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Islam & International Criminal Law: A Brief (In) Compatibility Study

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**ISLAM & INTERNATIONAL
CRIMINAL LAW:
A BRIEF (IN) COMPATIBILITY STUDY**

By Michael J. Kelly[†]

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I. INTRODUCTION

The dissonance between international criminal law, as it is currently developing, and the Islamic world is great. Likewise, the gulf between the criminal law of Western societies and that of Islamic societies is a wide one. Indeed, Westerners often only have tragic and brutal stories of stoning and honor killing on which to base their perspectives of the Muslim world. Treatment of women often lies along the deepest recess of this chasm. But that is slowly beginning to change in countries where Shari'a (traditional Islamic law) is not prevalent enough to block it. The tragic yet hopeful story of Fawaz and Zahra demonstrate how this can happen:

The struggle, if there was any, would have been very brief. Fawaz later recalled that his wife, Zahra, was sleeping soundly on her side and curled slightly against the pillow when he rose at dawn and readied himself for work at his construction job on the outskirts of Damascus. It was a rainy Sunday morning in January and very cold; as he left, Fawaz turned back one last time to tuck the blanket more snugly around his 16-year-old wife. Zahra slept on without stirring, and her husband locked the door of their tiny apartment carefully behind him.

Zahra was most likely still sleeping when her older brother, Fayyez, entered the apartment a short time later, using a stolen key and carrying a dagger. . . . [He] stabbed her five times in the head and back: brutal, tearing thrusts that shattered the base of her skull and nearly severed her spinal column. Leaving the door open, Fayyez walked downstairs and out to the local police station. There, he reportedly turned himself in, telling the officers on duty that he had killed his sister in order to remove the dishonor she had brought on the family by losing her virginity out of wedlock nearly 10 months earlier.

"Fayyez told the police, 'It is my right to correct this error It's true that my sister is married now, but we never washed away the shame.'" By now, almost anyone in Syria who follows the news can supply certain basic details about Zahra al-Azzo's life and death: how the girl, then only 15, was kidnapped in the spring of 2006 near her home in northern Syria, taken to Damascus by her abductor and raped; how the police who discovered her feared that her family, as commonly happens in Syria, would blame Zahra for the rape and kill her; how these authorities then placed Zahra in a prison for girls, believing it the only way to protect her from her relatives. And then in December, how a cousin of Zahra's, 27-year-old Fawaz, agreed to marry her in order to secure her release and also, he hoped, restore her reputation in the eyes of her family; how, just a month after her wedding to Fawaz, Zahra's 25-year-old brother, Fayyez, stabbed her as she slept. . . .

Under Syrian law, an honor killing is not murder, and the man who commits it is not a murderer. As in many other Arab countries, even if the killer is convicted on the lesser charge of a “crime of honor,” he is usually set free within months. Mentioning the killing — or even the name of the victim — generally becomes taboo.

That this has not happened with Zahra’s story — that her case... has become something of a *cause célèbre*, a rallying point for lawyers, Islamic scholars and Syrian officials hoping to change the laws that protect the perpetrators of honor crimes — is a result of a peculiar confluence of circumstances. . . . But at heart it is because of Zahra’s young widower, Fawaz, who had spoken to his bride only once before they became engaged. Now, defying his tribe and their traditions, he has brought a civil lawsuit against Zahra’s killer and is refusing to let her case be forgotten.¹

Honor killings have a long tradition in some parts of the Muslim world, although they are neither mandated nor sanctioned by Islam. In highly conservative Islamic societies, the small change in thinking that is beginning as a tentative bloom in the sands of Syria remains unthinkable. From that rigid perspective, the post-modern, highly secularized thinking in Western society is simply beyond the pale. That is why Imams have been known to issue *fatwas* against Pokémon — a child’s cartoon character in the Japanese anime style.²

It is a truism that there are multiple levels of incongruity between Islamic societies and Western societies.³ Some of these differences are obvious, like those concerning treatment of women, recognition of civil liberties, degree of societal religious adherence/tolerance, and the seriousness with which pluralistic liberal representative democratic institutions are supported. Others are less so. Many differences are based on values, tradition, and the continued existence of a vibrant tribal life, especially in Arab and African societies, that pre-date Islam but that continue to exist overlaid by Islam.⁴ Do these incongruities rise to the level of incompatibility?

Women’s rights advocate, Ayaan Hirsi Ali, a former Muslim, Somali woman and Dutch parliamentarian, reinforces this message of incompatibility everywhere she goes: “The 21st

¹ Katherine Zoepf, *A Dishonorable Affair*, N.Y. TIMES (Magazine), Sept. 23, 2007, available at <http://www.nytimes.com/2007/09/23/magazine/23wwln-syria-t.html>.

² *Pokemon Faced with Fatwa*, BBC NEWS, Apr. 9, 2001, available at <http://news.bbc.co.uk/2/hi/entertainment/1269050.stm>.

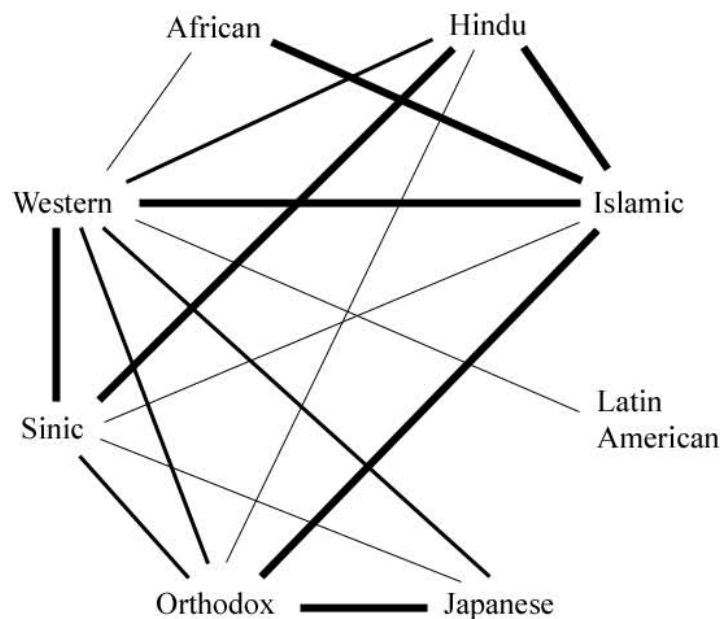
³ Jennifer F. Cohen, *Islamic Law in Iran: Can It Protect the International Legal Right of Freedom of Religion and Belief?*, 9 CHI. J. INT’L L. 247 (2008).

⁴ Graham E. Fuller, *A World Without Islam*, 164 FOREIGN POL’Y 46, 47 (2008). “Without Islam, the face of the Middle East still remains complex and conflicted. Struggles over power, territory, influence, and trade existed long before Islam arrived.” *Id.*

century began with a battle of ideas, and this battle is about the values of the West versus those of Islam . . . Islam and liberal democracy are incompatible . . . Islam unreformed, as a set of beliefs, is hostile to everything Western.”⁵

In the wake of 9/11, many were moved to give renewed credence to Harvard political scientist Samuel Huntington’s dire prediction of civilizational warfare⁶ in the context of pitting Islamic society against Western society. Figure 1 graphically depicts this diametric opposition of Islam to the West:

“Emerging alignments” of civilizations, per Samuel Huntington’s theory in *The Clash of Civilizations* (1996).



Greater line thickness represents more conflict in the civilizational relationship.

Figure 1: Illustration derived from SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS (1996), Christopher Parham.

Huntington first floated his thesis to the general public in a 1993 *Foreign Affairs* article, in which he asserted:

The great divisions among humankind and the dominating

⁵ Ayaan Hirsi Ali, *The Role of Journalism Today*, National Press Club Washington, D.C. (June 19, 2007), available at <http://www.islam-watch.org/AyanHirsi/Role-of-Journalism-Today.htm>. [NA - please note we found a different website for this proposition] Others disagree on the compatibility question. See SHIREEN T. HUNTER, *THE FUTURE OF ISLAM AND THE WEST: CLASH OF CIVILIAZATIONS OR PEACEFUL COEXISTENCE?* (1998).

⁶ SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1998).

source of conflict will be cultural. Nation states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations. The clash of civilizations will dominate global politics. The fault lines between civilizations will be the battle lines of the future.⁷

While Huntington demurred on the question of whether a clash of civilizations was actually occurring after 9/11, he left that possibility open.⁸

Corollary to this supposition of societal incompatibility, which is no doubt true in some degree, is the general observation that most international criminal law structures are based upon Western models. Thus, the argument that such legal norms and institutions are also largely incongruent with Islamic societies should come as no surprise. The trial of Saddam Hussein by Muslim judges attempting to use a Western-style judicial institution is a case-in-point.

