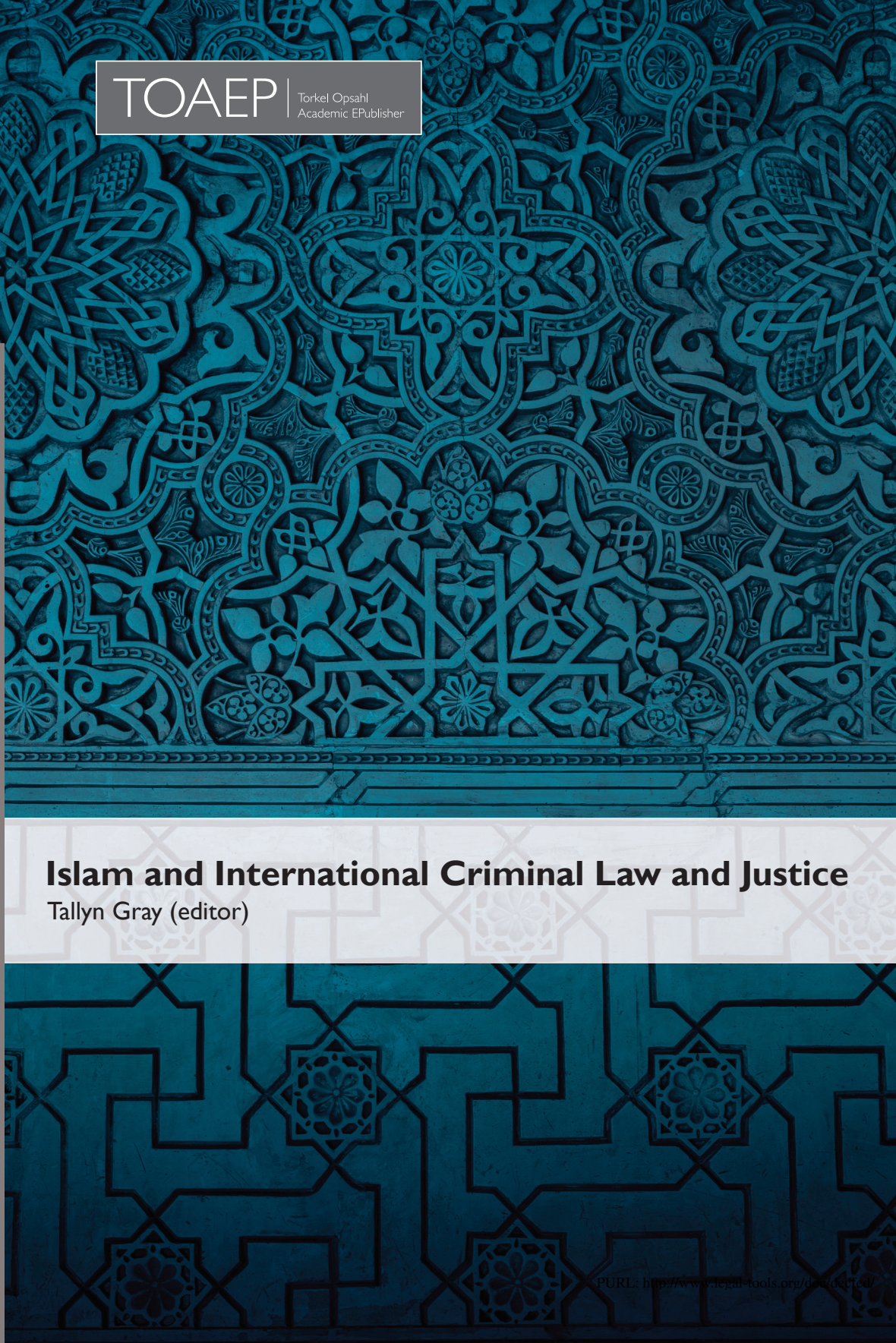

Islam and International Criminal Law and Justice

Tallyn Gray (editor)

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7

Arab and Islamic States' Practice: The *Sharíʿah* Clause and its Effects on the Implementation of the Rome Statute of the International Criminal Court

Siraj Khan*

7.1. Introduction

International law has changed drastically over the last century. Islamic law, in contrast, is at times conceived of as a monolithic bloc of laws derived from pre-modern revelations, with little or no relevance to modern societies, poorly suited, as it were, to the modern international legal framework.[1] This dichotomy begs a simple question: can a state whose legal system requires adherence to and compliance with Islamic laws adequately discharge its obligations under international law, particularly international criminal law? This chapter looks at the ways in which Islamic law complicates the adaptation of international law, specifically international criminal law, and adherence to it and to the International Criminal Court ('ICC').

7.2. The Convergence of the Islamic Legal Horizon with International Law

In the second part of the twentieth century, international law has emerged as a substantial force that demands the compliance of national laws. The

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1 Meghan E. Tepas, "A Look at Traditional Islam's General Discord with a Permanent System of Global Cooperation", in *Indiana Journal of Global Legal Studies*, 2009, vol. 16, no. 2, p. 695.

question of international law's compatibility with national laws, which, for the purposes of this contribution focuses exclusively on national laws derived from the *Sharíʿah*, relies on three independent tiers. The dilemma itself is not limited to international law and the *Sharíʿah* in particular,[2] but rather, this balancing act between state sovereignty on the one hand, and international law's dominance over domestic law on the other, is perhaps one of the consequences of the accelerated globalisation of constitutional law in the twentieth century.

The first tier requires an assessment as to whether a general international legal obligation exists for states. This obligation could take the form of a unilateral, bilateral or multilateral treaty; or be derived from other sources of international law, such as customary law.[3] In order to understand the dynamic between Islamic law and the international obligations of a state, one needs to first determine what obligations exist for the state. If there is no international legal obligation then the question of its compatibility with Islamic law remains a merely theoretical question. In this case, the issue is whether Islamic law provides principles and norms for the protection of human rights at the domestic level alternative to those provided by international law.

The second tier requires an assessment of whether Islamic/Muslim-majority states have accepted these obligations. This can happen through constitutionally recognising the validity and superiority of international law over domestic laws. It can also occur by enacting secondary implementing legislation, thereby incorporating the international legal rules into national legal systems. If the latter option is chosen, the constitution or relevant domestic laws must be amended and brought into conformity with the relevant international laws, ideally prior to ratification. The state can enter reservations or declarations to limit the application of its international legal obligations, but the validity of these limitations will be determined by the extent of the derogation. A number of international legal obligations, particularly those concerning the protection of fundamental rights and freedoms, have now been regarded – in scholarly opinion as

[2] For instance, see Helen Duffy, "National Constitutional Compatibility and the International Criminal Court", in *Duke Journal of Comparative & International Law*, 2011, vol. 11, pp. 5–38.

[3] Statute of the International Court of Justice, 26 June 1945 (http://www.legal-tools.org/doc/fdd2d2/), Article 38(1).

well as in the jurisprudence of many national supreme and constitutional courts – as non-derogable. Limitation of and derogation from these can be considered to inherently obfuscate the purpose and intention of the ratification of the treaty and would, thereby, constitute invalid derogations and limitations.

The third tier assesses the level of congruity between international legal obligations and the *Sharíʿah*. This third step may also incorporate part of the second step, for instance, in states whose national legal systems require international laws and treaties to be approved by parliament. This ratification usually takes place through the enactment of a law giving legal effect to the international treaty obligations at the domestic level. This is particularly relevant in states that are 'dualist' as regards the process of ratifying international treaties.

