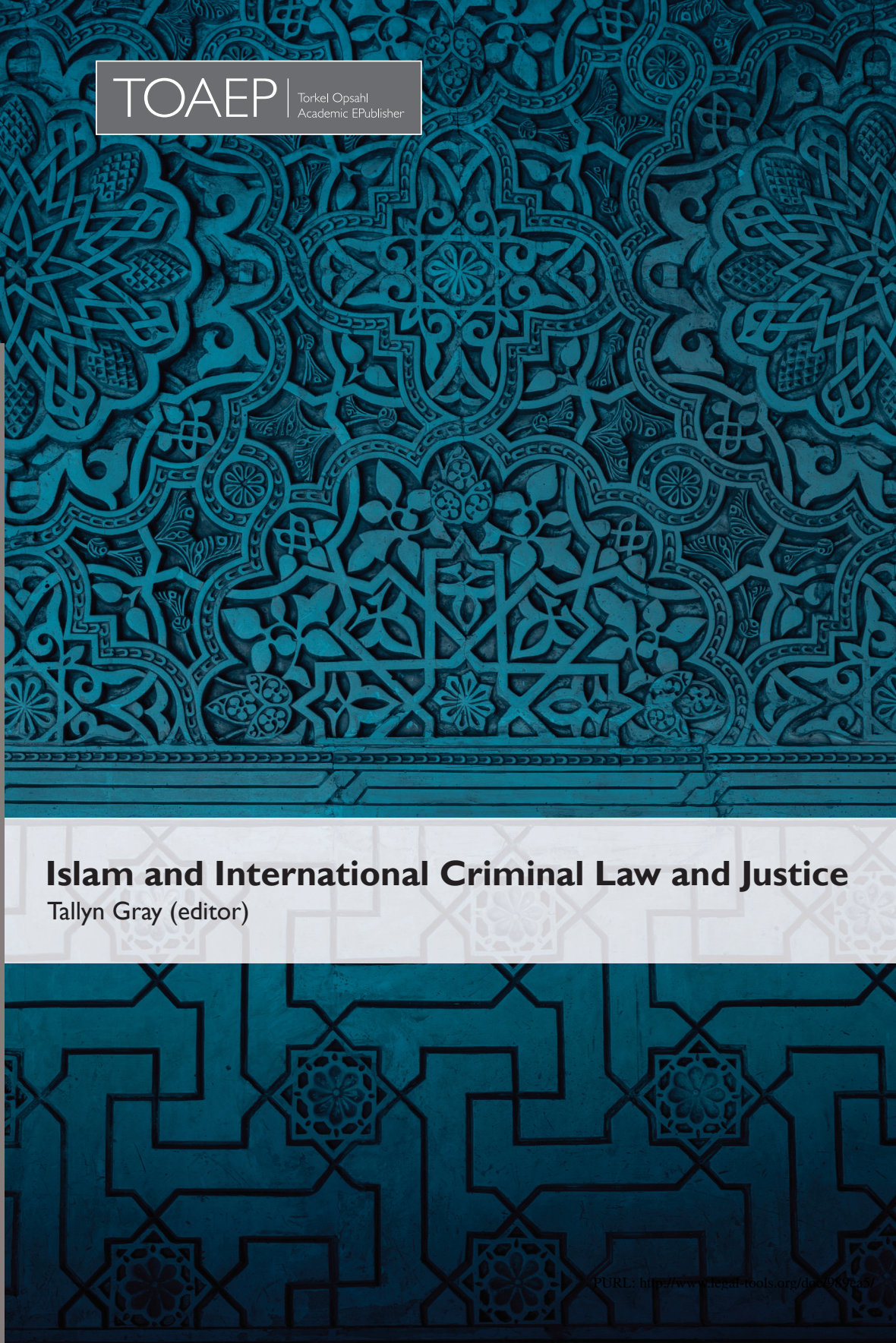

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What is the Measure of 'Universality'? Critical Reflections on 'Islamic' Criminal Law and Muslim State Practice *vis-à-vis* the Rome Statute and the International Criminal Court

Shaheen Sardar Ali and Satwant Kaur Heer*

8.1. Introduction

Contributions in this edited collection have explored a range of substantive and procedural aspects of international and Islamic criminal law regimes and the extent to which these resonate with the Rome Statute establishing the International Criminal Court ('ICC'). The present chapter digresses from this line of enquiry to focus on *actual Muslim state*[1] *practice* in relation to the Rome Statute and the ICC. In doing so, we hope to deepen our understanding of the multiple factors informing positions adopted by states in multilateral treaty negotiations. Drawing upon primary source materials in the form of official records of deliberations at the United Nations ('UN') Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June – 17 July 1998 (the 'Rome Conference') in drafting the Rome Statute, this chapter challenges the viewpoint that relatively few ratifications by Muslim states is the direct result of incompatibility of Islamic law and *Sharíʿah* with 'international' and 'universal' conceptions of criminal justice. Noting from

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1 When referring to Muslim states, we refer to all states that are members of the Organisation of Islamic Cooperation.

records[2] that not once were the words 'Islam', 'Islamic criminal law' or *Sharíʿah* uttered by any delegate from Muslim states, the present chapter poses the following three questions: Is there a basis for suggesting a definitive link between Islamic criminal law and a small number of Rome Statute ratifications by Muslim states? In the absence of a homogenous regime of 'Islamic' criminal/penal laws in most Muslim states, and in view of the inherent plurality of the Islamic legal traditions, which version of 'Islamic criminal law' is being referred to when it is argued that Islamic criminal law and its international counterpart are incompatible, and why? Finally, well aware that declarations of the supremacy of Islamic law and *Sharíʿah*[3] in national constitutions in most Muslim states is by and large rhetorical and window dressing, is this perspective itself indicative of hegemonic international politics?

This chapter advances the argument that in seeking to understand why so few Muslim states have ratified the Rome Statute, it is more useful to place state practice in international law at the centre of the debate rather than Islam and Islamic criminal justice. Using formal acceptance of the Rome Statute as the only indicator would imply that all common and civil law jurisdictions that failed to ratify the Statute have done so due to their incompatibility with 'international' and 'universal' criminal law principles – a position few would hold to be tenable. 'Muslim' states do not always vote as a bloc despite the Organisation of Islamic Cooperation's attempts to present a unanimous approach to issues; neither do Arab States. Preconceived factors are therefore being attributed to why particular states or groups of states fail to ratify international treaties in the areas of human rights and humanitarian law broadly defined. For instance, when the United States of America does not ratify international treaties, it is said to be due to their 'intransigence' or 'internal politics' and not due to incompatibility with her national laws. Contrast this with the position taken when a state with a majority Muslim population does the same; it is somehow

[2] See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June – 17 July 1998 ('Rome Conference'), Official Records, UN Docs. A/CONF.183/13 (Vol. I) (http://www.legal-tools.org/doc/ee97ab/), A/CONF.183/13 (Vol. II) (http://www.legal-tools.org/doc/253396/), A/CONF.183/13 (Vol. III) (http://www.legal-tools.org/doc/656f32/).