The Iraqi High Tribunal (“IHT”) was conceived and constructed by Western attorneys working for the Coalition Provisional Authority (“CPA”). The statute of the IHT grafted important Western concepts like due process, defense protections, and evidentiary standards, which would be found in most international criminal tribunals, onto a domestic criminal court within the post-war Iraqi legal system.

That Saddam’s trial was a chaotic affair, beset by difficulties from the beginning, evinced the failure of this graft to take. Muslim Iraqi judges operating within an Islamic society attempted valiantly to operate the Western machinery, but to little avail. The Saddam trial and its aftermath have been round-

⁷ Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. (1993).

⁸ Interview by Michael Steinberger with Samuel Huntington, Professor, Harvard University, in *So, Are Civilisations at War?*, GUARDIAN, Oct. 11, 2001, available at <http://observer.guardian.co.uk/islam/story/0,1442,577982,-00.html>, noting:

Clearly, Osama bin Laden wants [9/11] to be a clash of civilisations between Islam and the West. The first priority for our government is to try to prevent it from becoming one. But there is a danger it could move in that direction. The administration has acted exactly the right way in attempting to rally support among Muslim governments. But there are pressures here in the US to attack other terrorist groups and states that support terrorist groups. And that, it seems to me, could broaden it into a clash of civilisations.

Huntington’s position has not changed measurably since 2001. See Interview by Mark O’Keefe with Samuel Huntington, Professor, Harvard, Five Years After 9/11, *The Clash of Civilizations Revisited*, The Pew Forum on Religion & Public Life (Aug. 18, 2006), <http://pewforum.org/events/-index.php?EventID=125>; Interview by Amina R. Chaudary with Samuel Huntington, in *The Clash of Civilizations Revisited*, 24 NEW PERSPS. Q. (Aug. 27, 2007), available at http://www.digitalnpq.org/archive/2007_winter/14_huntington.html.

ly condemned as such a failure that the case would not be cited as authority by any subsequent international judicial body.⁹

This paper explores why that incompatibility between Islam and international criminal law persists and considers recommendations for mitigating that dynamic. Why is this important? Primarily because the Western-influenced international criminal law apparatus and the Muslim world are likely to collide more often in the future. If a war crimes tribunal is established in Afghanistan, or if the trial of Syrian agents for the assassination of Lebanon's former prime minister goes forward, it is imperative that Islamic societies touched by those processes feel a sense of "buy-in" or participation that is meaningful for them. Otherwise, it becomes the same old story of Western domination over conflicting Muslim interests, and that story only breeds more resentment and even hatred.

II. THE "STATE" PROBLEM

Although individuals are the subject of International Criminal Law, states are the actors that devise what the law is, create the tribunals and hire the prosecutors to enforce it, and jail those convicted of violating it. States are manifestations of the people living in them; thus Islamic states are easily generalized as having an "Islamic" animus. Yet, Islamic states are also seen as not participating widely in International Criminal Law. Why not? Before that question is answered, one must appreciate the loaded nature of the term "Islamic state."

What is an Islamic state? There are fifty seven state members in the Organization of Islamic Conference ("OIC").¹⁰ Yet that cannot be the true measure of how an Islamic state is defined because some OIC members do not even have majority Islamic populations. Measured by the yardstick of religious adherence of a population to Islam, there are in fact forty-seven predominantly Islamic states plus Palestine. Table 1 correlates OIC states with their respective Islamic populations.¹¹

⁹ Marlise Simons, *Hussein's Case Won't Bolster International Human Rights Law, Experts Fear*, N.Y. TIMES, Dec. 31, 2006, available at http://www.nytimes.com/2006/12/31/world/middleeast/31history.html?_r=1&oref=slogin.

¹⁰ See Organization of the Islamic Conference, <http://www.oic-oci.org/> (last visited Apr. 2, 2010).

¹¹ CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2007), available at <https://www.cia.gov/library/publications/the-world-factbook/index.html>. The following statistics are missing from Table 1: Maldives: 100% of the Maldivian population is Sunni Muslim, UNITED NATIONS OFFICE ON DRUGS AND CRIME, UNGASS GOALS ON CONTROL OF PRECURSORS: SOUTH ASIA, http://www.unodc.org/pdf/india/publications/ungass_Goals/19_annexureiv-countryreport-maldives.pdf; Somalia: 99.5% of the Somalian population is Muslim, Moshe Terdman, *Muslims Persecution of Christians: The Unknown*

TABLE 1: MUSLIM POPULATIONS WITHIN OIC MEMBER STATES

OIC STATES	% POP. MUSLIM	OTHER RELIGIONS
Afghanistan	99%	Other 1%
Albania	70%	Albanian Orthodox 20%, Roman Catholic 10%
Azerbaijan	93.40%	Russian Orthodox 2.5%, Armenian Orthodox 2.3%, other 1.8% (1995 est.)
Bahrain	81.20%	Christian 9%, other 9.8% (2001 census)
Bangladesh	83%	Hindu 16%, other 1% (1998)
Benin	24.40%	Christian 42.8%, Vodoun 17.3%, other 15.5% (2002 census)
Bosnia and Herzegovina	40%	Orthodox 31%, Roman Catholic 15%, other 14%
Brunei	67%	Buddhist 13%, Christian 10%, other (includes indigenous beliefs) 10%
Burkina Faso	50%	Indigenous beliefs 40%, Christian (mainly Roman Catholic) 10%
Cameroon	20%	Indigenous beliefs 40%, Christian 40%
Chad	53.10%	Catholic 20.1%, Protestant 14.2%, animist 7.3%, other 0.5%, unknown 1.7%, atheist 3.1% (1993 census)
Comoros	98%	Roman Catholic 2%
Cote d'Ivoire	40%	Indigenous 25-40%, Christian 20-30% (2001), migratory workers: Muslim (70%), Christian (20%)
Djibouti	94%	Christian 6%
Egypt	90%	Coptic 9%, other Christian 1%

Side of Radical Islam in Somalia, SOFIR, June 2006, <http://www.sofir.org/sarchives/005657.php>; Yemen: virtually all citizens, around 99%, are Muslim, belonging either to the Zaydi order of Shi'a Islam (30%) or to the Shafa'i order of Sunni Islam (70%). In Gaza, the population is comprised of 99.3% Muslim and 0.07% Christian citizens. Central Intelligence Agency, The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html> (last visited Apr. 27, 2010). West Bank population is comprised of 75% Muslim, 17% Jewish and 8% Christian and other citizens. Central Intelligence Agency, The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/we.html> (last visited Apr. 27, 2010). With respect to religious affiliations (not actual population numbers): "Palestine is today perhaps the most homogeneous society in the Middle East in matters of religion, being the only country with close to 100% of its population belonging to Sunni Islam. Things were different earlier, when Judaism, Christianity and Druze religion were strong elements. Hardship over decades through the 20th century, the division into two separate entities, alongside great intolerance among Palestinian Muslims are the main factors leading to the present uniformity. Palestinian Christians formed sizeable communities up until recently, but their number is now less than 1%. Looklex Encyclopedia, Palestine, Religions, http://lexicorient.com/e.o/palestine_4.htm (last visited Apr. 27, 2010).

Gabon	1%	Christian 55%-75%, animist
Gambia, The	90%	Christian 9%, indigenous beliefs 1%
Guinea	85%	Christian 8%, indigenous beliefs 7%
Guinea-Bissau	45%	Indigenous beliefs 50%, Christian 5%
Guyana	10%	Christian 50%, Hindu 35%, other 5%
Indonesia	86.10%	Protestant 5.7%, Roman Catholic 3%, Hindu 1.8%, other or unspecified 3.4% (2000 census)
Iran	98%	Other (includes Zoroastrian, Jewish, Christian, and Baha'i) 2%
Iraq	97%	Christian or other 3%
Jordan	92%	Christian 6%, (2001 est.)
Kuwait	85%	Other (includes Christian, Hindu, Parsi) 15%
Kyrgyzstan	75%	Russian Orthodox 20%, other 5%
Lebanon	59.70%	Christian 39%, other 1.3%
Libya	97%	Other 3%
Malaysia	60.40%	Buddhist 19.2%, Christian 9.1%, Hindu 6.3%, other traditional Chinese religions 2.6%, (2000 census)
Maldives	100%	N/A
Mali	90%	Christian 1%, indigenous beliefs 9%
Mauritania	100%	N/A
Morocco	98.70%	Christian 1.1%, Jewish 0.2%
Mozambique	17.80%	Catholic 23.8%, Zionist Christian 17.5%, other 17.8%, none 23.1% (1997 census)
Niger	80%	Other (includes indigenous beliefs and Christian) 20%
Nigeria	50%	Christian 40%, indigenous beliefs 10%
Oman	75%	Other (includes Sunni Muslim, Shi'a Muslim, Hindu) 25%
Pakistan	97%	Other (includes Christian and Hindu) 3%
Palestine	100%	Jewish settlers considered Israeli citizens
Qatar	77.50%	Christian 8.5%, other 14% (2004 census)
Saudi Arabia	100%	N/A
Senegal	94%	Christian 5% (mostly Roman Catholic), indigenous beliefs 1%
Sierra Leone	60%	Christian 10%, indigenous beliefs 30%
Somalia	99.50%	N/A
Sudan	70%	Christian 5% (mostly in south and Khartoum), indigenous beliefs 25%
Surinam	19.60%	Hindu 27.4%, Protestant 25.2% (predominantly Moravian), Roman Catholic 22.8%, indigenous beliefs 5%
Syria	90%	Christian (various denominations) 10%, Jewish
Tajikistan	90%	Other 10% (2003 est.)
Togo	20%	Christian 29%, indigenous beliefs 51%
Tunisia	98%	Christian 1%, Jewish and other 1%
Turkey	99.80%	Other 0.2% (mostly Christians and Jews)