States that require no further enactment by parliament for the enforcement and applicability of treaty obligations, so-called 'monists', have found alternative ways of accommodating international law. Some have installed bureaus for 'legislative opinion/interpretation'. These bureaus check the legitimacy and constitutionality of laws and provide interpretative guidance, usually while the law is still in draft or bill stage. In the absence of a supreme or constitutional court, the bureau can also review the legitimacy and constitutionality of laws post-enactment. In most states, the only way to assess the compatibility of international law with Islamic law – where both international and Islamic law are legally or constitutionally mandated – would be to challenge the law for unconstitutionality. At this third step, courts will likely be involved in checking the compatibility of the legal obligations under international law with the Constitution, national laws and Islamic law, particularly where national laws give effect to, or are derived directly from, Islamic legal principles and provisions.

In relation to both international law and Islamic law, particularly in the context of Muslim-majority states and those that apply Islamic law to some extent, one may ask which international law and which Islamic law is being referred to? The first question can be answered using the jurisprudence of domestic supreme courts, especially their decisions related to the status and interpretation of international law. These decisions often refer to the jurisprudence of international and regional courts (such as the European Court of Human Rights, the African Court of Human and Peoples' Rights and the Inter-American Court of Human Rights) or the juris-

prudence of the International Court of Justice. The second question as to which Islamic law is more complex because Islamic law and jurisprudence are not wholly, nor uniformly, codified into domestic laws and codes in all states.[4] Indeed, the jurisprudence in a specific state as to what constitutes Islamic law may be inconsistent.

Building upon other scholarly contributions,[5] it is my contention here that a more measured and methodological approach to Islamic law and its application would be beneficial and would have the potential to indigenise international law to the Islamic legal context. Such culturally-sensitive approaches have the potential to achieve greater buy-in from Muslim-majority states in which the *Sharíʿah* features strongly in the legal system.

International law and the *Sharíʿah* may not be reconcilable with a purely textual and black-letter law approach, or at all in some limited cases. Such incongruence may occur purely as a result of a difference in conceptions of the origins of law from an Islamic worldview as compared with the origins of law elsewhere. This does not necessitate re-visiting anachronistic readings of the 'abode of war' and 'abode of peace' paradigms as dictated in classical Islamic literature, but we must understand that Islamic law accentuates an inherent consideration of normative values, which are derived from religious beliefs and sacred scriptures, around which the legal system functions. These normative values are inseparable from the law, particularlyparticularly in the Islamic legal tradition, whereas in non-Islamic and Western legal traditions, it is no longer the case that the normative value of a law should derive from scriptural or religious values. They may be derived merely from current social norms and political theologies without a normative moral value rooted in a religious, moral or ethical tradition.

[4] For example, one of the few instances where Islamic Law has been systematically introduced into codified law is the codification of Islamic family law in the 1958 'Code of Personal Status' (the 'Mudawwanat Al-Aḥwál Al-Shakhṣiyyah') in Morocco. See Léon Buskens, "Shariah and National Law in Morocco", Jan Michiel Otto (ed.), *Shariah Incorporated*, Leiden University Press, Leiden, 2010, p. 100.

[5] 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. 591–92.

The normative values in Islamic legal traditions are derived from religious beliefs and sacred scriptures and structure the legal system. At times, Islamic legal traditions are inseparable from the law. In non-Islamic and Western legal traditions, at least with the rise of liberal legal orders beginning from the nineteenth century, the law no longer looks to religion as a source for its legitimacy. Laws are believed to be outcomes of current social norms and political theologies without deep roots to a religious tradition. Hence, certain scriptural proscriptions in the *Sharíʿah* on various issues – some of which are subject to change, while others remain strict outliers to amendment – may not meet modern sensibilities amongst secular, liberal audiences, but nevertheless will be dominant in dictating what the law will be on a particular issue.

The Islamic legal tradition is hospitable to accommodating international law and allows for interpreting the *Sharíʿah* through a qualitative and objective-driven interpretative licence, as in the *maqáṣid* approach. This is one of the many approaches that can be used to encourage harmonisation, as well as to justify an informed and valid incongruence stemming from substantive reasoning for derogating from international law. So far, most international treaties and conventions that are drafted do not take adequate cognisance of Islamic legal proscriptions. A rare exception to this is the United Nations ('UN') Convention on the Rights of the Child. In Article 20 of the Convention we find references to Islamic law in the context of adoption. In doing so, the Convention specifies the varieties and equivalents of *kafálah* – akin to foster-care – as valid forms of adoption.[6] Even with this pluralistic accommodation, some Muslim-majority member-states still entered reservations to the provision, whereas others removed their reservations overnight without any substantive changes to

[6] Convention on the Rights of the Child, 2 September 1990, Article 20 (http://www.legal-tools.org/doc/f48f9e/), reads:

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, *inter alia*, foster placement, *kafálah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

their domestic laws or highlighting any revolutionary development in their understanding of Islamic law. This example illustrates well that in fact there was nothing in the provision that was contrary to the *Sharíʿah* after all.[7]

In the background of analysing the effect of the *Sharíʿah* on the applicability of the Statute of the ICC ('Rome Statute') in Muslim-majority states where the *Sharíʿah* is applied, attention must also be directed to the intention of some states in becoming signatories to the Rome Statute, especially where states have not fully ratified and likely will not in the near future. To understand why such states may have signed the Rome Statute but not applied or effected its principles at the domestic level towards full ratification, we have to re-assess the timing of the signatures. According to the rules of the ICC, only signatory states can have a say in the development process of the ICC. At the time of its establishment, out of a total twelve Muslim-majority states that eventually signed the Rome Statute, five signed ten days before the deadline. It is therefore a simple assumption that many of the states that signed at a late stage did so to be able to influence the final text of the Statute.[8] Somalia, Mauritania, Pakistan, Iraq,

[7] Egypt had entered reservations against the provisions related to adoption in the Convention on the Rights of the Child 1989. The reservation read as follows: "Since The Islamic Shariah is one of the fundamental sources of legislation in Egyptian positive law and because the Shariah, in enjoining the provision of every means of protection and care for children by numerous ways and means, does not include among those ways and means the system of adoption existing in certain other bodies of positive law, The Government of the Arab Republic of Egypt expresses its reservation with respect to all the clauses and provisions relating to adoption in the said Convention, and in particular with respect to the provisions governing adoption in articles 20 and 21 of the Convention". On 31 July 2003, the Government of Egypt informed the Secretary-General that it had decided to withdraw its reservation made upon signature and confirmed upon ratification in respect of articles 20 and 21 of the Convention. See the United Nations Treaty Collection, available on the UN website.

[8] Algeria signed the Rome Statute on 28 December 2000; Bahrain signed on 11 December 2000; Egypt signed on 26 December 2000; Iran signed on 31 December 2000; Jordan signed on 7 October 1998 and ratified/acceded on 11 April 2002 (Jordan was a founding member and therefore preceded other Muslim-majority states); Nigeria signed on 1 June 2000 and acceded on 27 September 2001; Oman signed on 20 December 2000; the Philippines signed on 28 December 2000 and acceded on 30 August 2011; Sudan signed on 8 September 2000; Syria signed on 29 November 2000; the United Arab Emirates signed on 27 November 2000; the Kingdom of Morocco signed on 8 September 2000; Yemen signed on 28 December 2000; and Kuwait signed on 8 September 2000. Tunisia was the latest State to sign and ratify the Statute on 24 June 2011, but notably does not specify the *Sha-*

Libya, Lebanon, Qatar, and Saudi Arabia have not signed the Rome Statute.

At a very conceptual level, it is understood that the development of international criminal law stems from the laws of armed conflict, once referred to as the laws of war. This specific need for regulation of war and armed conflicts emerged rapidly following the world wars in the twentieth century, when the initial development of international criminal law occurred, pushed mainly by Western powers that had participated in the two world wars.[9] The initial development of the League of Nations occurred after the First World War and the ratification of numerous treaties regulating armed conflict and the unlawful use of force thereafter. Between the First and Second World Wars, the laws relating to protection of humans and non-combatants from unlawful and illegal use of force were developed to provide substantive protection to states and their citizens against the unlawful use of force.[10] They also criminalised certain acts, recognising them as international crimes, or crimes with an international character when perpetrated by the authorities of one state against another. Along with criminalising certain acts, the laws also provided guidance on when the use of force would be legitimate and exceptions to this effect. It is not surprising, therefore, that the crimes recognised by international criminal law during its early development until the present age have been distinctly defined in the context of the types of crimes committed in the two world wars, and therefore cover a very specific experience of the use of force.