[3] *Sharíʿah* is the overarching umbrella of rules, regulations, values and normative frameworks, covering all aspects and spheres of life for Muslims. Islamic law is only one aspect of *Sharíʿah*; hence the use of both *Sharíʿah* and Islamic law.

directly or indirectly attributed to Islam, Islamic law and *Sharíʿah* – as in the case of the Rome Statute.

This chapter comprises three main parts. The first part presents a brief contextual and historical overview of the Islamic criminal law regime, why it is relevant to distinguish between doctrinal and theoretical conceptions of Islamic criminal law, its historical ebb and flow, and partial revival in a few Muslim states today (Section 8.2.). The second part introduces the discussion on Muslim state practice in international law through the lens of interventions made by delegates from Muslim states during the drafting process of international treaties, focusing on the Rome Statute. The third part presents some analytical observations based on the drafting process of the Rome Statute and Muslim states' interventions. As the concluding section, it proposes ways of claiming universality of norms and principles by adopting an inclusive approach towards all legal systems in honest and serious dialogue across regional, political, religious and cultural divides. Lastly, it suggests acknowledgement that religious, legal and cultural traditions are dynamic and evolving, and that the way forward is to focus on actual state practice rather than narrowing it to religious precepts alone.

8.2. Islamic Criminal Law: A Brief Contextual Journey

This section presents a brief contextual journey of the Islamic criminal law regime and why a simple comparison with 'universal' or international principles of criminal law is futile in understanding why Muslim states have not ratified the Rome Statute in large numbers. It also attempts to displace some deeply-entrenched notions in academic writings on Muslim States and the ICC by conflating classical principles of Islamic criminal law with penal codes in a handful of Muslims states. Others are unable to differentiate between 'Arab' and 'Muslim', employing these terms interchangeably. But what appears to be universally accepted among critics of Muslim states' engagement with international law in general is the assumption that there exists general and unanimous consensus among Muslim communities regarding what constitutes Islamic criminal law and that all Muslims subscribe to an identical, uncontested and homogenous legal system.

In seeking to articulate the plurality and dynamism of the Islamic legal traditions and *Sharíʿah*, and to adopt a different line of enquiry, we are guided by Rudolph Peters's approach to the study of Islamic criminal

law in his excellent work, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century.* His remarks are particularly apt in the present enquiry:[4]

> I do not compare Islamic criminal laws with modern criminal laws […] A completely comparative approach is in my opinion, not meaningful and not feasible. It is not meaningful because it is not clear with what system of criminal law it must be compared. With a modern European or American system? Or, with a pre-modern European system? Neither comparison will be very helpful in understanding the Islamic doctrine whose early origins date back to the seventh century. Moreover we are dealing with a fluid and often contradictory body of opinions and not with a uniform unequivocal doctrine of criminal law. This makes comparison even more complicated.

The criminal laws of societies, communities and states offer insights into what core values a society cherishes[5] and what interests they seek to protect.[6] Just as societies evolve, so do their values and laws. Islamic law is no exception in this regard. We use this term with some caution and by default, as Islamic law is not a uniform body of laws akin to common and civil law systems but more in the form of a scholarly discourse with varying, equally legitimate principles, viewpoints and opinions on the basis of which legally-enforceable laws may be formulated.[7]

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4 Rudolph Peters, *Crime and Punishment in Islamic Criminal Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, Cambridge University Press, Cambridge, 2005, p. 2. Despite the pitfalls identified by Peters, a growing body of literature has emerged in the area of comparative criminal law (between theoretical and doctrinal conceptions of Islamic criminal law and its 'universal' or 'international' counterpart), the purpose of which is mainly to highlight commonalities and differences between the two traditions. That is not to say that this research is not useful or that it ought not to be undertaken. Comparative research is important and valuable but has its challenges in fluid and dynamic areas such as the Islamic legal traditions.

5 *Ibid*.

6 M. Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Times of War and Peace*, Cambridge University Press, Cambridge, 2014, p. 118.

7 See Mohammad Hashim Kamali, "Legal Maxims and Other Genres of Literature in Islamic Jurisprudence", in *Arab Law Quarterly*, 2006, vol. 20, p. 77; Gamal Moursi Badr, "Islamic Law: Its Relationship to Other Legal Systems", in *American Journal of Comparative Law*, 1978, vol. 26, p. 187; Bassiouni, 2014, see *supra* note 6; Mohammad Hashim Kamali, *Sharí'ah Law: An Introduction*, Oneworld Publications, Oxford, 2008; Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, Cambridge University Press, Cambridge, 2005.

Based on the primary sources of Islamic law – the *Qur'án* and *Sunnah* and supplemented by secondary sources and juristic techniques, that is, *ijmá'*, *qiyás* and *ijtihád*, provisions of Islamic criminal law are plural. This plurality emerges from the fact that Islamic law developed through juristic schools of thought headed by scholars who commanded a wide following and, over time, only drew upon the approaches and interpretations of these 'Masters'.[8] Thus, despite common sources, the Islamic legal traditions convey differing legal formulations depending upon the school of thought (*maḏhab*) to which the scholar belongs.[9] Even within the *maḏháhib* (plural of *maḏhab*), there exist variations; hence the difficulty of describing a coherent body of 'Islamic criminal law'.

Lying at the intersection of religion, culture, tradition, and politics, Islamic criminal law is thus informed by centuries of history and civilisational baggage, including the description 'Islamic criminal law'. Within the Islamic legal traditions as mandated by the Qur'ánic text, *'adl* (justice) is the driving force behind dispute resolution. Seen as the opposite of *ẓulm* (injustice), Islamic criminal regimes strive to do justice and legal rules are tools for achieving *'adl*. This in turn implies that Islamic criminal law is malleable and contextual, not immutable and fixed. For instance, suspension of the death penalty and amputation of limbs in times of famine amount to modification of Islamic criminal or penal laws because implementing it during famine would not be *'adl* but tantamount to *ẓulm*. The moratorium on *ḥudúd* laws for theft during the reign of *Caliph* Omar Ibn al Khittab due to famine in the Arabian Peninsula is an example. In contemporary times, Tariq Ramadan, a Muslim scholar, has called for a moratorium of the death penalty, arguing from within the Islamic legal tradition that so long as all the pre-requisites for a just, equitable and well-governed Muslim society are not fulfilled, implementing *ḥudúd* punishments would not amount to *'adl* but *ẓulm*.[10]

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8 We refer here to the founders of schools of juristic thought in Islam including more prominently, Imám Abú Ḥanífa, Imám Málik, Imám Sẖáfi'í, Imám Ḥanbal and Imám Jafar.

