Criminal Responsibility of Hierarchic Superiors in Islamic Law and International Criminal Law (ICL)

Nosheen Qayyum
Ph.D. Scholar, Department of Law,
International Islamic University, Islamabad
sys3mxs@yahoo.com

Abstract

This article aims to address the issue of criminal responsibility of hierarchic superiors from the perspective of Islamic law in order to identify potential conflicts and convergence with international criminal law (ICL). To enable a basic understanding of Islamic law, it begins with the examination of the basic concept of crime, its classification, components, etc. It then proceeds to examine the criminal liability of hierarchic superiors in the Islamic legal system in comparison with ICL from three different dimensions; firstly, the responsibility of hierarchic superiors where they physically execute international crimes; secondly, where they order others to commit illegal acts; thirdly, where they omit to prevent the occurrence of the crimes perpetrated by the troops acting under their effective command and authority. It concludes that when a person is physically involved in the perpetration of international crimes, the Islamic legal system strictly adheres to the notion of 'individual criminal responsibility' and is not fundamentally in conflict with Western legal traditions. However, both legal systems collide when a person commits crimes like rape or murder under duress. As far as the 'imputed criminal liability' of hierarchic superiors for the crimes perpetrated by their underlings is concerned, it is a new issue that has not been addressed either by the Holy Qur'ān or the Sunnah of the Holy Prophet (PBUH); it comes under the policy of 'siyāsah' which empowers Muslim rulers to adopt proper rules and regulations addressing the matter, keeping in view the objects and purpose of Islamic law.

Keywords*: Criminal Responsibility, Islamic Criminal Law, Siyāsah Sharīʿah, International Criminal Law*

Introduction

International criminal law (ICL) has been inclined to inculpate those hierarchic superiors who are accused to be involved in the perpetration of international crimes. At the end of the Second World War, significant attention was paid to establishing leadership accountability and in this regard, Justice Jackson's remarks deserve special mention where it was expressly recognized that the law should not only focus on petty crimes committed by ordinary individuals, it should also reach those who not only hold great power but also make 'deliberate and concerted use of it.' (Excerpt of the speech delivered by Justice Jackson before the International Military Tribunal (IMT), Nuremberg). Similarly, the main focus of the *ad hoc* tribunal established by the United Nations (UN) Security Council (SC) in the former Yugoslavia (ICTY) had been to put on trial those senior leaders who were accused to be involved in the perpetration of international crimes. (Resolution No 1534 adopted by the UN SC on 26 March, 2004). The ICC pre-trial chamber in *Katánga & Ngudjôlo* case also affirmed that in the context of international crimes, "the criminal responsibility of a person is believed to increase in *tandem* with a rise in the hierarchy; the higher in rank or farther detached the mastermind is from the perpetrator, the greater that person's responsibility will be".

As a matter of fact, international crimes are usually planned, instigated, aided, and abetted by high-level leaders (including both military and civilian superiors) and are physically executed by low-level soldiers, members of irregular forces, or by those belonging to private military contractors, policemen, etc (Yanev, 2016). From the criminological point of view, it is difficult to charge senior leaders as 'direct perpetrators', as they are distant from the place of occurrence of the crimes and thus lack the element of *actus reus (*Manacorda & Meloni, 2011). Thus, the application of ordinary modes of perpetration such as ordering or instigating the crime appears to be unsatisfactory in these crimes as these modes do not take into account the inherent gravity of the offenses and thereby diminish the magnitude of the role played by the orchestrators of international crimes. On the other hand, the law of complicity makes the leaders accomplice to the crime and assigns secondary responsibility to them (Ibid). Thus, instead of relying on conventional modes of liability like as planners, instigators, aiders, or abettors, international legal bodies like the ICTY and the International Criminal Court (ICC) preferred to adopt the doctrine of 'Joint Criminal Enterprise' (Tadic Appeals Chamber

judgment) and the German approach of 'Control theory of perpetration' (The Pre-trial chamber decision in Lubanga case), respectively.

As far as Islamic criminal law is concerned, it aims "to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to an individual or public interest" (Nyazee, 2007). If a person is indulged in an illegal act, there is consensus among all schools of thought that he is individually responsible for the impugned act, which is non-transferrable (Bassiouni, 2013). The criminal responsibility of an individual is based on deliberate or intentional abuse of freedom of choice in his/her social or international conduct (Malekian, 2011). This liability extends to every person, regardless of the social status or official position of the accused; since no one is deemed to be superior except based on *taqwā*: "O mankind! We created you from a single (pair) of a male and a female and made you into nations and tribes, so that you may know each other. Verily, the most honored in the sight of Allah is the most righteous of you. And Allāh has full knowledge and is well acquainted" (49:13).

The notion of 'individual criminal responsibility' is well ingrained in Islamic criminal law and it appears to be equally problematic to attribute to the leaders those crimes of their underlings which were perpetrated under their supervision¸ and in which they did not physically participate. Since the issue is of recent vintage, it has not been expressly regulated either by the text of the Holy Qur'ān or the *Sunnah* of the Holy Prophet (PBUH) and is also not dealt with by classical Muslim jurists. The lacunae need to be filled by having recourse to other norms of *sharīʿah*, particularly the doctrine of *siyāsah* which plays an essential role in deciding those new issues regarding which there lacks an explicit provision in Islamic law.