An oft-cited concern of some Muslim-majority states regarding joining the ICC has been that to do so would usurp the *Sharíʿah*'s exclusive jurisdiction in those states, effectively deferring this area of law to the Rome Statute, thereby substituting the law of God for the law of man. Though it is accepted that joining the ICC would involve a degree of jurisdictional deference in favour of the ICC, it need not necessarily involve an absolute abdication of the power to prosecute criminals domestically.

ríʿah as a source of law in its Constitution. See Coalition for the International Criminal Court, "Status of Ratification of the Rome Statute", 10 November 2011 (http://www.legal-tools.org/doc/21cfec/); Nassar, 2003, p. 593–94, see *supra* note 5.

9 Farhad Malekian, *International Criminal Responsibility of States: A Study on the Evolution of State Responsibility with Particular Emphasis on the Concept of Crime and Criminal Responsibility*, University of Stockholm, Stockholm, 1985, pp. 55–67.

10 *Ibid.*, pp. 103–13.

Once notified of an impending prosecution, a state can, in good faith, itself prosecute the accused domestically. This ensures that countries fearful of incompatibility between the *Sharíʿah* and international criminal law have the possibility of avoiding ICC jurisdiction by domestically prosecuting those cases. This principle of 'complementarity', established under Article 17(1) of the Rome Statute,[11] provides that the ICC will only investigate and prosecute cases in which national courts are unwilling or genuinely unable to investigate or prosecute. This inadvertently limits the invocation of the ICC's jurisdiction and allows the state to apply the relevant domestic laws. However, this system has been criticised since the complementarity regime envisaged by the ICC was conceived from a Western conception of justice, not taking into account Islamic criminal law and its rules of evidence, procedure and the system of retribution and punishments. This means that states imposing a system of criminal evidence and procedure based on the *Sharíʿah*, or those with relatively less 'developed' systems of criminal justice, would almost always fall foul of the requisite standards of criminal justice as applied in Western legal jurisdictions, and of the principles that establish whether a state is or is not able to investigate and prosecute cases as required by the ICC. Such states would therefore be unable to find protection by the complementarity regime under the Rome Statute.[12]

Article 21(1)(c) of the Rome Statute expressly allows for the application of "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime" at such trials. Therefore, though the Rome Statute allows for trials to apply Islamic criminal laws and principles, it would only do so provided that "those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards". However, since most Islamic criminal laws and principles would likely be judged as falling below the necessary norms and standards referred to in Article 21(1)(c) above, and the qualifications stated in Article 21(3) to "be con-

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

[12] Adel Maged, "Arab and Islamic Shariah Perspectives on the Current System of International Criminal Justice", in *International Criminal Law Review*, 2008, vol. 8, no. 3, pp. 485–86, fn. 37, and corresponding text.

sistent with internationally recognized human rights", these provisions are unlikely to provide any rapid confluence between the legal traditions to allow for trials based on Islamic criminal laws and principles.

The triggering mechanisms for the ICC to invoke its jurisdiction are quite clear, but the application of these mechanisms has not occurred without concern. The three triggering mechanisms are:[13]

1. The State complaint, where every State Party can refer a situation to the prosecutor;[14]
2. The Prosecutor's *proprio motu* power to initiate an investigation on the basis of information received[15] and then a referral to the pre-trial chamber to request authorisation to proceed to full prosecution; and
3. The referral of a situation to the ICC by the UN Security Council by a resolution under Chapter VII of the UN Charter.[16]

This third option is known to have its flaws; particularly, awarding a political body the right to initiate criminal justice proceedings at the international level is susceptible to abuse through politicised prosecutions. Article 16 of the Rome Statute also gives the Security Council the power to halt investigations and prosecutions for a period of twelve months, in cases where the Council deems that in complex situations, an investigation or prosecution may hinder international peace and security whilst pursuing international criminal justice. This power was particularly criticised when the Security Council, at the behest of the United States of America (which famously has not ratified the Rome Statute), invoked Article 16 in two Resolutions which exempted UN peace-keepers who were not nationals of a State Party to the Rome Statute from the jurisdiction of the ICC for two consecutive periods of twelve months each.[17] This was seen by many States Parties to be inconsistent with the letter and spirit of the Rome Statute, particularly when, on the expiry of the second twelve-month peri-

13 Hans-Peter Kaul, "International Criminal Court (ICC)", in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, December 2010.

14 See Rome Statute, Article 13(a) (http://www.legal-tools.org/doc/7b9af9/), *supra* note 11.

15 See Rome Statute, Articles 13(c) and 15 (http://www.legal-tools.org/doc/7b9af9/), *ibid*.

16 See Rome Statute, Article 13(b) (http://www.legal-tools.org/doc/7b9af9/), *ibid*.

17 United Nations Security Council Resolution 1422 (2002), UN Doc. S/RES/1422(2002), 12 July 2002 (http://www.legal-tools.org/doc/1701d5/); United Nations Security Council Resolution 1487 (2003), UN Doc. S/RES/1487(2003), 12 June 2002 (http://www.legal-tools.org/doc/20e269/).

od, efforts were made once again to extend it further – though these efforts ultimately failed due to lack of support from Security Council members.

Mention must also be made of the difference in theoretical conceptions and definitions of crimes in the Rome Statute and in Islamic criminal law. These have been covered in detail by others and would in any case be too extensive to detail here. It should suffice to say that under both international criminal law and the Islamic criminal legal system, various crimes of an international character are understood and regulated somewhat differently. The regulation of these crimes is largely dictated by the circumstances through which such crimes develop. The history of policing such crimes involves the attempt of state authorities to regulate and criminalise those offences against the specific backdrop of the regional political and historical environments from which they emerged.[18]

7.3. The *Sharíʿah* Law Clause

Many Muslim-majority states recognise the validity of both the *Sharíʿah* and Islamic law. This finds mention to varying degrees: in the Constitution's preamble, the provision on determination of a state religion, the principle of conformity of legislation to the principles and rulings of the religion, and the conditions to be satisfied by the Head of State. Most pertinent to this chapter is the conformity of legislation to the principles and rulings of the religion, which often finds expression in what is termed the 'source of law clause' or the '*Sharíʿah* law clause' in the Constitution. The 'source of law clause' refers to the normative legal value for the *Sharíʿah* or for the principles and rules that are derived from it.[19] It establishes the

[18] For a substantive treatment of the various crimes under both international criminal law and Islamic criminal law (including those recognised by one system and not the other under shared conceptual frameworks), see Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search*, Brill, Leiden, 2011, pp. 171–91 (aggression), 193–207 (war crimes), 210–12 (unlawful use of weapons), 213–23 (crimes against humanity), 225–36 (slavery), 237–41 (genocide), 243–50 (apartheid), 251–63 (torture), 265–70 (crimes against internationally protected persons), 271–74 (taking of hostages), 275–80 (drug offences), 280–88 (trafficking in persons and pornography), 295–97 (criminalisation of alcohol consumption), 299–302 (piracy), 331–37 (humanitarian protection of prisoners of war).

[19] Clark B. Lombardi, "Designing Islamic Constitutions: Past Trends and Options for a Democratic Future", in *International Journal of Constitutional Law*, 2013, vol. 11, no. 3, pp. 615–45; Dawood I. Ahmed and Moamen Gouda, "Measuring Constitutional Islamization:

principles and sources by which laws are drafted and written, and eventually applied by the executive and administrative authorities in the state as well as, importantly, by the judicial authorities.