9 Muslims are broadly divided into *Sunní* and *Shí'ah*. *Sunnís* subscribe to the *Ḥanafí*, *Málikí*, *Sẖáfi'í* or *Ḥanbalí* school of juristic thought. *Shí'ah* follow the *Al-Ithná'ashariyyah*, *Zaydí* and *Ismá'ílí* schools of thought.

10 Tariq Ramadan, "An International call for Moratorium on corporal punishment, stoning and the death penalty in the Islamic World", 5 April 2005, available on his web site.

Islamic criminal law is composed of three categories of crimes – *ḥudúd*, *qiṣáṣ*, and *ta'zír*. These categories cover substantive, procedural, evidentiary matters. *Ḥudúd* (singular *ḥadd*) means limit(s) drawn in the religious text of Islam where penal action and penalty are mandatory as these offences are deemed extremely serious. *Ḥadd* offences include *ḥirábah* (highway robbery or banditry); *ziná'* (sexual relations outside marriage); *sariqah* (theft); *sharb al-khamr* (drinking alcohol). Two other *ḥadd* offences are contested and there is no consensus as to their *ḥadd* nature including *baghí* (rebellion against a legitimate ruler) and *riddah* (renunciation of one's belief in Islam). Due to the serious penalties involved (death, amputation of limbs for instance), stringent evidentiary requirements and safeguards are in place for all *ḥadd* offences.[11]

The second category – *qiṣáṣ* – literally means 'equivalence' and refers to offences against individual life or physical integrity. The penalty is based on the principle of 'eye for eye', meaning that if a person has been killed their heirs may take the life of the killer. But this category is fluid due to the fact that compensation in lieu of life may also be permissible, such as *diyát* (blood money) or forgiveness. The third category, *ta'zír*, implies those offences for which there are no *ḥadd* (mandatory) punishments and discretion of the judge is permitted. Often, offences where evidentiary requirements are not fulfilled drop into the *ta'zír* category and hence lesser penalties.[12] Historically, as a predominantly jurists' law, it is important to understand that procedurally, the Islamic legal traditions were inquisitorial; hence vast discretion was afforded to judges (*quḍáh*).

From the nineteenth century onwards, in Muslim-majority jurisdictions – particularly those colonised by European powers – Islamic criminal law was slowly replaced by European penal codes, 'eclipsed' as Peters terms it, and remaining suspended from statute in many Muslim states to this day. So what is being debated, discussed and studied in most scholarly offerings today in relation to its (in)compatibility with international norms and principles is the combination of doctrinal Islamic criminal law

[11] For an excellent collection of essays on the subject see, M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System*, Oceana Publications, New York, 1983; Muḥammad Abdel Haleem, Adel Omar Sherif and Kate Daniels (eds.), *Criminal Justice in Islam: Judicial Procedure in the Shariah*, I. B. Tauris, London, 2003; Bassiouni, 2014, see *supra* note 7.

[12] *Ibid*. Islamic criminal law is a complex subject and due to word limitations, we present the rules at their simplest.

and actual criminal law of some Muslim states. Islamist parties and groups, when coming into power, consider it their priority, as it contains instruments of power and hegemony in the form of corporal punishments of extreme harshness and cruelty. This is evident in the so-called 'Islamisation' process in Pakistan, Sudan, Northern Nigeria, and Malaysia. Saudi Arabia is the sole Muslim country where Islamic criminal regime has applied uninterrupted.

The 'Islamisation' drive in some Muslim states has resulted in the enacting of penal codes supposedly based on the *Qur'án* and *Sunnah* reviving the classical doctrine of criminal laws of the pre-modern era. It is without doubt that provisions of these laws are in conflict with international human rights conventions in several areas. But what is not being highlighted as explicitly and robustly is that these so-called 'Islamic criminal laws' are contested within Muslim states and communities themselves, due to plurality of interpretations and lack of essential pre-requisites for these offences and punishments. These laws are also in conflict with the constitutions and other national laws of these states. Pakistan is a case in point. Peters is of the view that: "When Islamic criminal law was reintroduced in the various countries, it did not meet with much opposition. In most countries it was supported by large groups in Muslim society. This is due to the powerful ideological discourse surrounding it, which holds promises for the 'ordinary people'".[13] Whilst this may be an accurate inference, the constituency of those who actually happily subscribe to it is minimal, mostly political and ideological elites. It is those very 'ordinary people' who are at the receiving end of the so-called Islamic criminal law regimes in Muslim countries where it has been re-introduced. The *ḥadd* offences and punishments for sexual relations outside of marriage (*ziná'*) were massively abused to the point that, following large scale public debates, the law was 'disabled' by the enacting of the Women Protection Act 2006 in Pakistan. Further, whilst many Muslims welcome Islamisation of state and society, their understanding of what this means is neither monolithic nor homogenous, as most Muslims when questioned seek both Islam and democracy, equality, freedom of religion and freedom from corrup-

[13] Peters, 2005, see *supra* note 5, p. 14.

tion (see, for example, the slogans from the Muslim street during the Arab Spring).[14]

Re-introduction of aspects of Islamic criminal law in these jurisdictions is not motivated by an honest religious spirit or desire to live by the Qur'ánic text and *Sunnah*. As more than one writer on the subject has shown, this move was and remains guided by political and cultural motivations and to gain legitimacy and authority in the public domain. In Pakistan, General Zia-ul-haq introduced his agenda of Islamisation and Islamic criminal laws to appease his right-wing Islamist supporters and gain a political foothold to counter his seizure of power in a military coup. In Iran, Áyátulláh Khomeini had a similarly political motive, as did Nimeiri in the Sudan.

Arguments made by some that Islam and *Sharíʿah* are inherently incompatible with international conceptions of rights including criminal law are factually incorrect. Islamic legal traditions are plural, evolving and dynamic and open to development, just as international norms are changing, and changes to the *ḥudúd* laws in Pakistan are an example of this fluidity. How long ago was it that armed invasion of land belonging to others was a legitimate way of acquiring territory? When did international law prohibit slavery? Does international law allow colonialism, torture, inhuman and degrading punishment today when not more than a century ago these were countenanced?