Review of Literature

Contemporary writers have done a lot of work in the field of Islamic criminal law in comparison with ICL, in which they found potential differences and convergences between both legal systems. As far as the criminal responsibility of hierarchic superiors is concerned, it has been a neglected issue since most writers mainly focused on one dimension only and that is the physical perpetration of international crimes. They have simply ignored other aspects of the matter involving the situations where superiors play a crucial role in the execution of international crimes, without physically getting involved therein. For instance, in

2011 Cherif Bassiouni in his book 'The *Sharī'a* and Islamic criminal justice in time of war and peace' briefly discussed the adherence of the Islamic legal system to the notion of individual criminal responsibility, which in exceptional cases can be extended to others based on a legal relationship, like the tortuous liability of an employer for the acts of his employee. In the same year, M. E. Badar wrote an article "Islamic law and the jurisdiction of International Criminal Court" in which he tried to ward off the claim that basic principles of Islamic criminal law are inconsistent with the western legal system. In that article, he analyzed the core principles of Islamic law in comparison with ICL and found that both legal systems are compatible. The irrelevance of the official position of the accused is among the principles which were briefly discussed by the writer.

Comparatively, a bit comprehensive discussion can be found in the work done by, Malekian in his book, 'Corpus *Juris* of Islamic International criminal justice' published in 2017. In that book, the writer also dealt with the issue of 'individual criminal responsibility' in Islamic law in comparison with ICL and found out that the laws and provisions dealing with individual criminal responsibility' as enshrined in the statutes of the Nuremberg tribunal, the ICTY, the ICTR and the special court for Sierra Leone (SCSL) and the Rome Statute (RS) of the ICC are all in conformity with the principles of Islamic criminal law and justice. Islamic legal system is against impunity and all individuals are equal before the law and it thus endorses the norm of the irrelevance of the official position of the accused of international criminal justice. In view of the writer, criminal responsibility in both legal systems is based on three key elements; legal which refers to the violation of a legal norm; physical refers to the involvement of a person in the impugned act and mental, which refers to the intentional commission of a prohibited act. He concludes that since intention plays an important role in the ascertainment of criminal responsibility of individuals, this liability could be extended to all those who collectively get involved in the commission of a crime with guilty minds, and thus it is not different from the concept of 'Joint Criminal Enterprise' which also assigns responsibility to a group of people who deliberately participates in group crimes with common intention. The crux of the discussion is that where a person is physically and deliberately involved in an illegal act, he is individually responsible for that conduct and this liability is not different from the one embodied in the statutes of international courts and tribunals.

Hence, the writings of contemporary scholars mainly focus on the legal outcome of the physical perpetration of international crimes, this article aims to fill the existing lacunae by attempting to clarify the stance of Islamic law regarding those situations as well where superiors play an important role in the execution of international crimes, without physically getting involved therein. Thus, apart from a situation where superiors physically get involved in the execution of international crimes, it also aims to address the criminal liability of superiors where they compel others to commit illegal acts and also where they do not prevent the occurrence of the crimes perpetrated by the troops acting under their effective command and supervision, from the perspective of Islamic law.

Research Methodology

The present study used the 'doctrinal research methodology', to cope with particular issues of questions of law as the main objects of research. In the context of the present research, the particular issue of the doctrinal study was the determination of the criminal liability of hierarchic superiors from an Islamic law perspective, in comparison with ICL. The findings of the present study are largely based on the Qur'ān and the Sunnah of the Prophet (PBUH) as the primary sources of Islamic law, classical books of *fiqh* especially those belonging to *Hanafī* school of thought, though opinions of jurists of other schools have also been mentioned, if found necessary. Moreover, the books and articles written by contemporary scholars have also been taken into consideration. As far as ICL is concerned, international legal instruments, especially the provisions of the Rome Statute (RS) of the ICC have been analyzed.

The Notion of Crime (*Jarīmah*) and Criminal Responsibility in Islamic Law

In Arabic, the word '*jarīmah'* is used for unlawful conduct, which means sin, crime, or offense (Wahr, 1983). Technically, it applies to the 'commission of an act' forbidden by Allah Almighty or 'omission of an act' enjoined by Him (Abū Zahra, n.d). Thus, it has been defined as "the commission of a prohibited act, or omission of an act required by the *sharī'ah* for which punishment has been prescribed" (Awdā, n.d,).

Broadly speaking, the concept of crime in Western legal traditions is not different from Islamic legal tradition and is usually referred to as an act that leads to the violation of social norms protected by a state (Marchuk, 2014). Technically, it is a violation of a legal rule which gives rise to the punishment of the violator in the form of fine, imprisonment,

forfeiture, or a combination of the three (0'Keefe, 2015). Hence, a crime is a violation of a legal obligation, it could be negative, i.e., the commission of a prohibited act or positive, i.e., omission to perform a legal duty (Ibid).