Turkmenistan	89%	Eastern Orthodox 9%, unknown 2%
Uganda	12.10%	Roman Catholic 41.9%, Protestant 42%, other 3.1%, none 0.9% (2002 census)
UAE	96%	Other (includes Christian, Hindu) 4%
Uzbekistan	88%	Eastern Orthodox 9%, other 3%
Yemen	99%	Small numbers of Jewish, Christian, and Hindu

As Table 1 clearly demonstrates, the degree of Islamic practice within predominantly Islamic states varies widely, not to mention the type of Islam practiced. Nor is coverage of OIC membership completely correlative with predominantly Muslim states: Algeria, which is not an OIC member, has a Muslim population of 99%.¹² While geographic dispersal loosely tracks OIC membership combined with practicing population statistics per state (see map below), diversity among Islamic states is widespread, creating a heterogeneous mosaic of states as opposed to a monolithic “civilization” as Huntington might argue.¹³



Figure 2: Worldwide Muslim Distributions
(Source - CIA, 1995)

a. Institutional Diversity

Key diversity factors revolve around geography, ethnicity and cultural differentiation. Degree and type of tribalism also come into play. Yet one might generalize that all Islamic societies tend to be more socially conservative. However, it is still

¹² CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, Algeria (2007), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ag.html>.

¹³ HUNTINGTON, *supra* note 6.

axiomatic that conservative African values \neq ¹⁴ conservative Arab values \neq conservative Persian values \neq conservative South Asian values.

The societies in which Islam thrives today color the type of Islam practiced within those states as assuredly as North American, Latin American, European or African value systems color the type of Catholicism practiced – which is not exactly as Rome prescribes, much to the consternation of the Pope. Nevertheless, outcomes can sometimes be similar – as in the case of treatment of women. Whether this is a function of the pre-Islamic tribal society or of Islam is a better question, and one that should be left to a sociologist, not an international law specialist.

Diversity within the Muslim world also comes by way of political organization. Not all Islamic states are Islamic republics, monarchies, theocracies, or secular states. For instance, Libya is a secular dictatorship,¹⁵ Morocco is a constitutional monarchy,¹⁶ Brunei is a religious sultanate,¹⁷ Turkey is a secular republic¹⁸ and Saudi Arabia is a religious monarchy.¹⁹ The political systems adopted vary widely in the Muslim world, which directly impacts the character of criminal law domestically and therefore can affect the approach taken to international criminal law.²⁰

¹⁴ This symbol connotes “does not equal.”

¹⁵ U.S. DEPT. ST. BUREAU OF DEMOCRACY HUM. RTS. AND LBR., INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003: LIBYA (Dec. 18, 2003), <http://www.state.gov/g/drl/rls/irf/2003/24457.htm>

¹⁶ U.S. DEPT. ST. BUREAU OF NEAR EASTERN AFF., BACKGROUND NOTE: MOROCCO (Oct. 2007), <http://www.state.gov/r/pa/ei/bgn/5431.htm>.

¹⁷ U.S. DEPT. ST. BUREAU OF EAST ASIAN AND PACIFIC AFF., BACKGROUND NOTE: BRUNEI (May 2007), <http://www.state.gov/r/pa/ei/bgn/2700.htm>

¹⁸ U.S. DEPT. ST. BUREAU OF NEAR EASTERN AFF., BACKGROUND NOTE: TURKEY (Sept. 2007), *available at* <http://www.state.gov/r/pa/ei/bgn/3432.htm>.

¹⁹ U.S. DEPT. ST. BUREAU OF DEMOCRACY HUM. RTS. AND LBR., INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: SAUDI ARABIA (Nov. 4, 2005), <http://www.state.gov/g/drl/rls/irf/2005/51609.htm>.

²⁰ CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2007), *available at* <https://www.cia.gov/library/publications/the-world-factbook/index.html>. The choices that Islamic societies make vis-à-vis democratic regimes is also impacted as in the case of Indonesia:

[A]n interesting observation about Indonesian politics that is instructive for the future course of politics throughout the Muslim world. The apparent disappearance of socialism as a legitimate alternative for organizing politics and society has left two competing alternatives in Indonesia. One alternative is a republic based in part on Western notions of secular governance, and the other is an Islamic state rooted in traditional principles of governance. How society in the world's largest Muslim country is able to reconcile these competing political philosophies may very well be one of the most important political developments of the twenty-first century.

LAWRENCE S. GRAHAM ET AL., THE POLITICS OF GOVERNING: A COMPARATIVE

b. *Constitutional Role of Islam*

Examples of Islamic Republics include Pakistan,²¹ Afghanistan,²² Mauritania,²³ and Iran²⁴ – which has a very high degree of religiosity mixed with state apparatus.²⁵ This is born out in key provisions of Iran's constitution, which glosses the law with heavy religious overtones – including identifying God as the supreme source of legislation:

Iranian Constitution:

Article 2 - The Islamic Republic is a system based on belief in:

1. The One God, His exclusive sovereignty and the right to legislate, and the necessity of submission to His commands;
2. Divine revelation and its fundamental role in setting forth the laws;
3. The return to God in the Hereafter, and the constructive role of this belief in the course of man's ascent towards God; [and]
4. The justice of God in creation and legislation.

Article 4 - All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council

INTRODUCTION ch.8 (2007), available at <http://www.cqpress.com/cs-graham/chap8/study.asp>. For further discussion, see Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 FORDHAM INT'L L.J. 4 (2003); Anver M. Emon, *On Democracy as a Shar'i Moral Presumption: Response to Khaled Abou El Fadl*, 27 FORDHAM INT'L L.J. 72 (2003).

²¹ U.S. DEPT. ST. BUREAU OF DEMOCRACY HUM. RTS. AND LBR., INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: PAKISTAN (Nov. 8, 2005), <http://www.state.gov/g/drl/rls/irf/2005/51621.htm>:

[Pakistan] is an Islamic republic, and the Constitution requires that laws be consistent with Islam. The Constitution states that "subject to law, public order and morality, every citizen shall have the right to profess, practice and propagate his religion;" however, in practice the Government imposes limits on freedom of religion. Islam is the state religion. Freedom of speech is constitutionally "subject to any reasonable restrictions imposed by law in the interest of the glory of Islam." The country was created to be a homeland for Muslims, although its founders did not envisage it as an Islamic state.

²² U.S. DEPT. ST. BUREAU OF DEMOCRACY HUM. RTS. AND LBR., INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: AFGHANISTAN (Nov. 8, 2005), <http://www.state.gov/g/drl/rls/irf/2005/51615.htm>.

²³ U.S. DEPT. ST. BUREAU OF DEMOCRACY HUM. RTS. AND LBR., INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: MAURITANIA (Nov. 8, 2005), <http://www.state.gov/g/drl/rls/irf/2005/51484.htm>.

²⁴ U.S. DEPT. ST. BUREAU OF DEMOCRACY HUM. RTS. AND LBR., INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: IRAN (Nov. 8, 2005), <http://www.state.gov/g/drl/rls/irf/2005/51599.htm>.

²⁵ CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, Iran (2007), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html>.

are judges in this matter.²⁶

By comparison, the tone of similar provisions in Turkey's secular constitution, reveals the degree of political diversity within the Muslim world – especially as it relates to the underlying character of the laws in those countries:

Turkish Constitution:

Article 2 - The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.

Article 12 - Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable....