The fact that common principles of law and justice can be and are evolving is demonstrated by the number of states of various persuasions who engage with international treaties. What makes these convergences challenging is the views of both Muslim apologists as well as some Western scholars who argue that human rights regimes reflect Western ideals and are not universal norms; hence the wariness of Muslim states towards treaties reflecting these norms. A reality check is in order here too: if only a literal interpretation and application of the *Qur'án* and *Sunnah* were applied and could not be changed, why have all Muslim states prohibited

[14] There are several Pew Foundation surveys that support our position where Muslims have expressed huge support for democratic regimes as well as Islamic law. Also see the study by Amaney Jamal and Mark Tessler, "The Democracy Barometers: Attitudes in the Arab World", in *The Journal of Democracy*, 2008, vol. 19, pp. 97–110; Mark Tessler, Amaney Jamal and Michael Robbins, "New Findings on Arabs and Democracy", in *Journal of Democracy*, 2012, vol. 23, no. 4, 2012, pp. 89–103.

slavery – an institution present in the *Qur'án* but with explicit guidance for its gradual waning away? Similarly, in the sphere of family law, Qur'ánic verses relating to laws of inheritance have been modified in keeping with societal and contextual demands of Muslim communities. Why can a similar approach not be adopted for other aspects of Islamic law, including criminal law?

In terms of criminal law, there are areas where international norms on criminal justice and those within classical Islamic criminal law doctrine clash. But that clash is not a 'Muslim' attribute alone. For instance, the death penalty is applied in the United States of America as well as most Muslim states. Prohibition of abortion and, until recently, of contraception is not confined to Muslim traditions but prevalent in a number of European and Latin American states. Corporal punishment too is an area where serious debate is required. Most importantly, it is the legal and judicial systems of many Muslim states that require attention. Access to legal aid, prompt, fair and impartial judicial proceedings and due process need strengthening and these are not being kept away from the population by Islam. Indeed, were Islamic principles to be strictly adhered to, equality of arms, and prompt, effective and speedy justice would be the priority of any Muslim government.

8.3. Muslim State Practice in National, International Law and Treaty Formation: Connecting the Dots

This section engages with the argument presented by scholars such as Ahmad Nassar,[15] Steven Roach and others,[16] that focus on the position of Islamic and *Sharí'ah* being the supreme laws of Muslim states and that hence Muslim state practice in the national and international arenas will always be informed by these sources even in situations where the states themselves ratify or agree during deliberations to international norms.

[15] Ahmad Nassar argues many Muslim countries shun the ICC. A "common concern with joining the ICC has been that it would usurp Islamic law's exclusive jurisdiction, and substitute the law of man for the law of God", see Ahmad E. Nassar, "The International Criminal Court and the Applicability of International Jurisdiction under Islamic Law", in *Chicago Journal of International Law*, 2003, vol. 4, no. 2, pp. 587–96.

[16] Steven Roach, "Arab States and the Role of Islam in the International Criminal Court", in *Political Studies*, 2005, vol. 53, pp. 143–61; Mohamed Elewa Badar, "Islamic Law (Shariah) and the Jurisdiction of the International Criminal Court", in *Leiden Journal of International Law*, 2011, vol. 24, pp. 411–33.

This approach yet again mixes doctrinal plural Islamic legal norms with actual application on the ground and assumes that Islamic law is a fixed, homogenous category fossilised in time.

An oft-repeated statement regarding Muslim state practice *vis-à-vis* international treaty drafting and deliberations is that few Muslim states are active participants and shun the process and ratification processes.[17] The inference is that, since Muslim states adhere strictly to Islamic law and *Sharíʿah*, which runs counter to 'universal' norms, Muslim states are therefore reluctant to engage in these processes. However, an examination of the participants at the Rome Conference dispels the notion that Muslim states shunned the process. The table below (Table 1) identifies the number of Muslim state representatives present at the negotiations in Rome and demonstrates that Muslim states, by sending delegations ranging from one (Uzbekistan) to fifteen (Iran and Egypt) members, wanted to be involved in the negotiations.

Number	Name of Muslim State	Number of representatives at the Rome Conference
1.	Afghanistan	4
2.	Azerbaijan	6
3.	Bahrain	10
4.	Bangladesh	5
5.	Brunei	6
6.	Egypt	15
7.	Iran	15
8.	Iraq	6
9.	Indonesia	14
10.	Lebanon	3

[17] See discussion in Shaheen Sardar Ali, *Modern Challenges to Islamic Law*, Cambridge University Press, Cambridge, 2016, pp. 146–83.

11.	Libya	5
12.	Jordan	6
13.	Kazakhstan	7
14.	Kyrgyzstan	3
15.	Malaysia	3
16.	Kuwait	10
17.	Morocco	12
18.	Niger	4
19.	Oman	9
20.	Pakistan	5
21.	Qatar	6
22.	Saudi Arabia	11
23.	Syria	5
24.	Tajikistan	2
25.	Turkey	7
26.	Tunisia	6
27.	United Arab Emirates	11
28.	Uzbekistan	1
29.	Yemen	7

Table 1: Number of Muslim States and their Representatives at the Rome Conference.[18]

While numbers in and of themselves may not always translate into meaningful and effective participation, they cannot be easily dismissed either. International diplomacy has factors and indicators of the serious-

[18] Rome Conference, Official Records Volume II, Summary Records of the Plenary Meetings, p. 92, paras. 23–27, see *supra* note 2 (http://www.legal-tools.org/doc/253396/).

ness with which events are gauged; of these, making one's presence felt through strong delegations (in numbers as well as participation) is one. Therefore, irrespective of whether this active presence translated into ratifications or not, it is indicative of the intention to engage with the processes leading to the adoption of the Rome Statute and the ICC. A number of prominent Muslim scholars and diplomats were also deeply involved in the negotiations, including Professor M. Cherif Bassiouni as Chair of the Drafting Committee and Prince Zeid Ra'ad Zeid Al Hussein of Jordan, later the UN High Commissioner for Human Rights. Finally, it is relevant to make the point that, of the Muslim states present, at least three represented countries with the largest Muslim populations – Indonesia, Pakistan and Bangladesh. These non-Arab states did not always follow the line of Arab-Muslim states; neither were they in the elite club of 'Arab group of states'.

Table 2 below shows the number of Muslim states that have signed and ratified the Rome Statute; currently this stands at twenty-four states, out of a total of 123 State parties. These states are a mixture of those who were present and participated in the negotiations and many who signed and ratified the treaty subsequently.