Classifications of Crimes in Islamic Law

The crimes in Islamic law are classified into *hudūd, ta 'zīr,* and *siyāsah. Hadd* means to limit, restrict, confine or bound (Baalbaki, 1997) and refers to those restrictions which are imposed by Allah Almighty, to prevent people from committing acts forbidden by Him (al-Māwardī, n.d). *Hadd* refers to those ″fixed punishments which pertain to the rights of Allah″, and includes crimes like 'unlawful sexual intercourse' (*'zinā')*, 'false accusation of illegal sexual intercourse' *('qadhf')*, 'drinking wine' ('*shurb al-khamar')*, 'theft' ('*sariqah'),* 'highway robbery' ('*qitā'al-tarīq')*, 'apostasy' *('riddah')* and *'baghā'* ('insurrection') (al-Kāsāni, n.d). The rules of *qisās* or *qawad*, which are applicable in cases of murder (as well as bodily injuries) are also fixed but are excluded from the category of *hudūd* crimes, as they pertain to the pure 'rights of individuals' (*'abd*). (Al-Kāsanī, n.d). The word '*qisās'* means 'equivalence' and it implies that a person who is indulged in a wrong full act against another person must be harmed in a way he harmed the victim (Bassiouni, 1997). The punishment of *qisās* is either in the form of retaliation or payment of compensation, as Allah Almighty says: "O ye who believe! *qisās* is prescribed for you in case of murder…" (2: 178.) Since homicide and wounding are considered injuries directed against the victim or his/her family, instead of the society it is the sole discretion of the victim to choose an appropriate way of redressing the injury (Cammack, 2011).

Under the second category comes the crimes of *tā'zīr*, which means censure, blame, rebuke, reprimand (Wahr, 1983) and are related to the violation of pure 'individual rights'; these can be implemented in those situations where *hadd* or *qisās* cannot be inflicted due to strict procedural requirements (Abū Zahrā, n.d). Under *ta'zīr*, the types and categories of punishments include flogging, banishment, public condemnation, and reproach and in some cases the punishment may be just a warning while in others it may be a death sentence (Okon, 2014).

Apart from *hudūd* and *ta'zīr* crimes, there is also a third category that relates to the 'rights of state' (*haq al-saltanah*), or the 'collective rights of individuals' and is termed as '*siyāsah'*. Under this category, rulers have been given wide discretionary powers to adopt rules according to the growing needs of the time regarding those issues which are not expressly

regulated either by the text of the Holy *Qur'ān* or the *Sunnah* of the Holy Prophet (PBUH) (Nyazee, 1997).

The classification of crimes into *Hudūd, Ta'zīr,* and *Siyāsah* entails many consequences. One such consequence is that whenever the 'right of Allah' is violated, (like in the cases of *hudūd* crimes); no one is empowered to grant pardon or reduce the sentence of the accused. However, where a right pertaining to an individual (in the case of *ta'z*īr), or the one pertaining to the state (in the case of *siyāsah)* is violated, punishment can be commuted (Nyazee, 2007). Another difference, which is related to criminal proceedings and evidence is that in *hudūd* crimes, the testimony of women is inadmissible, as it involves the right of Allah, while in cases of *ta'zīr*, the testimony of a single man and two women needs to be maintained. However, where a right of the state is violated, the testimony of a single woman is permissible just like other 'circumstantial evidences'. Thus, the rules of evidence are quite lenient in the case of *siyāsah* crimes, as compared to both *hudūd* and *ta'zīr* crimes (Ibid).

Indeed, the fixed part of Islamic law plays an important role in laying down the fundamental principles on the basis of which the flexible part is developed. These principles are more general in nature and are derived from the Qur'ān or the Sunnah of the Prophet (PBUH) and must not be confused with either the rules of specific provisions of the substantive or procedural law or with juristic opinions found in the classical books of *fiqh* which are decisions of the jurists arrived at in particular situations and not the principles relied upon to decide cases. (Nyazee, n.d). Another important function of the fixed part is 'to yield the ultimate principles or the purposes of the Islamic law'. These are termed as *maqāsid al-sharī'ah* or purposes of Islamic law, which are preserved or protected by the *sharī'ah* and play an important role in the development of law (Ibid, 118).

Elements of Crime in Islamic Law: *Actus Reus* and *Mens Rea*

In Islamic law, the elements of the crime include both the '*actus reus',* i.e., the physical commission of an act and '*mens rea',* i.e., the 'state of mind' of the accused. *Actus reus* refers to the physical commission of an act that has been declared unlawful by the *sharī'ah* like adultery theft, usurpation, etc. It can also be in the form of omission of a duty, which could be either personal like failure to pay *zakāt* or could also affect the rights of other persons. For example, if a person does not give food to a hungry person who later dies, or leaves a blind

person helpless on a road who eventually falls into a well; in both these situations he/she has committed a crime by omitting to perform his moral duty (Abū Zahrā, n.d).

Alongside '*actus reus'*, '*mens rea'* is also an important component of a crime in Islamic law on the basis of which criminal culpability of the defendant is ascertained; it refers to the state of mind of the defendant during the course of occurrence of the crime. According to the Islamic legal maxim "matters shall be judged by their objectives" ('*al-umūr bi-maqāṣidihā'*); it implies that actions must be determined according to the intention (*niyya*) of the (wrong) doer (Zakariyah, 2015). This legal maxim is based on both the Holy *Qur'ān* and the saying of the Holy Prophet (PBUH): "That man can have nothing but what he strives for" (53: 39), "actions are judged according to the intentions".(*Sahīh Bukhāri,* The Book of Revelation, *Hadīth* No 1).