Article 13 - Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality.²⁷

A sense of religious overtone to the law itself has significant consequences for how populations interact with the law and the state. Iran, unlike Turkey, operates on the basis of Islamic law reigning supreme and clerics controlling the laws that are promulgated and enforced.²⁸

III. LEGAL DIVERGENCE: COMPLETE INCOMPATIBILITY?

Indeed, what is Islamic law? The origins of Islamic law date to the 7th Century founding of the religion. Shari'a (root: shara'a عرّش) is a term used to denote divinely inspired Islamic law, which means “the way” as used in the Qur'an 45:18 – “Then We put thee on the (right) Way of Religion: so follow thou that (Way), and follow not the desires of those who know

²⁶ Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] art. 4, 1358 (1980), *available at* <http://www.iran-online.com/iran/iran-info/government/constitution-1.html>. For the full text of the Constitution of the Islamic Republic of Iran, *see* <http://www.iran-online.com/iran/iran-info/government/constitution.html>.

²⁷ Türkiye Cumhuriyeti Anayasası [The Constitution of the Republic of Turkey] art. 13, 1982, *available at* http://www.anayasa.gov.tr/images/-loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf.

²⁸ U.S. DEP'T OF STATE, IRAN HUMAN RIGHTS PRACTICES, 1995 (Mar. 1996), http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_nea/Iran.html

Islamic legal scholars are well aware of the disdain that Western legal scholars have traditionally held Shari'a:

When looked at in Europe for over a century, "Islamic law" could only disappoint, and in fact was made to disappoint. It could never match any version of European law. It was ineffective, inefficient, even incompetent. It was thought mostly to apply to personal status, having at an early stage 'divorced' itself from 'state and society.' Its penal law was a little more burlesque, 'never had much importance,' and was in fact downright 'deficient.' Of course, much of this was colonialist discourse and potent doctrine, cumulatively but programmatically designed to desiccate the Shari'a and replace it with Western codes and institutions. . . . These stereotypes remain tenacious. . . .³⁰

Consequently, there is a bit of defensiveness pushing back from the Muslim legal world against Western presumptions against their systems, to the extent that those systems exist intact or were resurrected after colonialism ended.

a. Sources & Nature of Islamic Law

The sources of Shari'a are:

- The Qur'an, which is infallible;
- The Sunnah – ancient traditional interpretive guides to the Qur'an functioning as a living example of Muhammad;
- The Fiqh – the body of Islamic jurisprudence including the rulings of judges and Islamic scholars that direct and apply Shari'a to individual Muslims in their daily lives – inclusive of:
 - The Qiyas – analogical reasoning of jurists;
 - The Ijma – consensus³¹

As with any legal system, there is a divergence of Shari'a interpretation even within the predominantly Muslim states that utilize it. Every Muslim agrees on the authority of the Qur'an as it is the word of God. Sunni and Shi'a Muslims disagree about which aspects of the Sunnah to follow depending upon which ancient scholar authored portions of the Sunnah: Sunni Muslims tend to follow all of it, while Shi'a Muslims

²⁹ For an electronic version of The Holy Qur'an, see THE HOLY QUR'AN (M.H. Shakir trans., Tahrike Tarsile Qur'an Inc., 1983), available at <http://quod.lib.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=783591>.

³⁰ Wael B. Hallaq, *What is Shari'a?*, in 12 Y.B. OF ISLAMIC & MIDDLE E. L. 151-152 (2005-2006).

³¹ MATTHEW LIPPMAN, SEAN MCCONVILLE & MORDECHAI YERUSHALMI, ISLAMIC CRIMINAL LAW AND PROCEDURE 28-29 (1988).

don't follow that portion written by Umar, the second Sunni Caliph.³²

Some Muslim scholars challenge the inclusion of the Fiqh as it inappropriately blends revealed and unrevealed truth and argue that the Qur'an and Sunnah should be kept separate as a Basic Law from the Fiqh, which is a constantly evolving body of law.³³

The Fiqh is not subject to codification; it is an evolving body of jurisprudence as determined by Islamic scholars.³⁴ But the Fiqh is much less ascertainable than the evolving law in common law Western jurisdictions. The Fiqh is subdivided into schools of thought (4 Sunni and 1 Shi'ite), which further fracture it as follows:

- Malikites (most conservative) – Northern African states
- Hanafites (more emphasis on custom) – Afghanistan, Turkey, Pakistan, Egypt
- Shafi'ites (rationalists) – Indonesia, Eastern African states
- Hanbalites (Wahhabi traditionalists) – Saudi Arabia
- Shi'ites (subdivides into 3 branches) – Imamiya is followed in Iran³⁵

Despite the divergence of opinion on the bearing of Shari'a, its religious intonations persist no matter what interpretation it is given. Such intonations are therefore included in the criminal aspects of Islamic Law. Western criminal law also originally shared religious intonations, but long ago abandoned these for the secularized bearing of today.³⁶

The divergence of Shari'a from Western law varies with which aspects of Islamic law are at issue. The civil, especially commercial (financial and contracts) aspects of Shari'a largely

³² Christopher M. Blanchard, Congressional Research Services, Order No. RS21745, *Islam: Sunnis and Shiites* (2009), available at <http://fas.org/sgp/crs/misc/RS21745.pdf>.

³³ Ali Khan, *The Reopening of the Islamic Code: The Second Era of Ijtihad*, 1 ST. THOMAS L.J. 341 (2003).

³⁴ *Id.*

³⁵ RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW* 6 (2005); LIPPMAN, *supra* note 31, at 28-33.

³⁶ See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983). This point is debatable and many may believe that the West should rejoin religious morality with secular law. Some may even believe that it never was abandoned and some in the Muslim world may think that Western laws are still reflective of Judeo-Christian notions of right and wrong. Indeed, many in the Muslim world may in fact believe that while Western laws are Judeo-Christian, Western society is not living that way.

comport with generalized Western law.³⁷ The personal (family) and criminal aspects of Shari'a, however, diverge significantly from generalized Western law.³⁸

Western law, especially the civil code iteration, has formed the basis for international criminal law and the foundation for international criminal tribunals, infusing international criminal process with Western predilections. Thus, the more a predominantly Islamic State has incorporated the criminal aspects of Shari'a, the less likely that state is to participate in international criminal law processes. Major criminal Islamic law (Shari'a) divides itself into two categories: major crimes against Men – Homicide and Wounding, and crimes against God – Theft, Banditry, Unlawful Sexual Intercourse, Unfounded Accusation of Unlawful Sexual Intercourse (slander), Drinking Alcohol and Apostasy.³⁹

Crimes against God are those mentioned in the Qur'an and have fixed punishments that may not be altered. These are known as *Hadd* crimes,⁴⁰ and examples of the punishments mandated for such crimes include:

- Theft – Amputation of one or both hands
- Banditry – Crucifixion
- Adultery – Death by stoning
- Fornication – Flogging
- Slander – Flogging
- Public Intoxication – Flogging⁴¹

Deterrence is the key goal for these infractions, thus the harshness of the punishment.⁴² The Saudi's have long claimed that the low crime rate within the Kingdom compared to that in other predominantly Muslim states that do not wholly incorporate Shari'a is irrefutable proof that deterrence works in their society – a claim that has gained some salience with even western social scientists.⁴³

Moreover, *Hadd* punishments must be administered sequentially, so if a person is convicted of theft, slander, and drinking alcohol, the punishments follow in sequence: amputa-

³⁷ OUSSAMA ARABI, *STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE* 189-90 (2001).

³⁸ *Id.*

³⁹ PETERS, *supra* note 35, at 24. Minor crimes (*tazir* and *qesas* crimes) are not considered here.

⁴⁰ LIPPMAN, *supra* note 31, at 41.

⁴¹ PETERS, *supra* note 35, at 53.

⁴² *Id.* at 30.

⁴³ Sam S. Souryal, *The Religionization of a Society: The Continuing Application of Shariah Law in Saudi Arabia*, 26(4) J. FOR SCI. STUD. REL. 429-49 (1987).

tion, flogging and additional flogging.⁴⁴ Because *Hadd* punishments are harsh, the evidentiary standard is high. Only confessions made in court are valid, witness testimony must come from two Muslim men of good standing (or one Muslim man and two Muslim women), and circumstantial evidence is not admitted if retaliation is demanded.⁴⁵ Since these are crimes against God, repentance, if proved, can exculpate one being tried for a *Hadd* crime. “By showing his repentance, the offender actually proves that he has already been reformed and does not need to be punished anymore.”⁴⁶

That said, there remains interpretive flexibility, so judges rarely inflict these punishments.