Number	Name of State	Date of Signature/Ratification
1.	Afghanistan	10 February 2003
2.	Albania	18 July 1998/ 31 January 2003
3.	Bangladesh	16 September 1999/ 22 January 2002
4.	Benin	24 September 1999/ 22 January 2002
5.	Burkina-Faso	30 November 1998/ 16 April 2004
6.	Comoros	18 August 2006 (into force: 1 November 2006)
7.	Cote D'Ivoire	30 November 1998/ 15 February 2013
8.	Djibouti	7 October 1998/

		5 November 2002
9.	Gabon	22 December 1998/ 20 September 2000
10.	Gambia	7 December 1998/ 28 June 2002
11.	Guinea	8 September 2000/ 14 July 2003
12.	Guyana	28 December 2000/ 24 September 2004
13.	Jordan	7 October 1998/ 11 April 2002
14.	Maldives	21 September 2011
15.	Mali	17 July 1998/ 16 August 2000
16.	Niger	17 July 1998/ 11 April 2002
17.	Nigeria	1 June 2000/ 27 September 2001
18.	Palestine	2 January 2015 (into force: 1 April 2015)
19.	Senegal	18 July 1998/ 2 February 1999
20.	Sierra Leone	17 October 1998/ 15 September 2000
21.	Surinam	15 July 2008
22.	Tajikistan	30 November 1998/ 5 May 2000
23.	Tunisia	24 June 2011
24.	Uganda	17 March 1999/ 14 June 2002

Table 2: Signatures/ratifications of the ICC Statute by Muslim states.[19]

[19] See ICC, "The States Parties to the Rome Statute", available on the web site of the ICC.

Having looked at the statistical evidence of Muslim states' presence during the drafting stages and the eventual ratification of the Rome Statute, we now investigate their levels of participation and the content of their interventions. Here too, official records of their deliberations offer credible primary evidence upon which to draw inferences regarding Muslim states' perceptions and approaches to the Rome Statute and the ICC. This section offers examples of interventions by Muslim state delegations, supporting the argument advanced in this chapter that Islamic law is not the focus of interventions of Muslim states in these treaty deliberations. On the contrary, it is guarding national jurisdiction, the principle of complementarity, restricting (or extending) the scope of the ICC to internal or external conflicts and so on.

The drafting process of the Rome Statute is not an isolated case of these complexities. During the course of her research on the drafting processes of the UN Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'), and the UN Convention on the Rights of the Child ('CRC'), Shaheen Ali discovered the complexity and multi-layered discourse of balancing national laws, culture, custom, tradition and religion with competing international human rights norms. In studying the CEDAW drafting process, she observed elsewhere:[20]

> Socio-economic, religious, political, and ideological posturing at the global level evidently contribute to a treaty during its drafting as well as after its adoption, and in the context of the present inquiry this was manifested through the wider capitalist–socialist polarity, since CEDAW was drafted at the height of the Cold War. Divisions were also visible in those developed and developing countries' concerns and priorities under the umbrella of the burgeoning 'non-aligned' movement, as well as in the positions adopted by Muslim states.

Similar disparate approaches to the CRC through voting patterns at the drafting process as well as subsequent ratification and reservations are evident from official records and academic writings on the subject.[21] It

[20] Ali, 2016, p. 156, see *supra* note 17.

[21] The CRC became unique in that it is the first international human rights treaty to make specific mention to Islamic law and *Sharí'ah*. For a detailed analysis of Muslim state practice regarding the CRC, see Shaheen Sardar Ali and Sajila Sohail Khan, "Evolving Conceptions of Children's Rights: Some Reflections on Muslim States' Engagement with the United Nations Convention on Rights of the Child", in Nadjma Yassari, Lena-Maria Möl-

must be acknowledged that positions adopted by Muslim majority states regarding CEDAW and the CRC were at times informed by Islamic law and *Sharíʿah* whilst no similar mention is made during deliberations of the Rome Statute.

Reading through official records of the drafting process of the Rome Statute, a few facts emerge that reinforce the main argument of this chapter – that Muslim states are not necessarily driven towards a particular position on a treaty by virtue of their affiliation to Islamic law and *Sharíʿah.* They engage with the process as any other state would – defending their territory, sovereignty and political alignments at national, regional and international levels. This is evident in the discussion below, as an 'Arab Group', an 'African Group' and a 'Like-minded Group' of states developed during the deliberations and negotiations. In a lively and informative account of the negotiations, the late Professor M. Cherif Bassiouni, Chair of the Drafting Committee and himself an eminent Muslim scholar, brings to the fore the complex alignments, groupings, quality of delegates as well as levels of expertise at the negotiating table and in respective capitals. He observes:[22]

> The Arab States formed one of the most active informal groups; they met frequently and adopted common positions that were not necessarily supportive of the ICC, although some states (such as Egypt and Jordan) were part of the 'like-minded states'. The 'like-minded states' met most frequently and were the driving force for completing the Draft Statute and for establishing the ICC.

Not a single word about Islamic law and *Sharíʿah*, although he points to the different levels of skills and authority in delegates from what he calls the 'developed' and 'developing' worlds. He also makes comparisons between their levels of preparedness, clarity of instructions as well as authority to conduct negotiations.[23]

Furthermore, in some earlier treaty drafting processes, Muslim states have not hesitated in adopting positions informed by the Islamic

ler, Imen Gallala-Arndt (eds.), *Parental Care and Best Interest of the Child in Muslim Countries*, T.M.C. Asser Press, The Hague, 2017, pp. 285–324.

22 M. Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of the International Criminal Court", in *Cornell International Law Journal*, 1999, vol. 32, p. 443, fn. 25.

23 *Ibid.*, p. 456.

legal traditions and expressly making claims for modification or removal of certain formulations, stating that these are unacceptable on the basis of conflict with their religious and cultural traditions. By not invoking Islamic law and *Sharíʿah* at all during the deliberations for the Rome Statute, did Muslim states indicate acceptance of international criminal law provisions on the basis that these were in conformity with the Islamic legal traditions? If the Islamic criminal law regime was so central to the policy of Muslim States parties, then why was there no flagging up of contradictions between the draft Statute and domestic criminal regimes – at least by some Muslim states? Alternatively, is this a tacit acknowledgement by Muslim states of the fluidity and evolving nature of the Islamic legal traditions and the variation with which it is applied in their countries and movement towards a responsive and contextual understanding of Islamic law and *Sharíʿah*?

Bearing in mind these questions, we now turn our attention to what Muslim states did say during the deliberations and ways in which these interventions may be interpreted.

8.4. Statements of Support from Muslim States for the Draft Rome Statute: Token 'Universality' or Shared Criminal Law Principles?