Since the intention is a hidden matter as something between a person and his Lord, in penal matters Muslim jurists determine it by relying on external pieces of evidence. For instance, where homicide is committed, the external evidence will be the weapon used to assault the victim. Thus, in view of *Hanafī* jurists, if a person uses a lethal weapon that is more likely to cause death like a sword, knife, a sharp wood or a sharp stone or any weapon made up of copper, silver, gold, the resultant death will be classified as '*qatal-e-*'*amad'* or 'intentional killing'. However, if a person uses an instrument which unlike ordinary circumstances caused the death of the victim, like he used a small stick, or a small stone or hit the victim with a single or two lashes; in such a situation the resultant death will be designated as 'quasi-intentional killing', in view of *Hanafī* jurists, unlike *Imām* Shāfʿī who considers it as an 'intentional killing'(Kāsāni, n.d).

As far as the statute of ICC is concerned, article 30 (1) expressly provides that a person becomes liable for those crimes which are enumerated in its statute, if he commits those crimes 'intentionally' and 'knowingly': "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court only if the material elements are committed with intent and knowledge".

Individual Criminal Responsibility in Islamic Law

Islam strictly complies with the notion of 'individual criminal responsibility', i.e., every individual is personally responsible for the crimes perpetrated by him; no one can be deemed to be liable for the misdeeds of others. There are innumerable verses of the Holy *Qur'ān*

which support that stance. ″And that man can have nothing but what he strives for″ (53: 39). "No soul burdened with sin will bear the burden of another. And if a sin-burdened soul cries for help with its burden, none of it will be carried even by a close relative" (35:18.) "ˆDivine grace isˋ neither by your wishes nor those of the People of the Book! Whoever commits evil will be rewarded accordingly, and they will find no protector or helper besides Allah." (4: 123).

Abū Rimthah narrates that once he went to the Holy Prophet (PBUH) with his father. The Prophet asked his father: Is this your son? The father replied in affirmative while swearing on oath. Upon this, the Messenger of Allah (PBUH) smiled and said: "He will not bring evil on you, nor will you bring evil on him". (Abū Dawūd, *Kitāb al-Diyāt*, *Hadith* No 4495.).

Islamic law adheres to the notion of 'individual criminal responsibility' in those cases as well where the crime has been committed by more than one individual, by making liable every person who individually satisfied all the elements of the alleged offense. For instance, to be guilty of theft, the property must have been taken from a place of safekeeping (*hirz*). Thus, if a person steals an item from a safekeeping and is caught before escaping, *hadd* punishment will not be inflicted, however he will be subject to amputation if he acquired possession of the stolen item after coming out of the safekeeping. Similarly, if he threw the stolen item towards the other participant, who was assisting him outside the *hirz* or safekeeping, in such a situation *hadd* punishment will not be inflicted on either of them because no one among them individually satisfied the element of theft, i.e., taking away the property from *hirz* or safekeeping (they will rather be given discretionary punishment) (Kāsānī, n.d; Al-Māwardī, n.d).

Similarly, Muslim jurists hold the opinion that if various people collectively assaulted an individual then the right of retaliation is available against all of them, however if the legal heirs of the victim pardoned them, payment of a single *diyyah* will exonerate all of them. (Al-Māwardī, n.d). However, if they acted in succession, the person who attacked first will be considered liable if the victim's death occurred within a day after the attack, otherwise the last attacker will be considered liable. As far as other assailants are concerned, in both these situations they will be subject to discretionary punishment. (Peters, 2005).

Mālikī school of thought does not differentiate between the liability of the principal and the accessory and rather treats them all equally irrespective of the contribution made by each of them, ranging from 'aiding' and 'abetting' to directly causing the death of the victim. Thus, a person who managed to bring poison and the person who administered it, both will be subject

to retaliation. Similarly, if three men took the victim to a remote area and one among them killed him, all of them shall be subject to retaliation (Ibid).

On the other hand, Banditry or highway robbery is the only crime regarding which the 'collective criminal liability' of all the perpetrators involved therein has been recognized. If the aggravating crime has been committed by more than one perpetrator, all of them shall be subject to the prescribed punishment. Thus, if one of the perpetrators seizes property belonging to the victim, all the contributors will be subject to amputation of the right hand and left foot. However, if one of the participants escapes *hadd* punishment due to a minority or any other reason, all others shall also be relieved (Ibid).

Though 'individual criminal responsibility' is well recognized in Islamic law, there are few instances where a person is considered 'vicariously liable' for the faults of others. These include the institution of *al-ʿāqila*, wherein the relatives of the killer are supposed to pay compensation on his behalf. Bukhārī narrates those two women from a tribe known as '*Hudhail'* quarreled with each other and one of them threw a stone toward the other who eventually died (along with her fetus). The relatives of both the offender and the victim took the case to the Prophet (PBUH) for adjudication, who held that the *'Asaba* (near relatives) of the murderer had to pay *diyya* to the family of the victim. (*Kitāb al-Diyāt , Hadīth* No 48).

A person is also considered responsible for the actions of another due to a pre-existent legal duty towards him /her. For example, the liability of an employer arises for those actions of his employee which occurred during the performance of his duties and caused damage to a stranger (Muhamad, 2000). Similarly, a person can also be considered liable for the actions of his child, animal, or object under his control that caused a loss to a stranger. In the case of damage caused by an animal or other object, the liability will be imposed on its owner or lessee (*musta'jir*), or trustee (*mūdaʿ*), or usurper (*ghāsib*) or borrower (*mustaʿīr*) (Ibid).