If a person cannot be sentenced to a fixed punishment for a *hadd* offence because of lack of evidence, although it is otherwise plausible that he is guilty of it, he may be sentenced to discretionary punishment. For such sentences the strict rules of evidence do not apply. Circumstantial evidence is allowed, especially assumptions based on a person’s reputation.⁴⁷

While crimes are circumscribed under Islamic law, elements of crimes are often not codified. “There are very few general principles in Islamic criminal law.”⁴⁸ Consequently, the criminal justice system is ripe for abuse – especially if there are no real democratic structural or political constraints on the government.

How homicide is treated under classic Shari’a provides one with a glimpse into this system. The objectives pursued for homicide prosecution are a combination of retribution and retaliation. Retaliation is only allowed “if the victim’s bloodprice is the same as or higher than the offender’s.”⁴⁹ Financial compensation for murder is handled on the civil side of the ledger, not the criminal side, in the U.S. – as was famously demonstrated in the California state trials of the American football star O.J. Simpson in the 1990’s.⁵⁰

The prosecution is a decidedly victim-driven endeavor, as opposed to criminal prosecution in Western societies where victims play no role other than possibly as witnesses to the crime.⁵¹ Under Islamic law, the victim’s surviving family

⁴⁴ PETERS, *supra* note 35, at 32.

⁴⁵ *Id.* at 15.

⁴⁶ PETERS, *supra* note 35, at 27.

⁴⁷ *Id.* at 16.

⁴⁸ *Id.* at 19.

⁴⁹ *Id.* at 47.

⁵⁰ Symposium, *American Bar Association Report on Perceptions of the U.S. Justice System*, 62 ALB. L. REV. 1307, 1313 (1999).

⁵¹ PETERS, *supra* note 35, at 146.

serves as the prosecution in an adversarial process. Continuance of the prosecution is dependent upon the will of the victim's family – they can withdraw at any time, and the killer may be pardoned by the victim's family.

If a defendant's guilt is proven, the victim's family may demand retaliation or blood money. Financial compensation varies with the victim's sex, religion and legal status (the blood price of a woman is half that of a man). Retaliation is allowed if killing was intentional, otherwise the victim's family is entitled to financial compensation. Retaliation involves inflicting the same wounds on the perpetrator as the victim endured (eye for an eye; life for a life logic prevails here). The victim's family also may carry out the execution of a death sentence under the supervision of a state agent, but the potential executioner must demonstrate sufficient skill with a sword. If the victim has no next of kin, the state undertakes prosecution and punishment.⁵²

Only confessions and eyewitness testimony are admissible for homicide under Shari'a; no circumstantial evidence is admitted.⁵³ *Mens Rea* concepts are also in play: "[An] offender must have had the power to commit or not to commit the act (*qudra*); must have known (*ilm*) that the act was an offense; and must have acted with intent (*qasd*)."⁵⁴ Thus, minors and the insane do not qualify as prosecutable perpetrators. Moreover, killing an attacker in defense of life, honor or property of oneself or one's relatives is lawful if the act is proportional to the acts of the attacker.⁵⁵

The question of the intent of the murderer is more objectified under Islamic law, which, like Western common law, affords degrees of homicide. However, intent is ascertainable from the crime scene itself:

In Islamic law, intent is discerned from the manner in which a crime is committed, in particular the type of weapon used. The assumption is that an individual intending to kill will use a weapon with lethal capabilities. Relying on this type of visible, objective evidence avoids the necessity of determining what was in the mind of the offender at the time.⁵⁶

b. Usage of Shari'a

The level of criminal Shari'a utilized within a predominantly Islamic State varies by state. For example, Pakistan

⁵² *Id.* at 31.

⁵³ *Id.* at 12-15.

⁵⁴ *Id.* at 20.

⁵⁵ *Id.* at 25.

⁵⁶ LIPPMAN, *supra* note 31, at 50.

employs it very selectively and under a westernized respect for rule of law, while Saudi Arabia uses it exclusively, employing a 5000 member religious police force to enforce it.⁵⁷

Many states with predominantly Muslim populations incorporate some degree of Shari'a in commercial or family matters;⁵⁸ fewer use it for criminal law.⁵⁹ Since 1972, seven states have adopted pre-Colonial criminal aspects of Islamic Law: Libya, Pakistan, Iran, Sudan, the Northern States of Nigeria, Egypt and Saudi Arabia, where Shari'a was never extinguished.⁶⁰ In Egypt, the Supreme Court endeavors to balance the mandate of Article 2 in the constitution, requiring all legislation to conform to Shari'a, with life in the modern world through creative judicial interpretation⁶¹ against the backdrop of an overall reconstruction of Islamic law.⁶²

Iran is an active death penalty state, employing hanging on a regular basis, and since the 1979 revolution, it has reinstated amputation as a punishment for criminal conduct in accordance with Islamic law. However, Iranian judges have recently begun the practice of double amputations – ordering the right hand and right foot cut off so that walking for the survivor is nearly impossible even with a crutch or cane. According to the judicial branch in Sistan-Baluchistan Province, which is undertaking these more extreme measures, deterrence is the stated goal for this policy.⁶³

The strictest aspects of Shari'a were, of course, in play under the Taliban government in Afghanistan, which was overthrown in 2001.⁶⁴ Parts of Malaysia⁶⁵ and the United Arab Emi-

⁵⁷ PETERS, *supra* note 35, at 148-53.

⁵⁸ ARABI, *supra* note 37.

⁵⁹ *Id.*

⁶⁰ PETERS, *supra* note 35, at 148-53.

⁶¹ Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379 (2006).

⁶² ARABI, *supra* note 37, at 191-93.

⁶³ Nazila Fathi, *Hanging and Amputation Find Favor in Iran Courts*, N.Y. TIMES, Jan. 11, 2008, at A3.

⁶⁴ Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 NW. U. J. INT'L HUM. RTS. 4, 56 (2005). "The Taliban aimed to install a government and legal system that would revive a life like pious Muslims had lived '1,400 years ago.' The Attorney General of the Taliban declared: 'The Constitution is the Shari'a so we don't need a constitution.'"

⁶⁵ *Islamic Plan Unveiled for Malaysia*, BBC NEWS, Nov. 12, 2003, <http://news.bbc.co.uk/2/hi/asia-pacific/3263785.stm>; David Camroux, *State Responses to Islamic Resurgence in Malaysia*, 36 ASIAN SURV. 852, 860 (Sept. 1996); *Malaysia's top court draws line after Islamic cases*, REUTERS, July 26, 2007, available at <http://in.reuters.com/article/worldNews/idINIndia-28665-220070726>:

rates⁶⁶ are moving towards incorporating Shari'a, with varying prospects for success. What is the attraction to re-introducing the criminal aspects of Shari'a within a predominantly Muslim state? As Professor Rudolph Peters of Amsterdam University notes, it has multiple attractions for multiple constituencies:

Muslims, in order to be good Muslims, must live in an Islamic state, a state which implements Shari'a. It is not sufficient that that such a state gives Muslims the choice to follow or not to follow the Shari'a, it must actually impose the Shari'a on them, by implementing Islamic criminal law The establishment of an Islamic state is presented as a religious duty for all Muslims and as an endeavor that may bring Paradise within their reach. And there is another felicitous prospect connected with it: that of a pious and virtuous community on earth that enjoys God's favour and is actively aided by Him to overcome poverty and humiliation. . . . The reintroduction of Islamic criminal law is, from this perspective, a step towards salvation in the Hereafter as well as in this life. It is, therefore, much more than a merely technical reform of penal law. The notions connected with it make the project of enforcing Islamic criminal law attractive to both the ruling elite and large parts of the Muslim population.⁶⁷

Although some aspects of Shari'a may be in play for an Islamic state, that is not to say that the population or government would support a complete imposition of Islamic law for all

Malaysia's highest court has ruled that legal cases involving non-Muslims cannot be decided by Shari'a courts, drawing a line after a spate of high-profile cases that left many in legal limbo. The Federal court, in a landmark judgment, held that disputes between a Muslim and a non-Muslim on family and Islamic matters should be settled in a civil court.

⁶⁶ According to Dubai's court system, civil and criminal courts generally retain jurisdiction appealable up to a court of cassation, but Shari'a courts have some influence:

Sharia or Islamic courts work alongside the civil and criminal courts in the UAE. The Sharia court is the Islamic court in the UAE and is primarily responsible for civil matters between Muslims. Non-Muslims will not appear before a Sharia court in any matter. Sharia courts have the exclusive jurisdiction to hear family disputes, including matters involving divorce, inheritances, child custody, child abuse and guardianship of minors. In the absence of any particular provision in the UAE codified law, the Islamic principles of Sharia as found in the Islamic Sharia textbooks are applied.

The Sharia court may, at the federal level only (which, as mentioned earlier, excludes Dubai and Ras Al Khaimah), also hear appeals of certain criminal cases including rape, robbery, driving under the influence of alcohol and related crimes, which were originally tried in lower criminal courts.

