shari'ah* (*maqasid al-shari'ah*). The fact that the United States was accused of committing the offense of espionage by the Iranians may not hold as justification for the seizure of the United States embassy. The Islamic Republic of Iran within the purview of this article is therefore found liable under Islamic law for failing to discharge its diplomatic commitments to the diplomatic mission and staff of the United States embassy.

160. *Id.* at 124.