Individual criminal responsibility is also a founding principle of ICL as article 25 of the RS explicitly declares that "[a] person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with this Statute".

Criminal Responsibility of Superiors in Islamic Law

The Holy *Qur'ān* enjoins to uphold justice, though it is against one's interest or against the interest of one's near relatives, whether rich or poor, as Allah Almighty says ″be persistently standing firm in justice ... even if it be against your selves or the parents, and the relatives. Whether one is rich or poor... ″ (4: 135) On another occasion, Allah Almighty says ″Surely

God bids to justice and doing good″ (16: 90). Thus, Muslims have been enjoined to uphold justice, without any discrimination based on the color, sex, faith or social status. The Holy Prophet (PBUH) during his last speech reiterated the 'principle of equality' of all human beings: "All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also, a White has no superiority over a Black nor a Black has any superiority over a White except by piety and good action." (Excerpt from the Prophet's Last Sermon).

Muslim narrates on the authority of 'A'isha, (R.A) that once a woman from *Quraish* committed theft during the time of the Holy Prophet (PBUH). When Osāma tried to intercede on her behalf, the Prophet (PBUH) got angry and said that this injustice destroyed the earlier nations because if a person holding a high social position committed theft, he/she was spared, and if a weak person would commit the same crime they inflicted him/her ordinary punishment. He swore to God and said that had his daughter Fatima committed theft, he would have amputated her hand. (*Kitāb al-Hudūd, Hadīth* No 4188).

Every person who commits a crime is answerable before a court of law just like an ordinary person, irrespective of his official capacity. The Holy Prophet (PBUH), on many occasions had presented himself for accountability. One such incident has been narrated by Ibn-e-Hibbān, according to which on the day of *Badar*, the Prophet (PBUH) while straightening the rows, hit a soldier on the belly with a baton in his hand. The soldier complained to the Prophet (PBUH) upon which he lifted his shirt and asked the soldier to take retaliation (Ibn-e-Kathīr, 1996). Similarly, complaints were made against the caliphs of the Prophet (PBUH) in the courts of the *qādi* and Abū Bakar, ʿUmar, ʿAlī, and many *Umayyad* and *Abbasid* Caliphs appeared before the courts and defended their suits (Hamidullah, 2011).

As far as ICL Is concerned, article 27 of the RS does not recognise special privileges for anyone and the statute is equally applicable to all, irrespective of the official capacity of the accused as A head of state, or as a member of parliament, or as a person holding any other official position.

Criminal Responsibility of a Superior Where He Issues Illegal Orders

Generally speaking, Muslims are enjoined to obey their rulers, as Allah Almighty orders us to obey Him and His Messenger and the people of authority (rulers). (4:59) Abū Huraira narrates that the Holy Prophet (PBUH) obliged Muslims to obey their ruler. (Sahīh Muslim,

Kitāb al-Imārah, *Hadīth* No 4523). However, obedience is required in lawful conducts only, not in sinful things, as narrated by Ibn-e -'Umar that the Holy Prophet (PBUH) said "It is obligatory upon a Muslim that he should listen and obey him whether he likes it or not, except that he is ordered to do a sinful thing. If he is ordered to do a sinful act, a Muslim should neither listen to him nor should he obey his orders." (Ibid, *Hadīth* No 4533) Thus, it is clear that Muslims are not obliged to obey unlawful acts of superiors.

As far as those situations are concerned, where a person holding a high position compels others to commit an offense, it has been discussed by classical Muslim jurists under the doctrine of *Ikrāh*, i.e. duress. Below we shall discuss the doctrine of *Ikrāh* (duress), its types and the consequences of illegal orders committed under duress:

The Doctrine of *Ikrāh* (Duress) In Islamic Law

Before proceeding further, it is pertinent to mention here the difference of opinion between Abū Hanīfa and both his disciples regarding the qualities of a coercer. According to Abū Hanīfa, the coercer must be a person holding a position of authority (state official) and having the material ability to execute his threat. In this regard, Jasās writes that a coercer must be a person in authority who commands obedience (al-Jaṣṣāṣ, 2010).

On the other hand, both Abū Yūsuf and Muhammad in disagreement with Abū Hanīfa claim that coercion can be exercised by any person whether he is a ruler or not. (Kāsaniī, n.d). The reason for disagreement over the issue between the teacher and both his disciples as identified by Sarakhsī is that during the time of Abū Ḥanīfa, the ruler used to be the most influential person in the land whose commands were obeyed by all the people, and therefore he was deemed to be the only person who could effectively exert coercion, unlike the ordinary people. However, during the time of both his disciples there emerged strong local authorities that could equally be considered authoritative to exert coercion. This political change lead both the disciples to change their opinion and they eliminated the distinction between rulers and non-rulers, and thus argued that coercion could be exerted by any person, whether he is a ruler or not (Sarakhsī, n.d).