None of the Muslim states spoke against the setting up of the ICC, although delegates varied in the warmth with which they greeted and supported the initiative. More importantly, no one raised any issues of conflict between substantive provisions of criminal law and Islamic criminal law principles, despite divergence in some areas.

Examples of statements made by Muslim states include the following: Mr. Zarif (Islamic Republic of Iran) stated that "the establishment of an international criminal court, independent, universal, effective and impartial, would be a milestone towards achieving peace with justice".[24] The Bangladeshi delegates were one of the most enthusiastic and supportive, observing that: "the Conference offered a rare opportunity for the international community to put in place a system of justice to redress unspeakable crimes".[25] The Afghan delegate too made known the strong support of

[24] Rome Conference, p. 92, paras. 23–27, see *supra* note 18 (http://www.legal-tools.org/doc/253396/).),

[25] *Ibid.*, p. 107, para. 25.

their government by reaffirming his delegation's "support for the establishment of an international criminal court".[26]

A reading of interventions from delegates other than Muslim states supports the view that there was universal support for the establishment of the ICC – albeit with provisos, reservations and trepidation. There is no single instance of Muslim states arguing against the ICC. Consensus-building to ensure universality of principles as well as unanimous support to strengthen the ICC was also visible in these interventions, not least from Muslim states, although this general support did not translate into unanimity when it came to signatures and ratifications.

8.5. Protecting National Interests through Principles of Complementarity: A 'Muslim' Ploy or Wider State Practice?

Despite unanimous support and statements to this effect, official records show that most states also jealously guarded their sovereignty and territory by demanding the ICC be a forum of last resort and work complementary to national courts. They believed that the ICC regime ought to intervene only in situations where domestic jurisdictions are unable or unwilling to prosecute. These concerns were shared by Muslim states as well and articulated by the Malaysian delegation stating: "the International Criminal Court should complement and not replace national courts. In setting up a court to judge those who had committed very serious crimes abhorred by the international community, the national sovereignty of all nations must be upheld".[27]

Alongside this, many states were uncomfortable with the role and powers of the Prosecutor to initiate proceedings, as it was feared that this would infringe on state sovereignty and the principle of complementarity. This again was a position adopted by Muslim states *as well as other states* in general. For example, Mr. Al Awadi (United Arab Emirates), supported by Mr. Khalid Bin Ali Abdullah Al-Khalifa (Bahrain) expressed their concerns with regard to an independent prosecutor with the power to initiate proceedings which would "give the Prosecutor the right to take certain

[26] *Ibid.*, p. 87, paras. 59–62. Similar statements in support of the Statute and the ICC were also made by the representatives of Oman, Egypt, Kazakhstan, Pakistan, Brunei Darussalam, United Arab Emirates, Morocco, Niger, Nigeria, Sudan, Turkey and Kuwait.

[27] *Ibid.*, p. 109, paras. 45–50. Similar statements about the importance of complementarity were made by Qatar, Afghanistan and Bosnia and Herzegovina.

measures without the approval of the State concerned, which was incompatible with the principle of complementarity".[28] In contrast, some nations including Jordan, were supportive of an independent prosecutor, with Prince Zeid Ra'ad Zeid Al Hussein stating: "in the interests of an effective and credible Court, the Prosecutor would have to be in a position to refer matters to it, in compliance with the principle of complementarity, and to initiate investigations on the basis of information analysed responsibly and in a manner unaffected by international media coverage".[29]

It would seem, therefore, that issues expressed by Muslim states were not motivated in particular by Islamic law or *Sharíʿah* rather these concerns in relation to complementarity and an independent prosecutor were shared by other non-Muslim nations protecting their sovereignty.

8.6. Political and Historical Factors Influencing Statements of Participants: Call to Look Beyond Western Legal Systems for Genuine Universality

Drafting processes of international treaties are narratives of peoples and nations, their struggles and aspirations on various aspects of national, regional and international governance. They also provide a forum for agreements, disagreement and compromises on standard-setting texts that all states – sometimes with reservations – accept as guidelines for their actions. During the Rome Conference, many national delegates recalled their national experiences when making interventions, as is reflected in the observations below. It is quite telling that here, too, no mention of Islam, Muslim or Islamic law is made, although some Muslim states mentioned the importance of looking beyond Western legal systems to ensure genuine universality of principles in the Rome Statute. For example, Mr. Milo (Albania) stated:[30]

> that public opinion was increasingly concerned about the failure of the international community to prevent the continuing serious violations of international humanitarian law and punish those who committed them and the political leaders who were directly responsible for them. The perpetrators of the Serbian massacres in Bosnia were still unpunished, and

[28] *Ibid*., p. 349, para. 9.

[29] *Ibid.*, p. 199, paras. 89–91.

[30] *Ibid.*, p. 82, paras. 11–14.

> the same crimes were being repeated in Kosovo, where the genocidal massacres by the Serbian authorities were a consequence of an institutionalized policy of genocide and State terrorism carried out through the military, paramilitary and police machinery against Albanians. The Albanian people of Kosovo were prey to a policy of ethnic cleansing, and their resistance to that policy in self-defense could never be identified with terrorism. The international community's slow or inadequate response to such crimes tended to cast doubt on the effectiveness of international institutions. Security Council recommendations had not only failed to prevent the violence and terror in Kosovo but had even won time for the Serbian authorities to launch large-scale ethnic cleansing operations. For those reasons, Albania strongly advocated investing the International Criminal Court with universal jurisdiction over such crimes as genocide and ethnic cleansing, war crimes, whether international or domestic, aggression and other crimes against humanity.

The representative of Libyan Arab Jamahiriya, Mr. Al-Maghur, recalled that his country had submitted five issues to the International Court of Justice ('ICJ') and had complied with its decisions in all those cases. A similar conduct had regrettably not been adopted by certain other States, some of which were permanent members of the Security Council and were represented in the ICJ.[31] He also observed that "Western values and legal systems should not be the only source of international instruments. Other systems were followed by a large proportion of the world's population".[32] The Libyan representative's intervention was arguably one of the most politically 'loaded' statements and expressed his disaffection with 'Western' states. He referred to the need to include other sources of law and not confine the discussion to Western values and legal systems.

Delegates from Afghanistan also spoke to their country's devastation at the hands of aggression, war and devastation thus:[33]

> [H]is country had been a victim of aggression and the theatre of violations of humanitarian law, first by the former Soviet Union and more recently by the Taliban mercenaries with the

31 *Ibid.*, pp. 101–02, paras. 80–84.

32 *Ibid*.