The term 'Islamic law' is no longer adequate to designate both the religiously-inspired laws of a Muslim-majority country and 'the continuity of legal doctrine' (*fiqh*) as it once used to. In modern legislative and governance practice, 'Islamic law' has been downgraded to refer merely to laws enacted by parliaments composed of non-specialists in the *Sharíʿah* who make up the legislative organs. They are advised by boards of scholars as to which laws do or do not comply with the *Sharíʿah*. The lack of proper juristic method and consideration of juristic opinions (*fiqh*) in modern legislative processes is detrimental to the purpose and methodologies of deriving sound Islamic legal opinions on legislative and other matters. This dilution of Islamic law to a black-letter, overly textual and literal derivation of rulings from one main source (scripture) at the expense of a holistic methodology, has resulted in obscurantist formulations of Islamic legislation in the nation-state. The mere fact that the Constitution of the state has a *Sharíʿah*-law clause and a board of Islamic scholars advising Parliament, is considered sufficient by many to conclude that laws are therefore compliant with the *Sharíʿah*.[20]

Muslim-majority countries that have enacted criminal laws on the basis of the *Sharíʿah* law clause within their respective constitutions and have subsequently codified them within their domestic legal systems are fairly numerous: Libya first enacted Islamic criminal laws in 1972, the United Arab Emirates in 1978, Iran in 1982, Sudan in 1983 and the northern states of Nigeria in 2000–2002. In Somalia also, the rise of local Islamic courts, originally through the Islamic Courts Union, has resulted in the *de facto* imposition of Islamic criminal law, now largely controlled by non-state actors such as Al-Shabáb.[21] Islamic criminal laws have been

The Islamic Constitutions Index", in *Hastings International and Comparative Law Review*, 2015, vol. 38, pp. 1–74.

20 Baudouin Dupret, "The Relationship between Constitutions, Politics, and Islam: A Comparative Analysis of the North African Countries", in Rainer Grote and Tilmann Röder (eds.), *Constitutionalism, Human Rights, and Islam after the Arab Spring*, Oxford University Press, Oxford, 2016, pp. 234, 238.

21 Cedric Barnes and Harun Hassan, "The Rise and Fall of Mogadishu's Islamic Courts", in *Journal of Eastern African Studies*, 2007, vol. 1, no. 2, pp. 151–60; Global Security, "The

enacted in Saudi Arabia, Qatar and Yemen for much of their recent history, proceeding from the adoption and seemingly uninterrupted assimilation of tribal customs into a modern monarchic nation-state framework (with the exception of Yemen, which is still based on an intricate and large-scale system of tribal alliances). Another model exists in Afghanistan where the punishment for apostasy, though not specified as a *ḥadd* offence in the *Qurʾán*, and therefore not listed in the penal code, can be applied by virtue of a constitutional provision, which permits courts to directly apply Islamic legal punishments as derived from the *Ḥanafī* school of jurisprudence in matters that are not specified by the constitution or other laws.[22] But there are aberrations and inconsistencies in the manner of application of Islamic criminal laws, from selective and arbitrary, religiously- or politically-motivated convictions, to criminalising actions that support ideological movements and trends. In Sudan, some positive trends have been witnessed over the past decade, which evidence 'undeclared moratoriums' through creative application of procedural rules on some *ḥudúd* punishments, largely through judicial activism.[23]

Islamic criminal laws have also been enacted through negative 'repugnancy clauses', such as in Article 227(1) of the Constitution of Pakistan 1973 (amended 2015) which requires that:[24]

> [a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy *Qur'án* and *Sunnah*, in this part referred to as the Injunctions of Islam, and

Supreme Islamic Courts Union (ICU)", 10 May 2013; Stanford University, Mapping Militant Organizations Project, "Islamic Courts Union", 30 March 2016.

22 Said Mahmoudi, "The Sharî'a in the New Afghan Constitution: Contradiction or Compliment?", in ZaöRV, Max Planck Insistut Für Auslandisches Öffentliches Recht Und Völkerrecht, 2004, vol. 64, pp. 871–72; Constitution of the Islamic Republic of Afghanistan, 3 January 2004, Article 130 (http://www.legal-tools.org/doc/9aa221/): "In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of *Ḥanafī* jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner." See Adeel Hussain, "Afghanistan's Constitution between Shariah Law and International Human Rights", in *Verfassungsblog*, 22 May 2017.

23 Redress, "The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives", January 2014 (http://www.legal-tools.org/doc/4430b8/).

24 Constitution of the Islamic Republic of Pakistan, 12 April 1973 (as amended 7 January 2015), Article 227(1) (http://www.legal-tools.org/doc/dc9f9d/).

> no law shall be enacted which is repugnant to such Injunctions.

This model requires *ex-post-facto* determinations of whether actions done in compliance with existing laws go against Islamic legal principles and rulings and whether, therefore, the laws themselves contravene the *Sharíʿah*, in which case they are duly repealed. In Pakistan such determinations are delivered by the Federal *Sharíʿat* Court bench at the Supreme Court.

The '*Sharíʿah* law clauses' in most constitutions are vaguely formulated and offer little in the way of guidance to legislative bodies regarding the sources and principles of the *Sharíʿah*. After enactment of the legislation, the task of ensuring that laws comply with the Constitution and its provisions – such as with international law where this is obliged by the constitution – rests with the Constitutional Court or other apex court.

The following section provides a short excursus on the status of the *Sharíʿah* in the constitutions of some Muslim-majority states. This includes: (1) states that have not ratified the Rome Statute, but whose constitutional and legislative frameworks have been altered recently; (2) states that have recently entered into communications with the ICC regarding the status of their membership to the Rome Statute; and (3) states that have, by virtue of an application to the ICC, invited the ICC to exercise its jurisdiction to investigate acts committed on their territory. The case studies presented in this chapter suggest that the existence of the *Sharíʿah* clause does not substantively affect the decision of states on whether to ratify the Rome Statute, or the international legal obligations of states that have already ratified the Rome Statute. On this basis alone, it would suggest that there is no inherent incompatibility between the *Sharíʿah* and the Rome Statute when it comes to the fundamental principles of the *Sharíʿah*.

7.4. Case Studies and Recent Developments

The case studies below provide an overview of selected states whose constitutional and domestic legislative framework has expressly recognised the normative and legislative value of the *Sharíʿah*. It further elaborates on the potential of this recognition to allow for accession to, and full

compliance with, the Rome Statute.[25] I have chosen to include only those states whose legislative and constitutional frameworks have undergone substantial changes, or have received little scholarly attention in this context.