Meaning of *Ikrāh* (Duress)

Ikrāh or duress refers to a situation where a person is forced to do something against his will. The legal effect of performing an impermissible act under compulsion is that sometimes it becomes obligatory to perform the coerced act (like eating an unlawful thing is allowed in

case of necessity), sometimes it is permissible to do it, sometimes he gets an exemption (*rukhsa*) like uttering *kailimāh al-kufr* or abusing another Muslim and some other times it is impermissible to commit the coerced act (like killing another person, committing rape, etc) (Kāsanī, n.d).

Types of *Ikrāh* (Duress)

Hanafī jurists have categorised duress into two main types: the first is *ikrāh mulji*, i.e., compelling duress, which nullifies consent and revokes free choice. The second is *ikrāh ghayr muljī*, i.e., non-compelling duress which nullifies consent but does not revoke free choice (Sarakhsī, n.d). Al-Kāsānī explains the two types in the following words:

> Duress is of two types. One type creates necessity and leaves no recourse by its very nature like (a threat) of death or maiming or a beating that jeopardizes the life or limb, whether the beating is excessive or light. And some have said that such beating must be about the number of lashes required in a *hadd* [a set punishment that ranges from 40 to 100 lashes], however, such an opinion is incorrect because what is important here is that necessity is created and if [necessity] exists then there is no reason to require a certain number of lashes. And this type is called *tāam* (complete). The second type does not create a necessity and does not have some recourse and that is like imprisonment or bondage or beating that does not threaten to cause grave injury. And [here again] there is no specific amount of duress required but that it [duress] causes agony... and this type is called *ikrāh nāqis* [incomplete compulsion] (Kāsanī, n.d).

Legal Consequences of Illegal Acts Committed Pursuant to Orders of Superiors

Below we shall discuss the consequences of illegal acts including rape, murder, and destruction of property belonging to others, which are committed under extreme fear of death or serious bodily injuries:

Legal Consequences of Rape

Regarding coerced rape two opinions are attributed to *Abū Hanīfa*: one of his opinions is that coercion is not an excuse to commit an offense like rape, and therefore a person who commits it under coercion, will nevertheless be subject to *hadd* punishment, whether coercion has been exerted by a ruler or any other person. The reason given by him is that erection is not

possible without pleasure, especially when a person is under extreme fear; thus, it is considered a sign of willingness to commit the crime. This is in contrast with a woman, who is the 'object of the act'; adultery is possible where she is under extreme fear and even where she is asleep (Sarakhsī, n.d). However, Abū Ḥanīfa is reported to have later modified his opinion, claiming that in a situation where coercion has been exerted by a ruler, the coerced rapist will not be subject to *hadd* punishment, though he will be liable to pay dower. According to him, another situation where a coerced rapist escapes *hadd* punishment is when he was taken to an isolated place where he finds it impossible to seek help from anyone, in such a situation it makes no difference if the coercer is a ruler or an ordinary person. (al-Shaybānī, 2012).

It is pertinent to mention here that only threats regarding loss of 'life' or 'limb' eliminate the rapist's *ḥadd* punishment in contrast to the threats of 'imprisonment' or 'enchainment' which do not play any role in diminishing his punishment. This implies that if the coercer complies with the later type of threats and commits rape, he will be subject to *ḥadd* penalty for having indulged in unlawful sexual intercourse. Conversely, a rape victim, i.e., a woman escapes *hadd* punishment even if she complies with the threat of imprisonment (Ibid).

Legal Consequences of Coerced Homicide

Regarding coerced homicide, there is a difference of opinion on whether the coercer or the coercing agent will be subject to retaliation. According to Abū Hanīfa, in case of complete threat, the coerced will not be subject to *qisās* but would preferably pay blood-money, and the coercing agent will be subject to retaliation. However, in view of Abū Yoūsuf, none of them shall be subjected to execution; only the coercing agent will be required to pay compensation, while Zufur opines that the coercing agent will be subject to execution. Conversely, *Imām* Shāf'*ī* opines that both the coercer and the coerced will be subject to retaliation because the coerced is the person who directly took the life of an innocent person and the act of the coercing agent proved to be the major cause of the death of the victim (Kāsāni, n.d). In this regard, Shaybānī has presented a hypothetical situation to clarify the opinion of Imām Abū Hanīfa and Zufur:

> If the caliph sends an agent over a given region, such as *Khurasān* or some other place where he forces a man and orders him to kill another person illegally. The man refuses to obey the command, to which the agent responds:

> "Either you kill him with a sword or I kill you." The man kills the other person, in such a situation according to Imam Abu Hanīfa, it is not the coerced but the coercing agent who will be subject to retaliation, while in view of Abū Yoūsuf, it is preferred that the coercing agent must not be subject to retaliation but should rather pay compensation.

Shaybāni prefers the opinion of Abū Hanīfa, according to which coercing agent will be subject to execution, and further articulates how could a person who is not physically involved in the murder be killed in retaliation. According to him, highway robbery better clarify the matter where all the participants are considered liable to execution, though only one among them is involved in the murder of the victim. He also quotes the opinion of Hassan al-Basrī according to which if four people testify that a person committed adultery and consequently the accused was stoned to death and if after the execution of the punishment either of the witnesses retracted from his testimony, he would be executed though he was not physically involved in his death. Regarding the coerced, Shaybāni holds the opinion that in such a situation the coerced complied with the orders of the coercer and thus committed a sin and can be given discretionary punishment by the Caliph. (Shaybānī, 2012).