33 *Ibid.*, p. 87, paras. 59–62.

> direct participation of foreign militia and military personnel. The acts committed by the former constituted war crimes or crimes against humanity, while the latter continued to perpetrate war crimes, crimes against humanity and genocide. United Nations resolutions had gone unheeded. Those tragic events were evidence of the need for an independent, credible and impartial court which should not be hostage to a political body. Political considerations and the geo-strategic and geo-economics interests of Security Council veto-holders should not prevent the International Criminal Court from condemning aggressors. The world needed to establish a historical record of major international crimes, if only to establish the truth and to educate future generations, in order to deter potential criminals and avoid the repetition of such crimes […] He warned against the danger of the selectivity and double standards that prevailed in the assessment of human rights in the world.

Ensuring inclusivity of diverse legal systems was voiced by delegates from Afghanistan, Lebanon, Libya and Malaysia in various statements emphasising the importance of a court that was "truly independent, fair, effective and efficient, so that it could dispense justice in accordance with principles acceptable to the international community, bearing in mind diverse legal systems and cultures".[34] In addition, the Moroccan delegate stressed inclusivity by stating that "the Court must address the rights of all peoples. It must be permanent, universal, effective, credible, impartial, and independent of any political approach".[35]

Groupings on the basis of region, political and ideological leanings were also visible during the Rome Conference as demonstrated by the text of the interventions. Most prominent among these were the Arab Group, the African Group and the Non-Aligned Movement, although states also tended to be in more than one group. Thus, Indonesia as one of the founders of the non-aligned movement made the following statement; Mr. Effendi (Indonesia) said that "his delegation fully endorsed the position of the Movement of Non-Aligned Countries concerning the crime of aggression and nuclear weapons".[36] Countries in such groups convened individ-

[34] *Ibid.*, p. 109, paras. 45–50.

[35] *Ibid.*, p. 103, paras. 105–09.

[36] *Ibid.*, pp. 337–38, paras. 33–36.

ual meetings and relayed their respective position during the Rome Conference; hence Mr. Alhadi (Sudan), speaking on behalf of the Group of Arab States, stated:[37]

> The Conference had created a historic document, the signing of which would be a moment of dignity for all humanity […] While the Arab States would not stand in the way of the adoption of the Statute of the Court, he felt bound to place on record that they were not convinced by what had been agreed upon […] The Arab States were afraid that the inclusion of non-international conflicts within the Statute would allow interference in the internal affairs of States on flimsy pretexts […] The Statute gave the Prosecutor, acting *proprio motu*, a role beyond the control of the Pre-Trial Chamber […] The Group of Arab States had expressed their fear that the Security Council might be granted powers that could affect the role of the Court concerning any war criminal, regardless of country, religion, or nationality.

Even at this point, none of the concerns put forward by the Group of Arab States focused on an incompatibility with Islamic law or *Sharí'ah*; rather they were centred on the possibility of interfering with sovereignty of nations.

8.7. Limiting the International Criminal Law Menu? The Internal/External Conflict Debate

Discussions regarding inclusion of internal conflicts within the jurisdiction of the ICC led to different positions being taken by Muslim states. Bahrain, Pakistan, Turkey, Saudi Arabia, United Arab Emirates, Syria, Algeria, and Tunisia did not agree with the proposal of extending jurisdiction to internal conflicts within a state, stating quite strongly:[38]

> The future Court should have nothing to do with internal troubles, including measures designed to maintain national security or root out terrorism. Conferring a *proprio motu* role on the Prosecutor risked submerging him with information concerning charges of a political, rather than a juridical nature. To make the Statute universal and effective, reservations should at least have been permitted on certain articles

[37] *Ibid.*, pp. 126–27, paras. 74–78.

[38] *Ibid.*, p. 124, paras. 41–44.

> on which the Conference was deeply divided. For those reasons, Turkey had been unable to approve the Statute and had found itself obliged to abstain.

Mr. Dhanbri (Tunisia) agreed with the inclusion of genocide but was keen to emphasise that "his delegation interpreted crimes against humanity as taking place only in international armed conflicts; otherwise intervention by the Court would amount to interference in internal affairs contrary to the principles of the United Nations".[39] Jordan, Uganda, Brunei Darussalam and others approved of the Court having jurisdiction over internal as well as external conflicts. In support of the proposal, Mr. Sadi (Jordan) said: "the goal was to create a credible juridical deterrent to those who intended to commit grave breaches of international humanitarian law. Grave crimes should be prosecuted, whether they occurred in internal or external conflicts, and whoever committed them".[40] And later, joining the consensus on the inclusion of genocide in the Statute, he stated: "with respect to crimes against humanity, no distinction should be made between international and internal conflicts; that would introduce double standards, which his country could not accept".[41]

Other areas Muslim states were concerned about the inclusion of 'enforced pregnancy' as a crime against humanity and the 'death penalty' in sentencing. With regard to 'enforced pregnancy', Libya,[42] United Arab Emirates,[43] Egypt,[44] Iran,[45] and Jordan[46] were worried this could impact upon their national laws against abortion. However, this concern was not voiced in relation to Islamic law or *Sharíʿah*; the Arab states, alongside the Holy See delegation and other Catholic countries (including Ireland and several Latin American countries), during the Preparatory Committee stage put forward a proposal to replace the term 'enforced pregnancy'

39 *Ibid.*, p. 144, paras. 33–34.

40 *Ibid.*, p. 114, paras. 6–9.

41 *Ibid.*, p. 147, para. 28. The delegates of Senegal and Mali also concurred with this viewpoint.

42 *Ibid.*, p. 160, para. 63.

43 *Ibid.*, p. 160, para. 66.

44 *Ibid.*, p. 164, paras. 30–33.

45 *Ibid.*, p. 166, paras. 71–72.

46 *Ibid.*, p. 332, paras. 72–80.

with 'forcible impregnation'.[47] During the Rome Conference, a compromise was reached to ensure that the crime of 'enforced pregnancy' did not conflict with national laws regarding abortion. Article 7(2)(f)[48] containing the crime, stipulates non-interference with national law relating to pregnancy. Similarly, states including Lebanon,[49] United Arab Emirates,[50] Jordan,[51] and Saudi Arabia[52] discussed the inclusion of the death penalty in sentencing; however, it was decided that while the Court would not impose the death penalty, it would not interfere with countries that did. Mr. Sadi from Jordan noted that "on the vexed issue of the death penalty […] while international human rights instruments called for the phasing out of capital punishment, they did not yet prohibit it altogether". Neither of these issues were articulated citing Islamic law or *Sharíʿah*, and they were also not unique to Muslim states; as discussed above, Catholic countries were similarly concerned about the wording of 'enforced pregnancy' and American states as well as China also impose the death penalty. What drove the interventions from Muslim states therefore, was incompatibility with national legislation.