7.4.1. Egypt

Egypt first introduced the *Sharíʿah* into the Constitution as a normative device for the institutional, governance and legislative framework in 1971, by enshrining in Article 2 of the Constitution that "the principles of the Islamic *Sharíʿah* are a main source of legislation". In 1980, Article 2 was amended to include the definite article, to read: "the principles of the Islamic *Sharíʿah* are *the* main source of legislation". Following the protests and turbulences that overthrew Mubarak in 2011, a new Constitution was passed, which adopted Article 2, but added a new Article 219, which added that "the principles of the Islamic *Sharíʿah* include its general evidence and its fundamental and doctrinal rules, as well as its sources considered by schools of the People of tradition and consensus (*ahl al-Sunnah wa'l-jamáʿah*)". This insertion serves two purposes. Firstly, it limits the role of the Constitutional Court in extrapolating the principles of the Islamic *Sharíʿah* to that accepted by the four *Sunní* schools of jurisprudence, by virtue of the sentence "considered by schools of the People of tradition and consensus". Secondly, it adds that the principles of the Islamic *Sharíʿah* include evidence, and fundamental and doctrinal rules. This clause implies a link to the comprehensive and explicit evidence in the revealed text (*al-adillah al-kulliyah*), fundamental rules in terms of legal methodology (*al-qawáʿid al-uṣúlíyyah*), fundamental doctrines of law and rules of jurisprudence (*úṣúl al-fiqh* and *al-qawáʿid al-fiqhíyyah*), as well as a subtle reference to juristic orthodoxy in relation to the "sources considered by schools of the People of tradition and consensus", which usually refers only to the *Sunní* schools of jurisprudence. Though this was a novel approach, it was not implemented, since the 2012 Constitution was suspended in July 2013 through a military coup, and the new Constitution approved by referendum in January 2014 repealed Article 219 and re-

[25] This could be on the basis of the State's constitutional recognition of Islam as either the official religion of the State or its people, or by virtue of expressly recognising the legislative value of the *Sharíʿah* as an official source of law in the State in its Constitution or domestic laws.

instated Article 2, as amended in 1980. The source of law clause (Article 2) now reads: "Islam is the religion of the state and Arabic is its official language. The principles of Islamic *Sharíʿah* are the principal source of legislation". Article 219 went some way in intimating what the phrase "the principles of Islámic *Sharíʿah*" could include. Its repeal takes us back to a vague formulation, which allows for the inclusion of an unlimited number of sources with which legislation could be justified as being compliant to the *Sharíʿah*.

The ICC does not have jurisdiction over Egypt, since it has only signed and not yet ratified the Rome Statute.[26] Egypt has been a longstanding proponent of the idea of a permanent international criminal court and occupied an influential role in the drafting of the Rome Statute, which established the ICC.[27] Despite this, and despite being a signatory, it has still not ratified the Statute, thereby ensuring that the Rome Statute cannot be enforced in Egypt's domestic legal framework. Many states claim that Egypt's failure to ratify the Statute in their domestic legal systems stems from a fear of politically-motivated prosecutions, particularly in countries that have a heightened level of civil unrest. Since the date of its signature in 2000, there was no official relationship or communication between Egypt and the ICC, until recently when, in 2013, an attempt was made at invoking the jurisdiction of the ICC in Egypt.

In December 2013, things took an interesting turn in Egypt. The Freedom and Justice Party ('FJP') – effectively the political wing of the Muslim Brotherhood in Egypt – petitioned the ICC to investigate alleged crimes against humanity in Egypt, based on the number of supporters of one-time President Mohammed Morsi, who were allegedly killed after the ousting of Morsi. Lawyers on behalf of the FJP called on the ICC to accept jurisdiction since Morsi, according to them, was still the legitimate President of the Republic of Egypt; hence they should accept jurisdiction under Article 12(3) of the Rome Statute with respect to alleged crimes committed since 1 June 2013, with allegations of murder, unlawful imprisonment, torture, persecution against an identifiable group and the enforced disappearance of persons. It is important to note that Article 12 of

[26] Coalition for the International Criminal Court, 2011, see *supra* note 8 (http://www.legal-tools.org/doc/21cfec/).

[27] Roy S.K. Lee, *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, pp. 591–92.

the Rome Statute is also known as "[p]erhaps the most difficult compromise in the entire negotiations" for the Rome Statute.[28] This is due to the fact that subsections 2 and 3 of Article 12 allow states that are non-parties to the Statute to accept the exercise of jurisdiction by the Court, for instance if crimes are committed on the territory of, or by nationals of, a State Party.[29]

The FJP's application was dismissed as not having been submitted on behalf of the state concerned, based, *inter alia*, on the lack of 'effective control' exercised by the Morsi government. The ICC Prosecutor's Office ('OTP') refused to accept the request to investigate, stating that it had not been submitted by the ruling government.[30] This was the case even though, as argued by the lawyers appointed by the FJP, the African Union had decided to suspend Egypt from participating in its activities during that period and collectively refused to recognise the military government that took control on 3 July 2013. The OTP refused to accept that the African Union's suspension of Egypt amounted to effective recognition of the continuation and validity of Morsi's government at the time of the application. On 18 September 2014, lawyers on behalf of the FJP filed an application to request the Pre-Trial Chamber to review both the decision of the Prosecutor and of the Registrar not to open an investigation into the crimes alleged in Egypt. This was, perhaps, the first application of this type to ask for the appointment of a Chamber to review the decision of the Prosecutor not to conduct a preliminary examination. The Pre-Trial Chamber refused both arguments to review the original decision and to give leave to appeal the original decision on the grounds that the "Pre-Trial Chambers have constantly denied subsequent requests for reconsideration as having no statutory support".[31] They reasoned that the right to

[28] Philippe Kirsch QC and Darryl Robinson, "Reaching Agreement at the Rome Conference", in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 83.

[29] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, *Commentaries on International Law*, Oxford University Press, Oxford, 2010, pp. 277–91.

[30] ICC, Office of the Prosecutor, Press Release, "The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt", 8 May 2014.

[31] ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the Prosecution Motion for Reconsideration, ICC-01/04-01/06-123, 23 May 2006, p. 3 (http://www.legal-tools.org/doc/365c0b/); ICC, Situa-

lodge an interlocutory appeal is only given to parties to the relevant proceedings, and since in the previous decision the Applicant lacked *locus standi*, the Applicant could not be considered to be a party to the present proceedings within the meaning of Article 82(1)(d) of the Rome Statute.[32] Not only was the refusal of the application by the OTP controversial in raising serious questions about the relationship between Egypt and the Court, it shows that the ICC has been hesitant in getting involved in politically-sensitive cases.[33] It also raises serious questions about the scope of applicability of Article 12(3) of the Rome Statute.

Since the Arab Spring and Egyptian revolution of 2011 that led to the fall of President Mubarak's regime, there have been multiple calls for Egypt to join the ICC as a full member, and, indeed, it has been announced that Egypt will take the necessary steps to join and ratify "all

tion in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the Prosecution Motion for Reconsideration And, in the Alternative. Leave to Appeal, ICC-01/04-01/06-166, 23 June 2006, paras. 10–12 (http://www.legal-tools.org/doc/a2d89a/); ICC, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto and Joseph Arap Sang*, Pre-Trial Chamber II, Decision on the "Defense Request for Leave to Appeal the Urgent Decision on the 'Urgent Defense Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence' (ICC-01/09-01/Ll-260)", ICC-01/09-01/11-301, 29 August 2011, para. 18 (http://www.legal-tools.org/doc/84374a/); ICC, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto and Joseph Arap Sang*, Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-101, 30 May 2011, para. 42 (http://www.legal-tools.org/doc/dbb0ed/); ICC, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto and Joseph Arap Sang*, Pre-Trial Chamber II, Decision on the "Prosecution's Application for Extension of Time Limit for Disclosure'', ICC-01/09-01/11-82, 10 May 2011, para. 11 (http://www.legal-tools.org/doc/098503/); ICC, Situation in the Democratic Republic of Congo, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision on the Defense Request for Leave to Appeal, ICC-01/04-02/06-207, 13 January 2014, para. 39 (http://www.legal-tools.org/doc/fbb86a/).

32 ICC, Regulation 46(3) of the Regulations of the Court, Pre-Trial Chamber II, Decision on a Request for Reconsideration or Leave to Appeal the "Decision on the 'Request for Review of the Prosecutor's Decision of 23 April 2014 Not to Open a Preliminary Examination Concerning Alleged Crimes Committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014'", ICC-RoC46(3)-01/14, 22 September 2014, paras. 5-8 (http://www.legal-tools.org/doc/7ced5a/).