Legal Consequences of Destruction of Property Belonging to Another

If a person destructs the property of another under the influence of duress, Muslim jurists differentiate between the legal outcome of such an act depending upon whether duress is complete or incomplete. In the case of complete duress, it will be the coercer who will pay compensation to the victim, not the coerced. The reason is that the coerced in the case of 'complete duress' is considered as an instrument in the hands of the coercer, while in the case of 'incomplete duress', the liability to pay compensation rests upon the coerced. (Kāsānī, n.d).

Under the Rome Statute, duress resulting from a threat of imminent death or serious bodily harm is considered a valid ground for excluding the criminal liability of the coerced, provided he must not cause greater harm than the one he intended to avoid. Article 31 of the RS of the ICC reads as follows:

(1) In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

i Made by other persons; or

ii Constituted by other circumstances beyond that person's control.

Siyāsah Sharīʿah **and the Issue of Criminal Responsibility of a Superior for the Crimes Committed by His Subordinates in Islamic Law**

Unlike *hudūd* and *qisās* crimes, Islamic law does not attach criminal liability to the infringement of the rules of warfare, nor does it explicitly talk about the culpability of a superior for the crimes perpetrated by the troops under his control. As preceded earlier, *Hudūd* and *qisās* deal with that part of Islamic law which is fixed as it is directly regulated by a clear text and has also been extensively dealt with by Muslim jurists in their writings. Apart from the fixed part, there is also a flexible part that needs to be adopted according to the growing needs of the time. The *fuqahā* left the development of the 'flexible' part to the ruler who could adopt it according to the growing needs of the time. This policy is termed as the doctrine of '*Siyāsah sharīʿah'* (*Siyāsah henceforth*), i.e. the 'administration of justice according to the *sharīʿah'.* Below, we shall briefly explain the powers of Muslim rulers under the doctrine of *siyāsah* to settle the issue of 'imputed criminal liability' of hierarchic superiors for international crimes committed by the troops under their control:

Powers of a Muslim Ruler Under the Doctrine of *Siyāsah*

The literal meaning of *Siyāsah* is administration, management, or policy' (Wahr, 1983). In the usage of *fuqahā*, the term '*Siyāsah sharīʿah'* refers to 'an act of a Muslim ruler based on '*maslahah'* (i.e. the protection of the objectives of *sharīʿah*) in those cases when there does not exist specific text (of the Qur'ān and *Sunnah*) regulating that matter.' (Ibn-e-Nujaym, 1996). If the policy is carried out in accordance with the constraints laid down by *sharīʿah,* it will be termed as '*siyāsah ʿādilah'*or 'administration according to justice' and will be thus binding on the subjects. However, if it is carried out in deviation from the basic rules of *sharīʿah,* it will be termed as '*siyāsah zālimah'* or 'tyrannical administration', thus making the directives issued under the policy invalid. (al-Shāmi, 2003). The sole purpose of the doctrine is to serve the aims of justice and good governance, especially in those cases where there does not exist rules and regulations which properly address a specific situation or development (Kayadibi, 2015). Thus, Muslim ruler has wide discretionary powers to enact rules and initiate policies under the doctrine of '*siyāsah'*, provided that these actions are in the interest of the good government and does not violate any substantive principle of *sharīʿah*. (Kamali, 1989). However, Muslim ruler is bound to exercise that power keeping in view the 'object' and 'purpose of Islamic law', i.e. '*maqāsid al-sharīʿah'* or the 'goals and objectives of *sharīʿah*' (Kamali, 2008).

Importance of *Maqāsid al-Sharīʿah* in Settling Contemporary Issues

Literally, '*maqāsid'* is derived from '*qasad'* which means intention, purpose, design, and aim (Baalbaki, 1997), while in terms of *Sharīʿah,* it refers to the objectives or intentions behind the Islamic rulings (Auda, 2008). The 'object' or 'purpose' of *sharīʿah* is to promote the welfare of the people and remove hardships from them, as Allah Almighty says ″We have not sent you but as a mercy for all creatures″ (21: 107). According to Ghazālī, the protection of the purposes of *sharīʿa* consists of the protection of religion ('*hifz al-dīn'*), life ('*hifz al-nafs')*, intellect ('*hifz al-ʿaqal'*), lineage ('*hifz al-nasal')* and property ('*māl'*); whatever ensures the safeguard of these components and averts harm from them is '*maslahāh*', and whatever fails to do so is '*mafsadah'* (al-Ghazāli, n.d).

In the opinion of contemporary writers, '*maslahāh'* plays an important role in developing new issues regarding which there is no clear ruling, either in the Holy *Qur'ān* or the *Sunnah* of the Holy Prophet (PBUH). One commentator observes:

> The concept of *maslahah* can serve as a vehicle for legal change. It presents jurists with a framework to tackle the problem, inherent in a legal system that is based on a finite text, of bringing to bear the limited material foundation of the law (i.e., the Qur'ān and *hadīth*) on everyday life in an ever-changing environment. It thus bestows legitimacy to new rulings and enables jurists to address situations that are not mentioned in the scriptural sources of the law. (Opwis, 2005).