8.8. Claiming Universality through Inclusivity: Some Concluding Remarks

A close reading of the official records leading to the establishment of the ICC confirms the active participation of Muslim states during the negotiation process – although not always supporting some of its provisions. In this, they were not alone but in the company of the United States of America, India and Israel, who, according to commentaries on the process, gave negotiators a difficult time. Muslim states voiced general support to the treaty with varying degrees of warmth. They voiced concern at the role and powers of the Prosecutor, and also made interventions guarding the

47 Cate Steaines, "Gender Issues", in Roy S.K. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiators and Results*, Kluwer Publishers, The Hague, 1999, p. 367-90.

48 Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001 ('Rome Statute'), Article 7(2)(f) (http://www.legal-tools.org/doc/7b9af9/).

49 Rome Conference, p. 357, paras. 8–9, see *supra* note 18 (http://www.legal-tools.org/doc/253396/).

50 *Ibid.*, p. 357, para. 11.

51 *Ibid.*, p. 114, paras. 6–9.

52 *Ibid.*, p. 357, para. 9.

principle of complementarity and national jurisdiction. They were divided in their position on whether internal conflicts also ought to fall within the remit of the ICC – a position informed by their fear of intrusion in their domestic affairs.

Some commonalities, however, were evident in their approach towards an international criminal court. By arguing for complementarity principle to be upheld and for the ICC to be the institution of last resort, these states were perhaps conscious of the inadequacies in their legal and judicial systems. Hence, it would be a more plausible critique of the role of Muslim states in the drafting process of the Rome Statute to argue that they shied away from ratification as it meant incurring legal obligations. States would be open to inspections and monitoring of their internal laws, both substantive as well as procedural. The political elite of most of these states would be extremely uncomfortable at this state of affairs as harsh punishments, summary disposal of cases and weak and ineffective access to justice reinforce their power and hegemony over the population. This approach has nothing to do with religion, least of all with Islamic law and *Sharíʿah*.

Coming to the issue of incompatible provisions between Islamic criminal law and the Rome Statute, this is a fact and one can point to a few here. As mentioned above, the death penalty, amputation of limbs, flogging and similar harsh punishments for sexual relations outside of marriage, blasphemy, and apostasy are areas for serious and honest debate across the religious, political and cultural divides. But this dialogue must have as its primary aim the urge to deepen understandings of diverse criminal law regimes with a view to evolving some core common principles inclusive of these regimes. From the perspective of Islamic legal traditions, employing the concept of justice rather than law would be more fruitful. *ʻAdl* (justice) is the opposite of *ẓulm* (injustice) and it is these opposites that lay the foundation of its criminal law regime. So what is unjust cannot be acceptable law. Jurists and judges applied *ʻadl*-based law on a case by case basis as this was the essence of Islamic criminal law. But these concepts get lost in translation; hence, inclusivity might be fruitful were there a sincere effort to understand concepts in different legal traditions. It is therefore appropriate to use the word justice rather than law when discussing Islamic criminal regimes and distinguish between Islamic criminal justice in theory as opposed to whether and how it is applied in Muslim states today. In arriving at universal core principles as a

number of writers on the subject have suggested, justice appears more amenable to universality as legal formulations tend to vary across diverse legal systems.

A number of misconceptions and half-truths also require correction. Private vengeance for murder and the Qur'ánic injunctions on retribution are seen as the rationale for continued acceptance of *diyát* (compensation) in some Muslim communities. But this is only a partial truth, for its continued acceptance is not only due to these factors which are not fixed categories. Penal codes of some Muslim countries have legal provisions where the judge is required to also continue prosecution and apply a penalty for the murder. That this does not happen also implies lack of state will and a weak criminal justice system in these states rather than the absence of evolutionary and dynamic essence in the Islamic legal traditions.

Records of the drafting processes of the Rome Statute, in the same way as those relating to the CEDAW drafting narrative, de-stabilise the existing binaries in describing Muslim state practice in international law – Muslim/non-Muslim, Western/non-Western. The picture that emerges is more complex, richer and more nuanced, and this is evident in alliances beyond those based on religion. For instance, the like-minded group of countries, which Bassiouni describes, as well as the African group and non-aligned group of states. Therefore, applying a linear and simplistic analysis by attributing all actions of Muslim states to their religion is unhelpful for developing a genuinely universality of criminal justice norms. Arguments linking non-ratification of the Rome Statute by Muslim states to Islamic law and *Sharíʿah* implies uncritical evaluation of Muslim state practice in international law as well as within their countries. To be taken seriously by Muslim states in particular, and the international community more generally, scholarship on the ICC, the Rome Statute and international criminal law must be informed by credible and deep knowledge of Muslim state practice, how Muslims actually live Islam. Most importantly, there is no single monolithic Islam; neither is there one single homogenous body of *Sharíʿah* or Islamic law. Dropping everything vaguely 'Islamic' into one basket is probably the most serious correction the world community will have to reflect upon to arrive upon universality of norms. That respectful inclusivity of diversity will be the measure of universality.

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Islam and International Criminal Law and Justice

Tallyn Gray (editor)

Mindful of alleged and proven core international crimes committed within the mainly-Muslim world, this book explores international criminal law and justice in Islamic legal, social, philosophical and political contexts. Discussing how law and justice can operate across cultural and legal plurality, leading Muslim jurists and scholars emphasize parallels between civilizations and legal traditions, demonstrating how the Islamic 'legal family' finds common ground with international criminal law. The book analyses questions such as: How do Islamic legal traditions impact on state practice? What constitutes authority and legitimacy? Is international criminal law truly universal, or too Western to render this claim sustainable? Which challenges does mass violence in the Islamic world present to the theory and practice of Islamic law and international criminal law? What can be done to encourage mainly-Muslim states to join the International Criminal Court? Offering a way to contemplate law and justice in context, this volume shows that scholarship across 'legal families' is a two-way street that can enrich both traditions. The book is a rare resource for practitioners dealing with accountability for atrocity crimes, and academics interested in opening debates in legal scholarship across the Muslim and non-Muslim worlds.

The book contains chapters by the editor, Onder Bakircioglu, Mashood A. Baderin, Asma Afsaruddin, Abdelrahman Afifi, Ahmed Al-Dawoody, Siraj Khan, Shaheen Sardar Ali and Satwant Kaur Heer, and Mohamed Elewa Badar, in that order.

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