Consulate General of the United States, Dubai: The UAE Court System, Dubai-UAE (Mar. 25, 2005), *available at* http://dubai.usconsulate.gov/dubai/the_uae_court_system.html.

⁶⁷ PETERS, *supra* note 35, at 144.

aspects of the law. The recent Red Mosque uprising in Islamabad centered on the Pakistani government's resistance to the imposition of the restrictive Taliban version of Shari'a concerning family law advocated by Islamists in Pakistan.⁶⁸

Furthermore, the level of Shari'a usage may not be uniform even within a state. The Islamic parts of a state that are overwhelmingly Muslim may develop Islamic criminal law systems within the framework of the larger state. Nigeria is a recent example.⁶⁹ States within Nigeria, like those within the U.S., have the power to enact their own criminal law.

Between January 2000 and April 2002, twelve northern Nigerian states introduced the criminal aspects of Shari'a, set up Shari'a courts and adopted Shari'a penal codes conforming to the Malikite school. Thus, Nigeria now has dual criminal justice systems that nevertheless feed ultimately into a Supreme Court, albeit after passing through dual appellate processes *en route*.⁷⁰



Figure 2: Northern States of Nigeria (BBC News)

The question then arises, if secular and Shari'a criminal justice systems can coexist within a federal polity, can Islamic criminal law coexist with international criminal law in a similar fashion? Such a duality is already arguably in play with respect to human rights, as noted below in section IV. Whether this offers a viable model is problematic.

⁶⁸ David Bercuson, *The Birth of Pakistan's Taliban*, *GLOBE & MAIL* (Canada), Dec. 31, 2007, at A15. See also PETERS, *supra* note 35, at 155-60; Shaheen Sardar Ali, "Sigh of the Oppressed"? "Islamisation" of the Laws of Pakistan under *Muttahida Majlis-e-Amal: The Case of the North West Frontier Province*, in 10 *Y.B. OF ISLAMIC & MIDDLE E. L.* (2003-2004).

⁶⁹ Mansur Noibi, *Shari'a and the Nigerian Constitution – The Jurisdiction of the Shari'a Court of Appeal* 97-108, in 10 *Y.B. OF ISLAMIC & MIDDLE E. L.* (2003-2004).

⁷⁰ PETERS, *supra* note 35, at 169-73.

c. *Divergence of the Legal Culture*

Justice is swift in Muslim societies – particularly in those that practice Shari’a.⁷¹ Criminal justice systems in the Muslim world tend to operate on shorter time horizons than they do in the West. This is especially true in Arab societies, where the cultural paradigm reflects a preference for quick rewards and punishments. Such tension played out dramatically during the trial of Saddam Hussein in Baghdad, culminating in his hastily organized execution on December 30, 2006.⁷²

Another case in point is Saudi Arabia. Criminal trials in Saudi Arabia are conducted rapidly, many turning on coerced confessions resulting from beatings and torture while in confinement.⁷³ Punishment ensues shortly thereafter. This is in line with the traditional view of an Islamic judge’s role. “Razing injustice’ was the [judge’s] unqualified duty, to be fulfilled effectively and without undue delay. Protracted adjudication and postponements in the judicial process were thus abhorred, and deemed to aggravate injustice.”⁷⁴ Indeed, upon re-instituting strict Shari’a in post-Shah Iran, Ayatollah Khomeini said:

Islamic justice is based on simplicity and ease. It settles all criminal and civil complaints and in the most convenient, elementary, and expeditious way possible. All that is required is for an Islamic judge, with pen and inkwell and two or three enforcers, to go into a town, come to his verdict in any kind of case, and have it immediately carried out.⁷⁵

In contrast, criminal trials in Western states are more protracted in both common law and civil law societies. Such trials are often followed by extensive appeals opportunities, especially when the sentence is death. Modern international criminal tribunals follow the Western model in this regard, and trials can stretch into years,⁷⁶ as was the case with the trial of Slobodan Milosevic before the International Criminal Tribunal for the Former Yugoslavia in The Hague. The year-long trial of Saddam Hussein before the Iraqi High Tribunal in Baghdad was certainly an anomaly in this regard. Consequently, there

⁷¹ *Id.* at 146.

⁷² Michael J. Kelly, *The Anfal Trial Against Saddam Hussein*, 9 J. GENOCIDE RES. 235 (2007).

⁷³ U.S. DEPT. ST. BUREAU OF DEMOCRACY HUM. RTS. AND LBR., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2007: SAUDI ARABIA (Mar. 11, 2008), <http://www.state.gov/g/drl/rls/hrrpt/2007/100605.htm>.

⁷⁴ WAEL B. HALLAQ, SHARI’A: THEORY, PRACTICE, TRANSFORMATIONS 342-343 (2009).

⁷⁵ PETERS, *supra* note 35, at 147.

⁷⁶ See generally WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE (2006).

is a wide divergence in time horizons for criminal process in Islamic societies versus that in western-modeled international criminal tribunals.

IV. ISLAM & INTERNATIONAL HUMAN RIGHTS LAW

At least in its procedural aspects, it is said that “international procedural criminal law originates from and draws considerably on human rights law. . . . The notion of human rights underpinning the legitimacy of international criminal procedures was clearly envisaged by the 1946 judgment of the Nuremberg Tribunal”⁷⁷ Thus, the natural connection between human rights and international criminal law cannot be ignored. It is instructive to review the efforts taken by many states in the Islamic world to set themselves apart from the international human rights regime that has developed since the end of the Second World War.

Many Islamic states that incorporate Shari’a belong to treaties outlawing international crimes as well as human rights conventions. For instance, Saudi Arabia is a member of the Convention Against Torture,⁷⁸ the Convention on the Rights of the Child,⁷⁹ and the Convention on the Elimination of all forms of Discrimination Against Women⁸⁰ and is also a member of the Genocide Convention.⁸¹ However, Saudi *interpretation* of rights contained therein is rather restrictive. No one would reasonably argue that the rights guaranteed to women in the anti-discrimination treaty are observed in Riyadh on the same basis as they are in Oslo, yet both Saudi Arabia and Norway are parties to the same convention. This is true of torture as well.

Yet, beyond interpretation, there is also a fundamental disagreement concerning the very package of rights guaranteed. From the Islamic perspective, Islamic human rights are actually more universal than those prescribed by U.N. conventions because it extends to all individual’s belief in God.⁸² The fallacy of such an argument is revealed in the collision of “indi-

⁷⁷ GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 15-16 (2005).

⁷⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁷⁹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁸⁰ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

⁸¹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

⁸² MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 45-50 (2003).

vidual liberty” with God’s will – which, in Islam, is always superior to the will of man. Islam, moreover, stresses the duties of believers while international human rights law stresses the rights of man.

For example, adultery is one of the gravest crimes in Islam but is not considered a serious crime under international law. Even Muslim defenders of an Islamic version of human rights admit this incongruity:

The most significant difference between modern westernized attitudes towards human rights and their implementation and an Islamic perspective is the function of religion in general and the position of God in particular. Whereas God hardly finds his place anymore in Western lay societies, he is the seat of justice in the Muslim world. Islam sees God as the ultimate source of justice, which includes the Human Rights. The main goal of God’s message to human kind is the attainment of Justice. At this point there is a strong connection between Justice and Islam.⁸³

Thus, the Islamic view of human rights, especially in Shari’a states, diverges from the Western view and therefore from the Universal Declaration on Human Rights (“UDHR”) – which Iran called a secular interpretation of the Judeo-Christian tradition which could not be followed by Muslims in good faith.⁸⁴ This divergence led to the 1981 Universal Islamic Declaration of Human Rights⁸⁵ and later the 1990 adoption by the OIC of the Cairo Declaration on Human Rights in Islam.⁸⁶

The Cairo Declaration was a direct Islamic response to the UDHR, and Shari’a pervades the document. In fact, Shari’a is the basis for the Cairo Declaration, which can only be interpreted to conform with Shari’a. The Cairo Declaration departs substantively from the UDHR in key aspects: It qualifies rights of equality for women⁸⁷ and individual freedoms such as speech,⁸⁸ it leaves open the possibility of discrimination in

⁸³ Mohamed Al Awabdeh, *History and Prospect of Islamic Criminal Law with Respect to the Human Rights 10:2*, (Dissertation, Humboldt University – Berlin, 2005), available at <http://edoc.hu-berlin.de/dissertationen/al-awabdeh-mohamed-2005-07-07/HTML/front.html>.

⁸⁴ BADERIN, *supra* note 82, at 26-29.

⁸⁵ For the full text of the 1981 Universal Islamic Declaration of Human Rights, see <http://www.alhewar.com/ISLAMDECL.html>.