The criminal liability of a superior for the crimes perpetrated by his subordinates is among those issues which are not expressly regulated by the text of the *Qur'ān* or the *Sunnah* of the Holy Prophet (PBUH) and the matter needs to be addressed, keeping in view the object and purpose of Islamic law. The aim of Islamic law by limiting the means and methods of warfare is "to promote humanitarianism in war and lessen the horrors, evils and unnecessary human suffering in war." In view of Baderin, (2018) these rules could be observed only on the basis of reciprocity which can be acquired through 'international, political and legal co-operation' and depend on the ratification of international treaties.

In Islam, Muslims are allowed to enter into treaty relations with non-Muslims, provided that those treaties must not violate any of the fundamental principles of Islam. Allah the Exalted says "As for those who have honored the treaty you made with them and who have not supported anyone against you: fulfill your agreement with them to the end of their term. God loves those who are mindful of Him". (9:4).

The Holy Prophet (PBUH) signed the treaty of *Hudaybiyyah* with the *Meccans* at the end of the sixth year after *Hijra,* though most of the terms of the treaty were biased against Muslims. One such condition was that Muslims were obliged to hand over any *Meccan* intending to join the Muslims while *Meccans* were not under any such reciprocal obligation. Meanwhile, the negotiations regarding the terms and conditions between the Holy Prophet (PBUH) and Suhayl b. 'Amar, were going on, Abū Jundal managed to escape From Mecca and sought help from the Prophet (PBUH), who declined to do so as it was against the terms of the treaty. (*Ibne Hishām,* 2000). According to another incident, at the time of the migration of the Holy Prophet (PBUH) to Medina, many of his companions stayed in Mecca due to some personal reasons; among them were Hudhaifa b. Yamān and his father. Later on, the infidels of Mecca allowed them to move to Medina on the condition that they will not participate in

any war against them. Upon reaching Medina, when they intended to join in a war against the infidels, the Prophet (PBUH) did not allow them because they had already undertaken not to participate in any hostility against the Infidels. (Naumani & Nadwi, 2002).

Nowadays, many Muslim countries are members of the United Nations under which all its members are required to take necessary steps to secure the arrest of those war criminals who have either personally committed those crimes or have consented to the commission of those crimes and make arrangements to hand them over to the countries where the crimes took place. (UN General Assembly Resolution 3 (1), Extradition and Punishment of War Criminals, 13 February 1946). Similar obligations have been spelled out in the four Geneva Conventions and their additional Protocol, which expressly criminalise certain acts like war crimes, crimes against humanity, genocide, etc and oblige the member states to criminalise and extradite the perpetrators of these crimes. (See Arts. 49, 50, 129, 146 of the four GC, and Art. 85 of AP I).

Just like other legal systems, the purpose of Islamic law is to minimise the occurrence of crimes in society and to bring to trial the perpetrators thereof, without any discrimination based on religion, color, sex or any other status. The establishment of ICC is also the outcome of a treaty that is also ratified by a few Muslim countries. The basic aim of the establishment of the ICC is to bring to justice all those who are involved in heinous acts, especially the leaders, which is in concordance with the purpose and object of Islamic law. Thus, Muslims are not only allowed to ratify the statute of the ICC but are also bound to fulfill the ensuing obligations in this regard, as Malekian (2011) writes ″the statute of the ICC would not have been regarded as a legal statute if it had differentiated from the principal intentions of Islamic criminal law″.

Conclusion

In Islamic law, a crime is composed of two elements; *actus reus* i.e., the physical commission of an act and *mens rea,* i.e., the intention. In order to ascertain the criminal culpability of the accused, it is necessary that both elements must exist simultaneously. Thus, a person who satisfies these elements becomes personally liable for the offense perpetrated by him. The notion of ‘individual criminal responsibility’ is deeply rooted in the penal laws of Islam as no one can bear responsibility for the crimes perpetrated by others. This adherence can be seen in those cases as well where crimes liable to *hadd* punishment are perpetrated collectively by multiple individuals; in such a situation only those participants are deemed to be considered

as liable to *hadd* punishment who satisfy the definitional elements of the alleged offense. The only exception in this regard is the crime of *hirābah* or highway robbery where all the participants are considered equally liable, irrespective of the level of contribution made by each of them during the perpetration of the crime.

Islamic law upholds the rules of equality and justice by making liable every person who is indulged in unlawful activities without any discrimination based on color, sex, or his/her high official position. If a crime has been perpetrated by a person holding a high official position, he is answerable before a court of law just like an ordinary citizen. In this regard, the rules of Islamic law are not different from the rules of ICL which also sustains the principle of 'equality before the law'. The only point of difference between the two systems is the validity of duress as a general defense to the crimes like murder, rape, etc; unlike the ICC Statute which allows such defense in certain conditions, Islamic law does not relieve the coerced as it strongly believes in the sanctity of life.

As far as 'imputed criminal responsibility' of hierarchic superior is concerned, it is among those issues regarding which Islamic law is silent. The matter comes under the sole discretion of Muslim rulers under the doctrine of s*iyāsah* which is tantamount to acting on '*maslahāh'*, i.e. to decide it keeping in view the aims and objects of Islamic law. Since the purpose of Islamic law is to limit the 'means and methods of warfare', the desired purpose cannot be achieved until and unless Muslim states enter into treaty relations with other states and fulfill the resultant obligations in this regard. Having recourse to an international mechanism, like the ICC as long as it is not against the basic aims of Islamic law, is compatible with Islamic law.

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