33 Mark Kersten, "ICC Says No to Opening Investigation in Egypt", in *Justice in Conflict*, 1 May 2014.

United Nations agreements on human rights".[34] Egypt has since made similar commitments, each time stipulating exclusions to its full ratification of the ICC, such as ratifying whilst guaranteeing immunity for President Bashir by way of establishing a Bilateral Immunity Agreement between Egypt and Sudan. Such a process would be pursuant to Articles 27 and 98 of the Rome Statute, which recognise that immunities may exist on the basis of a state's other obligations under international law (such as a bilateral treaty agreement), which would provide the state with the option of a waiver of immunity and would require consent to surrender, and that this would exist alongside the state's ratification of the Rome Statute.[35]

Egypt has not ratified the Rome Statute, but it has taken significant steps to ratify most international treaties that regulate crimes, and has criminalised many offences even though they are not defined as international crimes in international criminal law, and all of this despite its constitutional commitments to retain the *Sharíʿah* as a source of law.[36]

7.4.2. Palestine

The most recent signatory to the Rome Statue from the Middle East and North Africa region was the State of Palestine, which accepted ICC jurisdiction in June 2014 and formally acceded to the Rome Statute on 2 January 2015, entering into force on 1 April 2015. The extent to which the State of Palestine will engage with the ICC is yet to be seen. Palestine's Basic Law of 2003 (equivalent to the Constitution) was passed by the Palestinian Legislative Council in 1997, and ratified by President Yasser Arafat in 2002. It has subsequently been amended twice: in 2003, the political system was changed to include a Prime Minister, and in 2005 major changes were made to the system of elections.

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[34] Foreign Minister of Egypt, Al-Araby Nabil, quoted in *Al-Rakoba.net Newspaper*, "Egyptian Foreign Minister Announces the Start of the Procedures for His Country's Accession to the ICC", 20 April 2011; Human Rights Watch, "Egypt: Important Commitment to Ratify Rome Statute", 29 April 2011.

[35] Mark Kersten, "Egypt to Join the ICC but Also Guarantee Bashir Immunity", in *Justice in Conflict*, 20 February 2011; Schabas, 2010, pp. 1037–45, see *supra* note 29.

[36] Egypt ratified the 1949 Geneva Conventions on 10 November 1952, and the two Additional Protocols on 9 October 1992. It also ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide on 8 February 1952 and acceded to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 26 June 1987. Egypt further acceded to the International Convention on the Suppression and Punishment of the Crime of Apartheid on 13 June 1977.

Article 7 of the Basic Law stipulates that "the principles of the Islamic *Sharíʿah* are a main source for legislation" and, therefore, the criminal laws for Muslims are also to be legislated in accordance with Islamic criminal laws.[37] The Basic Law, like all other constitutions, which include comparable source of law clauses, leaves it vague as to what the principles of the Islamic *Sharíʿah* are, though the clause is widely understood by scholars to refer to both the sources of Islamic law as well as widely-accepted principles applied by Muslim jurists. Article 18 of the Basic Law indicates Palestine's adherence to the Universal Declaration of Human Rights ('UDHR'), as well as a specific intent to "seek to join other international covenants and charters that safeguard human rights". Notwithstanding the above, the *Sharíʿah* law clause and Article 18 of the Basic Law would not preclude or prevent full ratification and implementation of the Rome Statute in Palestine. However, other recent developments may have implications for Palestine's full compliance with the Rome Statute.

On 22 January 2009, under Article 12(3) of the Rome Statute, Ali Khashan, Minister of Justice of the Government of Palestine, applied to the OTP to investigate "acts committed on the territory of Palestine since 1 July 2002" by Israel related to the on-going conflict between the two states.[38] The then-Prosecutor, Luis Moreno-Ocampo, was wary of the fact that an admission of the complaint to full investigation would have been tantamount to the recognition of Palestine as a state. As a result, the OTP refused to admit the application to investigate any alleged crimes until such time as the question of the statehood of Palestine was resolved – an issue that took more than three years to resolve at the ICC.[39] This is no longer an issue, with Palestine's accession to the Rome Statute on 2 January 2015 rendering it a State Party.

7.4.3. Tunisia

Tunisia was only the fourth member of the Arab League (out of a total of 22 Member States), and the 116th state overall to join the Rome Statute. In

[37] The Palestinian Basic Law, "2003 Permanent Constitution Draft", 17 February 2008, available on the web site of the Palestinian Basic Law.

[38] Palestinian Ministry of Justice, Office of the Minister Ali Khashan, "Declaration Recognising the Jurisdiction of the International Criminal Court", 21 January 2009 (http://www.legal-tools.org/doc/d9b1c6/).

[39] ICC, Office of the Prosecutor, "Situation in Palestine", 3 April 2012 (http://www.legal-tools.org/doc/f5d6d7/).

addition, it has the distinction of being the first North African state to accede to the Rome Statute, on 24 June 2011.

Tunisia is only the second most-recent country in the Middle East and North Africa to accede to the Rome Statute. While the congratulatory messages that were sent by the High Representative of the European Union to the world regarding Tunisia's accession made reference to the Arab Spring, it made no reference to Islamic law or the *Sharíʿah*, and for very good reason. After the revolution in Tunisia, the newly-written Constitution that was adopted makes reference in Article 1 to the fact that the religion of the State of Tunisia is Islam, but there is no 'source of law', '*Sharíʿah* law', or repugnancy clause, as found in the constitutions of other states that apply Islamic law. Furthermore, there is no mention whatsoever of Islamic law being a source of legislation. This would presume that Tunisia's criminal and other laws would quite easily be compliant with the Rome Statute and would not face the problems of other states that have acceded. But the clear reference in the Constitution establishing the religion of the State of Tunisia as Islam qualifies it for inclusion in our comparative analysis. Though the clause itself does not obligate consideration of the *Sharíʿah* for the purposes of enacting new legislation, it may serve as a legitimate reference point for existing indigenous and long-standing Islamic customs and traditions derived from the *Sharíʿah*. These traditions may not have been codified but could be afforded legislative protection under Article 1. The effect of Article 1 on enacting domestic legislation and ratifying international treaties is yet to be fully tested.

7.4.4. The Maldives

The Maldives is well-known for its beautiful natural landscapes and sweeping shorelines, but less so for the fact that the *Sharíʿah* is one of the sources of its laws. Article 10(a) of its Constitution states:[40]

> The religion of the State of the Maldives is Islam. Islam shall be one of the basis [*sic*] of all the laws of the Maldives.

Article 10(b) compounds this with a repugnancy clause:[41]

[40] Constitution of the Republic of Maldives, 7 August 2008, Article 10(a) (http://www.legal-tools.org/doc/93aff7/).

[41] *Ibid.*, Article 10(b).

> No law contrary to any tenets of Islam shall be enacted in the Maldives.

Not only does the Constitution explicitly provide for laws based on the *Sharíʿah*, the Penal Code of the Maldives came into effect on 16 July 2015, repealing the law of 1968. The new Penal Code was initially drafted through a commissioned project by the UN Development Programme, under the supervision of Professor Paul Robinson and a team of researchers at the University of Pennsylvania in 2006.[42] The draft legislation was not passed in the 16th *Majlis* (Parliament) in 2008, but was re-submitted to Parliament in late 2009 in the 17th Majlis. It remained with the *Majlis* until December 2013, was rejected in the first vote and then finally passed in April 2014. Its enforcement was delayed until April 2015 to allow institutions to amend their regulations and by-laws to ensure they were in compliance with the new Penal Code.[43]

The Code is particularly unique since it was specifically drafted to take consideration of the *Sharíʿah* and common law principles in criminal law, by experts from both the Islamic and common law legal traditions. It is perhaps not a mere coincidence that the Maldives acceded to the Rome Statute on 21 September 2011, in the run-up to the criminal law reforms, which culminated in the new Penal Code in April 2014. The Maldives does not have a history of civil war or violent conflict so it is not surprising for it to have escaped scholarly attention, particularly for the purposes of international criminal law.