⁸⁶ For the full text of the 1990 Cairo Declaration of Human Rights in Islam, see <http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm>.

⁸⁷ Cairo Declaration, Article 6(a): “Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.”

⁸⁸ Cairo Declaration, Article 22(a): “Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari’a.”

marriage on the basis of religion,⁸⁹ and it allows for corporal punishment⁹⁰ – thereby undermining the human dignity keystone of human rights law.

The Western consensus on this Shari'a-based alternative to human rights is that, in principle, the Muslim world should not be allowed to create a valid exception to international human rights norms. To do so denies the common humanity shared by all people, and universally recognized minimum standards of treatment are, of course, the main object and purpose of the modern system of globalized human rights.⁹¹

V. INTERNATIONAL CRIMINAL LAW

The internationalization of criminal law, which began in earnest with the trial of Nazi leaders at Nuremberg in 1946, has gained traction since the end of the Cold War. A proliferation of international institutions has given rise to a variety of structural models available for the prosecution and adjudication of violations of international criminal law. Yet very few Islamic jurists or Islamic states participate in the institutions that support the development of this jurisprudence.

a. Institutional Diversity

Two *ad hoc* tribunals, created by the U.N. Security Council to address war crimes, crimes against humanity, and genocide in the former Yugoslavia and in Rwanda, were designed to be temporary in nature with narrowly prescribed territorial, subject-matter and temporal jurisdiction. They were, and still are, staffed by international legal specialists not drawn from the countries in which the atrocities took place, and are physically removed from the those states as well.

The International Criminal Tribunal for the Former Yugoslavia, located in The Hague, and the International Criminal

⁸⁹ Cairo Declaration, Article 5(a): “The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right.”

⁹⁰ Cairo Declaration, Article 20: “It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.”

⁹¹ Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307 (1994).

Tribunal for Rwanda (“ICTR”), located in Arusha Tanzania, both began operations in 1993. Each court is considered successful in that each added vital justice elements to the conflicts they are associated with, achieved a relatively high degree of interaction among the legal academy, and continue to produce complex legal opinions that further elucidate difficult elements of international criminal law. Nevertheless, the international community quickly came to recognize that a chief weakness to the *ad hoc* systems centered on a lack of involvement (and investment) by the local community. In short, the *ad hoc* tribunals were over-internationalized.

An attempt to remedy this central weakness was the creation of a hybridized model. Following conclusion of the civil war in Sierra Leone, the U.N. worked with the local government to create a tribunal that contained both local and international judges, prosecutors, and staff, and was physically located in the country where the crimes occurred. U.N. officials sought to create a similar model for Cambodia, as the government began to pursue surviving former members of the Khmer Rouge that participated in the 1975 genocide. That effort has not been as successful as the Sierra Leone effort due, in large part, to political issues on the Cambodian side of the equation.⁹²

In addition to the *ad hoc* and hybrid models, both meant to be temporary in nature, a permanent model has emerged with the creation of the International Criminal Court in 2002. Located in The Hague and staffed with international experts, the theory behind the ICC is that a venue will be available when local courts cannot or will not prosecute atrocities within their jurisdictions. Moreover, it is meant to be shielded from the potential for politicization and serve as a larger deterrent to despotic conduct than previous institutions. Perhaps tellingly, all of the ICC’s prosecutorial activity to date has concerned situations in Africa.⁹³

A final model may lie in the Lockerbie trial example – which could be considered the ultimate form of *ad hoc*-ism. This was a special court that resulted from a political settlement between the United States, the United Kingdom and Libya to try two Muslim Libyan intelligence agents for the bombing of Pan Am flight 103 on Dec. 21, 1988 over Lockerbie, Scotland. The trial was held in The Hague at Camp Zeist but tried under Scottish law and before Scottish judges.⁹⁴ Ali

⁹² Susan Postalwaite, *The Pre-Trial Hearing of Pol Pot’s Key Woman Commander is the Latest Attempt to Bring the Khmer Rouge’s Ageing Leaders to Justice*, S. CHINA MORNING POST, May 29, 2008, at 16.

⁹³ See ARCHBOLD: INTERNATIONAL CRIMINAL COURTS PRACTICE, PROCEDURE AND EVIDENCE §§ 2-61, 3-1, 4-46 (2d ed. 2005).

⁹⁴ Iain Scobbie, *So Much Scots Law: The Legal Framework for the Lock-*

Mohmed Al Megrahi was found guilty and sentenced to life imprisonment while Al Amin Khalifa Fahima was acquitted.⁹⁵

Few nationals from Islamic States participate in international tribunals, and the ones who do are from the secularized traditions: ICTY & ICTR each have one judge from Turkey and Pakistan. The hybrid tribunals for Sierra Leone & Cambodian Special Courts have none and the International Criminal Court has none.

b. Muslim Participation

International criminal law has come to focus mainly on only three types of atrocity: genocide, war crimes, and crimes against humanity. A fourth crime, aggression, was tried at Nuremberg and Tokyo, but has not been tried since. It is an inchoate, undefined crime within the Rome Statute for the ICC.⁹⁶ Islamic States have largely signed onto treaties outlawing these crimes. Yet Islamic states have not participated meaningfully in the institutions that investigate and prosecute them.

Nevertheless, Islamic societies have had (or will have) some level of interaction with these three crimes in the context of these international and domestic tribunals:

- Bosnia-Herzegovina's War Crimes Chamber in Sarajevo (taking ICTY overload and locally initiated cases): International and Bosnian judges trying mostly Serbs
- Kosovo's War Crimes Chamber: Muslim, Serb and International judges triumvirate trying mostly Serbs
- Iraqi High Tribunal's Prosecution of atrocities committed under Saddam: Muslims trying Muslims
- East Timor's Hybrid Tribunal: Mostly Catholics trying Catholics (Muslims being tried in Jakarta by fellow Muslims)
- ICC's Investigation of genocide in Darfur, Sudan: Non-Muslims trying Muslims

The Iraqi High Tribunal ("IHT") is the only Arab nexus of these five tribunals, three of which are domestic courts, one is an analogue to a hybrid court, and one is a full-blown international tribunal. All of these tribunals, including the three do-

erbie Trial, 7 Y.B OF ISLAMIC & MIDDLE E. L. 157 (2000-01).

⁹⁵ § 2-96 *Lockerbie Precedent*, in ARCHBOLD INTERNATIONAL CRIMINAL COURTS (2d ed. 2005). See also ILIAS BANTEKAS AND SUSAN NASH, INTERNATIONAL CRIMINAL LAW § 15-6 (2d ed., 2003).

⁹⁶ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998).

mestic courts, were designed by Westerners with American and international expertise, not by Islamic legal scholars; all tribunals are code-based. Except for the IHT, all of the tribunals experience chronic issues with asserting jurisdiction over defendants, collecting evidence, and administrative concerns with respect to staffing and expertise. The U.S.-led occupation of Iraq allowed the Regime Crimes Liaison Office (a division of the U.S. Department of Justice that is located in Baghdad) to render much of these support elements to the IHT.⁹⁷

There will also be interaction among Muslims and the world of international criminal law in the context of the trial that will unfold regarding the assassination of former Lebanese Prime Minister Rafik Hariri. The International Criminal Tribunal for the Assassination of former Lebanese Prime Minister was created by the United Nations Security Council under Chapter VII on June 10, 2007⁹⁸ without approval from the Lebanese Parliament.⁹⁹ The two Islamic states on the Security Council (Qatar & Indonesia) abstained.¹⁰⁰ Syria, Hezbollah, and Lebanon's President oppose Tribunal. The Tribunal will exist outside Lebanon in The Hague and will be staffed by international personnel, including an international prosecutor assisted by a Lebanese deputy and a blend of International and Lebanese judges.¹⁰¹

The U.N. Commission conducting the investigation was led by Belgian prosecutor Serge Brammertz, the ICC's deputy prosecutor, who submitted his final report in November 2007.¹⁰² This will be the first International Tribunal to depart

⁹⁷ Estelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Defense Reform*, 23 ARIZ. J. INT'L & COMP. LAW 347, 430 (2006).

⁹⁸ S.C. Res. 1644, U.N. Doc. S/Res/1644 (Dec. 15, 2005); S.C. Res. 1664, U.N. Doc. S/Res/1664 (Mar. 29, 2006); S.C. Res.1757, U.N. Doc. S/Res/1757 (May 30, 2007).

⁹⁹ *Syria Will Note Cooperate with UN Hariri Tribunal*, VOA NEWS.COM, June 1, 2007, available at <http://www1.voanews.com/english/news/a-13-2007-06-01-voa47.html>.

¹⁰⁰ Minutes of the 5685th Meeting of the Security Council, May 30, 2007, S/PV.5685, available at <http://daccessdds.un.org/doc/UNDOC/PRO/N07/362/08/PDF/N0736208.pdf?OpenElement>.

¹⁰¹ Press Conference by United Nations Legal Counsel on Special Tribunal for Lebanon, available at http://www.un.org/News/briefings/docs/2007/070919_Michel.doc.htm. The Statute of the Tribunal is annexed to the Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, Nov. 15, 2006, S/2006/893, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/617/97/PDF/N0661797.pdf?OpenElement>.

¹⁰² Ninth Report of the International Independent Investigation Commission, Nov. 2007, available at <http://www.nowlebanon.com/Library/Files/EnglishDocumentation/Hariri%20Investigation/9th%20Brammertz%20report.pdf>. Mr. Brammertz left to fill the job of Chief Prosecutor at the ICTY upon the departure of Carla del Ponte. His replacement is the Canadian Deputy Attorney General, Daniel Bellemare. Press Release, Secretary-General of the

from focusing on the three traditional international crimes, concentrating instead on terrorism and murder charges.¹⁰³ The defendants will likely be Syrian and Lebanese Muslims, yet there will be little Islamic influence in the process.

Despite a lack of participation on the institutional side of the equation, Islamic states have sometimes participated meaningfully in the development of international criminal law as it is to be applied if they determine that their interests may be at stake. For example, many Arab states participated in negotiations leading to the creation of the ICC, including the final negotiations of the Rome Statute in 1996-1998. Most sought to exclude the designation of forced pregnancy as a crime against humanity and restrict the definition of sexual violence to rape only; a non-interference clause was finally inserted to protect national customs with regard to pregnancy.¹⁰⁴

These states also pushed for the crime of aggression to be state-centered only to allow for the co-existence of criminalized individual aggression and the duty on the individual to Jihad (the first meaning is personal struggle, but the secondary meaning is military struggle against Western hegemony – especially in the Arab world);¹⁰⁵ the crime of aggression was left undefined in the Rome Statute.

Very few Islamic States signed on to the Rome Statute. Of the 104 states parties to the Rome Statute, twenty are OIC members (and these are African states). Fifteen of these have predominantly Muslim populations. Jordan is the only Arab state party. None of the Shari'a-centered Islamic States are parties to the Rome Statute. Nigeria, which is not wholly Shari'a, is the only state party with a partial Shari'a system.

United Nations, SG/A/1109 (Nov. 16, 2007), *available at* <http://www.un.org/News/Press/docs/2007/sga1109.doc.htm>.

¹⁰³ Kim Gattas, *Lebanon's Groundbreaking Tribunal*, BBC NEWS, April 21, 2006, *available at* http://news.bbc.co.uk/2/hi/middle_east/4926536.stm. "The international court will be the first to try a crime described as 'terrorist' by the U.N. While other special tribunals have dealt with war crimes and crimes against humanity, like in Sierra Leone or Cambodia, it will be the first time that international justice tackles a political crime that targeted a specific person." *Id.*

¹⁰⁴ Steven C. Roach, *Arab States and the Role of Islam in the International Criminal Court*, 53 POL. STUD. 143 (2005), *available at* <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1467-9248.2005.00521.x>.

¹⁰⁵ *Id.* For a complete description of the proceedings, see 3 M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: SUMMARY RECORDS OF THE 1998 DIPLOMATIC CONFERENCE* (2005).

VI. ACCOMMODATION FOR MUSLIM INTERESTS

Why are Shari'a-centered Islamic States less likely to participate in international criminal law than Western States or even secular Islamic states like Turkey? Several factors may help explain this disconnect, including:

- **Islamic Law** – if the legal system is derived from religious authority rather than secular, participation is less likely
- **Level and type of Shari'a practiced** – if only the commercial or non-divergent aspects of Islamic Law are in play, participation is more likely; it becomes less likely if the criminal or more divergent aspects are in play
- **Cultural drawbacks** – The shape and extent of tribalism in the society that may disdain outside interference together with broad-based cultural expectations like speed in trial and sentencing and victim participation are factors that could come into play
- **Rule of Law factors:**
 - Independent judiciary (non-existent in most Arab states)
 - Crimes in Shari'a jurisdictions are not defined – this can lead to abuse
- **Fractured nature of Shari'a and the various schools of Islamic Law**
- **Level of Tailoring in Tribunal design to accommodate Islamic traditions** – no war crimes tribunal to date, international or domestic but Western-designed, has been able to adequately accommodate Islamic interests
- **Level of antagonism by/with West** – international criminal law is a Western-driven process; the adoption of Shari'a itself in some states was a direct rejection of Western criminal codes incorporated during the colonial era that supplanted Shari'a; political antagonism will hobble efforts at greater participation

Some have proposed the development of a hybrid international/Islamic criminal court. However, the diversity of predominantly Islamic states, cultures and traditions within predominantly Islamic states, degree of incorporation of Islamic law, adherence to varying schools of Islamic law and disagreement over the content of criminal law mitigates against creating a sustainable centralized international criminal tribunal in the Muslim world. Nevertheless, the Muslim world is about where the Western world was sixty years ago on international criminal law – agreeing on the broad outlines of the crimes but dif-

fering on the particulars. Such obstacles were eventually overcome in the West, beginning with Nuremberg.

Once, and if, internal differences concerning criminal law are surmounted within the Muslim world, differences between the Islamic and Western view must be addressed. This, of course, will be a very long process. Eventually, creation of a hybrid international / Islamic criminal tribunal could be a first step in addressing the disconnect between Shari'a-centered Islamic states international criminal law and human rights. But, again, that does not appear to be on the horizon.

A different view is offered by Professor Mashood Baderin, University of London, who proposes reconstituting the Wilayah al-Mazâlim, a grievance tribunal from the early days of the Islamic Empire. This ancient court was endowed with broad jurisdiction to address violations of individual rights by state officials.¹⁰⁶ Baderin seeks to use this type of body to help bridge wide gaps between the Cairo Declaration and international human rights law.¹⁰⁷ For instance, the ICCPR provides guarantees against torture, forced labor, servitude, social/legal equality, personal liberties, and freedom of thought, whereas many Islamic societies do not.

As envisioned by Baderin, the reconstituted Mazâlim Court "would be composed of . . . Islamic jurists learned in Islamic jurisprudence, but also . . . international human rights law."¹⁰⁸ The Court would have compulsory jurisdiction across Islamic states, accommodate the views of all Islamic schools, and develop a jurisprudence that moves toward a common interpretation of Islamic law for human rights.¹⁰⁹ While this notion is attractive, the lack of unity in the post-Caliphate world among Islamic states renders its viability a weak prospect.

VII. CONCLUSION

Participation from Islamic states in the creation of international criminal law, and their support of international criminal law institutions, is spotty at best. The more a predominantly Islamic state adheres to a Shari'a system, the less likely there is to be participation of any kind. To the extent this happens, as was the case with ICC negotiations, it is to blunt the incursion of international criminal law into the Islamic world, not to further the work of the field. Yet, as in the case of new judicial efforts in the Sudan, Bosnia, Indonesia, Kosovo and the forth-

¹⁰⁶ BADERIN, *supra* note 82, at 229-30.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

coming Hariri tribunal, Muslims will increasingly be drawn into working with these institutions.

Western justice meted out by western judges using western law against Muslim defendants, as was the case in the *Lockerbie* trial, is not a model that the Islamic world seeks to follow. This outcome is more likely considering Islam's passive role in the process of creating, shaping, and participating in international criminal law— especially if terrorism crimes become part of the chargeable canon as in the Hariri Tribunal.

How can greater meaningful participation from the Islamic world be achieved? A number of outstanding questions remain. Does creation of a separate legal system for Islamic versions of human rights and international criminal law undermine the “universality” of those immutable concepts? What place does cultural relativism have in this discourse? If secular and Rule of Law-centered Islamic States like Turkey and Pakistan can participate in international criminal law, can the incompatibility between Shari'a-centered Islam and international criminal law be bridged in any way other than by adopting a dualistic approach? How can the legitimacy of international criminal law and the tribunals that implement it be maximized for Islamic societies? Is legitimacy a separate question from compatibility?

Finally, can the Maslah (public interest) component of Islamic law be creatively invoked to get around the Shari'a obstacle? Islamic law defers greatly to public interest as an overriding consideration for modernists to argue that the traditional hard-line Islamic approaches to crime can only be imposed if they are in the public interest. Once this premise is accepted, then those seeking to bring Islamic law into the modern world, thereby connecting it better with international law, can progressively re-define “public interest.” That might be a generational answer to this intractable problem, but it might also be the best answer thus far.