The Islamic criminal system of the Maldives serves as an example of a successful effort between Islamic law specialists and those with Western legal backgrounds. They created a penal code that takes elements of both legal jurisdictions whilst remaining cognisant of modern conceptions of fairness, justice, fair trial principles and a combination of the law of evidence in criminal procedure in both Islamic law and the common law system.[44] The extent to which the domestic Islamic criminal legal

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42 Paul H. Robinson *et al.*, "Codifying Shariah: International Norms, Legality and the Freedom to Invent New Forms", in *Journal of Comparative Law*, 2007, vol. 2, no. 1, pp. 1–53.

43 Hassan Mohamed, "Maldives Celebrates Historic Penal Code", in *Maldives Independent*, 16 July 2015; *Penn Law News*, "Penal Code Drafted by Prof. Paul Robinson and Students Is Enacted in the Maldives", 8 May 2014.

44 For a comparable exercise in enabling a dialogue between the two legal systems as far as the modern application of Islamic criminal law is concerned, see Sadiq Reza, "Due Process

provisions in the new Penal Code and the domestic criminal law courts' architecture are coherent, comprehensive and able to prosecute crimes of an international character is yet to be assessed.

7.4.5. Sudan

On 8 September 2000, Sudan signed the Rome Statute, but roughly eight years later, Sudan's government submitted to the Secretary-General of the United Nations that, "Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature".

Sudan's body of criminal laws has long been noted to suffer from a substantial lack of reference to international crimes and has gained in prominence since the conflict in Darfur, in which many crimes stipulated in the Rome Statute were said to have been committed. It was subsequently alleged that the criminal justice system in Sudan was incapable, from a purely technical and capacity standpoint, to hold suspects accountable for such crimes, even if there was political will to support such prosecutions. Some of the accused for whom warrants were issued voluntarily presented themselves to the ICC's Pre-Trial Chambers.[45]

Prior to the Darfur conflict, it is noteworthy that many of the changes in the criminal laws in Sudan were ushered in by a military, and not a civilian government. Between November 1983 and June 1999, the Nimeiri Military Regime (1969–1985) repealed the Armed Forces Act of 1957 and introduced the People's Armed Forces Act of 1983. The new Act dealt with the repression of many war-related crimes and included them in a section of the Act on crimes and punishments (Section 10). Some of the crimes that were made punishable included looting, pillaging, and inhumane treatment of prisoners of war and the wounded. The Armed Forces Act of 1983 represented a measure of progress but was soon revoked by the civilian government that took power after the collapse of the Nimeiri regime, and was then replaced by the People's Armed Forces Act of 1986. During the short period of civilian rule in Sudan (1986–1989), the latter

in Islamic Criminal Law", in *George Washington International Law Review*, 2013, vol. 46, no. 1, pp. 1–27.

[45] See the case of Bahar Idriss Abú Garda, who voluntarily appeared at the pre-trial chambers in response to the warrant against him, and who was acquitted for insufficiency of evidence. Details of the case are available on the ICC web site.

Act has been widely regarded as one of the worst legislative acts that regulated the conduct of the armed forces in Sudan. It is clear that the purpose of this was to provide immunity to armed forces personnel from prosecution under national laws.

National courts were *de facto* precluded from prosecuting international crimes, which resulted in a serious gap in repressing the crimes of genocide and other war crimes. The ICC's investigation in respect of the Situation in Darfur, pursuant to a Security Council referral – since Sudan signed the Rome Statute but is not a State Party – originated because Sudanese laws were not deemed to adequately regulate the prosecution of international crimes. They also lacked adequate legal procedures to hold those accused of such crimes accountable. Undoubtedly, this has affected the ICC's approach with regard to the complementarity regime with Sudan and the Court's determination of whether it has jurisdiction over the international crimes allegedly committed in Darfur.

On 29 June 2005, pursuant to Security Council Resolution 1593 of 2005, information was sought from Sudanese institutions on any proceedings that had taken place in relation to the alleged crimes in Darfur. Some of the institutions approached included the Committees against Rape, the Special Courts, the Specialised Courts that replaced them, the National Commission of Inquiry, and other *ad hoc* judicial committees and non-judicial mechanisms. On the basis of this information, the then-Prosecutor of the ICC outlined in his statement to the Security Council that there were cases that would be admissible in relation to the Darfur situation.[46] Notwithstanding the inability of the criminal laws to deal with this issue, after the Security Council referred the Darfur situation to the ICC, Sudan did make changes by enacting the Armed Forces Act in 2007 and the Criminal Act in 1991 (as amended in 2009). These amendments were designed, it is claimed, to ensure that the armed forces acted within the recognised boundaries of the use of force. The amendments also incorporated crimes against humanity, genocide and war crimes.[47] The Armed Forces Act of 2007 contains provisions on these crimes within a whole

[46] ICC, Office of the Prosecutor, "Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)", 8 June 2011 (http://www.legal-tools.org/doc/f2676c/).

[47] See further Lutz Oette, *Criminal Law Reform and Transitional Justice Human Rights Perspectives for Sudan*, Ashgate, Burlington, 2011, pp. 163–72.

chapter on international humanitarian law. The Criminal Law amendments of 2009 added an entire chapter (Chapter 18) incorporating a total of seven articles which were drafted by a special committee formed in the Ministry of Justice following the ICC intervention in the Darfur situation.[48]

These are perhaps the latest in a series of amendments to the situation in Sudan that allow for the incorporation and recognition of international crimes in Sudan, and therefore, from the perspective of the state, obviate the need to ratify the Rome Statute. Though designed to end impunity for such crimes, mere incorporation is insufficient and there are serious challenges related to the level of implementation of these provisions by the Judiciary and ordinary courts in Sudan.

To summarise, notwithstanding the differences between Islamic law and international criminal law, states such as Sudan that have references to Islamic law in their domestic legislation are able to pass amendments to laws that can provide for the prosecution of such crimes. Therefore, the focus in such states should move away from the issue of compatibility of the various provisions in the codified Islamic laws and the Rome Statute. Instead, they should focus on providing for domestic laws, mechanisms for prosecution, evidential procedures and evidentiary rules that are coherent and substantial. This would allow for legitimate and fair trials for prosecuting such crimes without reference to the ICC, particularly where there are political and other strong objections to the ICC in certain countries due to the particular legal or political system that is in operation.

7.5. Conclusion

Article 18 of the Vienna Convention on the Law of Treaties 1969 requires a "state that has signed but not ratified a treaty to refrain from acts that would defeat its object and purpose".[49] This means that, irrespective of the fact that a state has not fully ratified the Rome Statute, if it is a signatory it must, at the very least, not act contrary to its provisions, even if it cannot act in total conformity with it. In any case, it must not act in contravention to the extent that it would frustrate the purpose and intent of the Statute. This is implied by the act of signature. Even if there is no interna-

48 *Ibid.*, for greater detail.

49 Vienna Convention on the Law of Treaties, 23 May 1969, in force 27 January 1980, Article 18 (http://www.legal-tools.org/doc/6bfcd4/).

tional legal obligation, which can be cited in case of breach, the signatory state must show elementary signs of compliance, even if only through ensuring that its actions do not breach any of the provisions of the Statute. Similarly, due to non-ratification, the ICC cannot exercise its jurisdiction over breaches of the Statute in the state. There are, however, other ways of invoking jurisdiction where, for example, the perpetrator of an act considered unlawful under the Rome Statute is a national of a State Party and is alleged to have carried out the unlawful act on the territory of another state, whether the latter is a State Party or not.

The procedures by which investigations and prosecutions are initiated at the ICC are also subject to some scrutiny by Arab states, and are perceived to counter the principles of the *Sharíʿah* related to accountability and trial of perpetrators of international crimes. The recent history of many Arab and Islamic nations that have achieved independence from foreign occupation has led to the making of a distinction by many states in the Middle East and North Africa region between the act of terrorism and the struggle for self-determination and independence.[50] Notably, on 1 July 1999, the Organisation of the Islamic Conference convened to conclude the Convention on Combating International Terrorism and specified in Article 2(a) that:

> Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.[51]

Some states still consider that struggles of nations for independence and sovereignty are legitimate and fully compliant with international law. In doing so, they support the recognition of, and differentiation between, terrorism and the right to self-determination against foreign occupation in international conventions. This distinction has been incorporated in at

[50] See Organisation of the Islamic Conference, Resolution No. 58/26-P, on the convention of an international conference under the auspices of the UN to define terrorism and distinguish it from the peoples struggle for national liberation, adopted by the Twenty-Sixth Session of the Islamic Conference of the Foreign Ministers, Session of the Peace and Partnership for Development, 28 June to July 1999, para. 6 of the Preamble, available on the web site of the Organisation of the Islamic Conference.

[51] Convention of the Organisation of the Islamic Conference on Combating International Terrorism, 1 July 1999 (http://www.legal-tools.org/doc/e8a798/).

least three regional conventions whose membership includes states that apply the *Sharíʿah*. Distinctly relevant to this is the international law norm of '*uti possidetis*' governing territorial delimitations, the modern and evolved concept of which prevents newly-independent states from altering their physical borders to pre-colonial borders.[52] The application of this norm, whose meaning and application has evolved according to time and geographical application,[53] has exacerbated widespread conflict among states throughout the Middle East and particularly in North Africa.

It is unfortunate that there is a discernable pattern of exclusionary behaviour that seeks to disqualify consideration of non-Western legal traditions in the debates and drafting of international conventions and treaties. A prime example of the effect of excluding perspectives from Muslim and Arab states, and especially Islamic legal perspectives, can be gleaned from the work papers of the drafting of the UDHR, whose records are meticulously preserved. Though almost all Muslim and Arab states have now adopted the UDHR, the implementation of its provisions in most states is severely lacking, and there are clear reasons why this may be the case. The general sessions of the drafting of the UDHR were attended, among others, by representatives of Arab states from Lebanon and Saudi Arabia, both of whom were Arab Christians. Their religious persuasion is not a substantive problem in its essence, and there is nothing objectionable to non-Muslims advising on such issues. In this case, however, what is relevant is that these non-Muslim delegates were not experts in Islamic law and, therefore, the treaty deliberations failed to highlight pertinent issues, which would be objectionable from an Islamic legal perspective. This hits directly at the issue of compatibility of the *Sharíʿah* with international law.

This is also clear from the objections of many Muslim states' representatives on the clauses related to the freedom to change one's religion, and was indicative of a wider reticence, to put it mildly, to accept views or contributions from religious perspectives and legal traditions that were

[52] Giuseppe Nesi, "Uti Possidetis Doctrine", in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2011.

[53] *Ibid*.

inherently tied to a religious ethical foundation.[54] For instance, a cursory analysis of the *travaux préparatoires* of the UDHR informs us that the first session of the Commission on Human Rights was composed of eighteen members, included Dr. Charles Ḥabíb Malik of Lebanon as a representative of Arab states, notably not a specialist on Islamic law; Mr. Osman Ebeid from Egypt; and Dr. Ghassame Ghani from Iran, who attended many of the initial sessions.[55] The only constant representative that remained was Dr. Charles Malik. What is extremely revealing of the attitude of the committee against including the perspective of peoples or states that applied Islamic law, or any ideas inspired from religious principles and law, can be ascertained by perusing the narratives of the choice of candidate sent by Britain. They sent Charles Dukes, described as "a retired trade unionist whose mind was unencumbered by the least knowledge of international law […] [a] gifted amateur".[56] Charles Dukes was chosen over Professor Hersch Lauterpacht on the recommendation of the Legal Adviser of the British Foreign Office who said that Professor Lauterpacht would be a "very bad candidate […] Professor Lauterpacht, though a distinguished and industrious international lawyer is, when all is said and done, a Jew recently come from Vienna. I think the representative of HMG on human rights must be a very English Englishman".[57]

On a more substantive level, during the discussions and the working groups, around 18 European constitutions were considered, 18 from Latin America, 5 Middle Eastern Constitutions (Iran, Iraq, Lebanon, Saudi Arabia, and Syria) and 4 African Constitutions (Egypt, Ethiopia, Liberia, and South Africa).[58] Though Saudi Arabia abstained in voting for the adoption of the UDHR (along with Belorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, Union of South Africa, USSR, and Yugoslavia), they gave no reason for abstention, leading to assumptions that it was due to Article 18, which recognised the right to change one's religion. What is further

54 William A. Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires: October 1946 to November 1947*, vol. 1, Cambridge University Press, Cambridge, 2013, p. lxxxiii.

55 *Ibid.*, pp. 155–56.

56 A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford University Press, Oxford, 2001, pp. 350–52.

57 *Ibid*.

58 Schabas, 2013, p. lxxxix, see *supra* note 54.

surprising is that Saudi Arabia chose to be represented by Jamil Baroody, a Lebanese Christian, who represented the state's opposition to both Article 16 (related to family and marriage rights) and Article 18, stating that domestic laws should govern these matters, and suggested (for Article 16) replacing "equal rights" with "full rights as defined in the marriage laws of their country".[59] He also criticised the draft for having "for the most part, taken into consideration only the standards recognized by western civilization and had ignored those of more ancient civilizations which were past the experimental stage, and the institutions of which, for example marriage, had proved their wisdom through the centuries […] It was not for the Committee to proclaim the superiority of one civilization over all others or to establish uniform standards for all the countries of the world".[60]

One possible solution to this issue could be to quite simply include representatives of Muslim states, and specifically independent experts of Islamic law and accomplished Muslim jurists, to partake in the discussion on the drafting of treaties and international legal documents to ensure that Islamic legal viewpoints are properly advocated and considered prior to finalising the draft covenant, declaration or treaty, and opening them for adoption.

There are other reasons that also explain and add to the level of animosity of Arab and Islamic states (as well as those in Africa) towards the ICC and its regime, notwithstanding the fact that the ICC may be a necessity where domestic legal systems are especially *unable* or *unwilling* to prosecute international crimes. This points us towards an argument made by many African states that can explain the attitude of some African states towards the ICC. The argument claims that African states, "unlike their powerful European and North American counterparts, are not allowed to uphold their primacy of jurisdiction". This provides the OTP with a convenient reason to reject a claim based on the principle of complementarity on the ground that the criminal courts of the relevant territorial state are unable or unwilling to prosecute. This is sometimes the case even where states have incorporated international crimes into domestic legislation,

[59] United Nations General Assembly, Official Records of the Third Session of the General Assembly, Part I, Third Committee. Summary Records of Meetings, 21 December 1948, pp. 890–92.

[60] *Ibid*., p. 370.

showing the state's intent to prosecute such crimes.[61] This reductivist attitude towards African and non-Western legal traditions has understandably been received with contempt. This is somewhat balanced by the precedents of the ICC in justifying their intervention in cases of 'genuine' inability to prosecute (Rwanda), and unwillingness (Libya, in respect of the Lockerbie bombers).

Related to this discussion is the difference between the conceptions of retributive justice and restorative justice in both Islamic criminal law and in Western legal systems (and in the ICC). Both the Islamic criminal legal system and the mechanisms of the ICC contain elements of retributive and restorative justice. The Rome Statute also envisages procedures for societies and victims that are largely restorative in their approach by including victims within aspects of the trial process. The level of restorative justice at the ICC could be further enhanced by recognising and offering methods that may seem trivial and inadequate to some, but for traditional societies – not only traditional Muslim societies – are a very important factor in the healing and transitional justice process.

[61] For the example of Sudan, see also Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge, 2014, pp. 251–53; Sarah M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, Cambridge, 2014, pp. 284–91.

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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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