

# 19. Exploring legal compatibilities and pursuing cultural legitimacy: Islamic law and the ICC

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## 1. INTRODUCTION

Based on its sources (pre-eminent among them the *Qur'an*), Islam contains a well-developed body of legal norms pertaining not only to a believer's relationship with God, but also to relationships between people. In this way, Islamic law covers a broad scope, articulating norms regarding crime and punishment as well as what would today be considered international law. In fact, Islamic law contains many techniques relating to preventing and punishing crime, victim remedies and reconciliation,<sup>1</sup> making it relevant to the elucidation and application of international criminal law by the International Criminal Court (ICC). This relevance is pertinent as many of the States with situations being considered by the ICC's Prosecutor have a Muslim majority, such as Afghanistan, Iraq, Libya, Mali, Palestine and Sudan. Furthermore, around two-thirds of the Red Cross' (International Committee of the Red Cross – ICRC) operations relate to armed conflicts in Islamic contexts.<sup>2</sup> Protracted conflicts today disproportionately affect Africa and the Muslim world, with 'some of the worst excesses in the use of force' being justified by groups such as Al Shabaab, Boko Haram and ISIS based on Islamic traditions.<sup>3</sup> The positive role that Islamic law can play in such conflicts is under-appreciated.<sup>4</sup>

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<sup>1</sup> Corri Zoli, M Cherif Bassiouni and Hamid Khan, 'Justice in Post-Conflict Settings: Islamic Law and Muslim Communities as Stakeholders in Transition' (2017) 33(85) *Utrecht Journal of International and European Law* 38, 39, citing Bassiouni, *Sharia and Islamic Criminal Justice in Time of War and Peace* (CUP 2014).

<sup>2</sup> ICRC, 'Report Prepared and Edited by Ahmed Aldawood Legal Adviser (Islamic Law and Jurisprudence), IHL and Islamic Law in Contemporary Armed Conflicts' (Experts' Workshop, Geneva, 29–30 October 2018) 9.

<sup>3</sup> Zoli, Bassiouni and Khan (n 1) 41, 47, and fn 48.

<sup>4</sup> *ibid* 43.

Despite the salience of Islamic law for the ICC, recognition, engagement and understanding is only nascent.

The topic of Islamic law and international criminal justice has become a growing concern in recent years<sup>5</sup> and demands thorough scholarly attention.<sup>6</sup> This is due in part to the fact that Islam is growing twice as fast as the world population and is projected to overtake Christianity as the largest religion in the next half century.<sup>7</sup> In addition to the sheer growth in numbers, the influence of Islamic law on some national legislatures and courts is also increasing. Indeed, around the world, the influence of religion – a part of culture<sup>8</sup> – is experiencing a resurgence, especially in political and public life.<sup>9</sup> Within the last few decades it has become a global phenomenon for people to claim ‘religion as a constitutive element of public life’.<sup>10</sup> Studies have shown that the world is becoming more religious, with the relative size of religiously unaffili-

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<sup>5</sup> For example, in 2018 a book dedicated to Islam and international criminal justice was published (Tallyn Gray (ed), *Islam and International Criminal Law and Justice* (Torkel Opsahl Academic Epublischer 2018)), and a side-event on the topic was held at the ICC’s annual Assembly of States Parties (International Nuremberg Principles Academy: Islam and International Criminal Law and Justice (co-hosted by Germany and International Nuremberg Principles Academy) 10 December 2018). While the Red Cross (ICRC) have met with Muslim scholars on international humanitarian law (IHL) for several decades, they hosted their first ‘Global Expert Workshop on IHL and Islamic law in Contemporary Armed Conflicts’ in 2018, see the ICRC report (n 2).

<sup>6</sup> Tallyn Gray, ‘Introduction’ in Gray (n 5) 2; Mohamed Elewa Badar, ‘Is There a Place for Islamic Law within Applicable Law of the International Criminal Court?’ in Gray (n 5) 202.

<sup>7</sup> Pew Research Centre, Michael Lipka and Conrad Hackett, ‘Why Muslims are the World’s Fastest-Growing Religious Group’ (6 April 2017) <http://www.pewresearch.org/fact-tank/2017/04/06/why-muslims-are-the-worlds-fastest-growing-religious-group/>, accessed 27 August 2018.

<sup>8</sup> As set out in the book’s introduction, culture encompasses the complex features characterising a society/social group, including its modes of life, value systems and beliefs. As so defined, culture includes religion as a value and belief system.

<sup>9</sup> Monica Duffy Toft, ‘False Prophecies in the Service of Good Works’ in Douthett Lettinga and Lars van Troost (eds), *Debating the Endtimes of Human Rights: Activism and Institutions in a Neo-Westphalian World* (Amnesty International 2014) 48; Mohammad H Fadel, ‘Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law’ (2007) 8 *Chicago Journal of International Law* 1, 1.

<sup>10</sup> Boaventura de Sousa Santos, *If God were a Human Rights Activist* (Stanford Studies in Human Rights 2015) 11.

ated people declining.<sup>11</sup> One scholar claimed that the pressing ‘question of the twenty-first century may very well be religion, particularly Islam’.<sup>12</sup>

The present study is also important given the numerous challenges the ICC is facing, including the backlash from across Africa, the withdrawal of States parties,<sup>13</sup> and the fact that few Muslim-majority States are party to the Rome Statute.<sup>14</sup> This is despite the involvement of many Muslim-majority States in drafting the Statute at the 1998 Rome Conference. The Drafting Committee comprised members from Lebanon, Morocco, Sudan and Syria, and its Egyptian chair, Bassiouni, commented that the Arab States were one of the most active groups.<sup>15</sup> Upon the Statute’s adoption,<sup>16</sup> Bassiouni exclaimed: ‘It asserts that impunity for the perpetrators of genocide, crimes against humanity and war crimes is no longer tolerated. In that respect it fulfils what Prophet Mohammad said, that “wrongs must be righted”.’<sup>17</sup> This chapter advocates the ICC’s use of or reference to Islamic law in relevant cases to promote the Court’s cultural legitimacy in Muslim communities and to foster the engagement of Muslim-majority States in the Rome Statute system. According to

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<sup>11</sup> Pew Research Centre, Michael Lipka and David McClendon, ‘Why People with No Religion are Projected to Decline as a Share of the World’s Population’ (7 April 2017) <http://www.pewresearch.org/fact-tank/2017/04/07/why-people-with-no-religion-are-projected-to-decline-as-a-share-of-the-worlds-population/>, accessed 27 August 2018; Pew Research Centre, ‘The Future of World Religions: Population Growth Projections, 2010–2050’ (2 April 2015) <http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/>, accessed 1 February 2019.

<sup>12</sup> Fadel (n 9) 1.

<sup>13</sup> Burundi and the Philippines have formally withdrawn from the Rome Statute. For further discussion of Africa’s relationship with the ICC see Chapter 16 in this volume.

<sup>14</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9. While many Muslim-majority states in Africa are a party, few Asian States (like Indonesia, Pakistan, Malaysia and Brunei) are. For further analysis of Asia’s reluctance to join the Rome Statute system, see Chapter 18 in this volume.

<sup>15</sup> M Cherif Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’ (1999) 32(3) *Cornell International Law Journal* 449, fn 25. See also Shaheen Sardar Ali and Satwant Kaur Heer, ‘What is the Measure of “Universality”? Critical Reflections on “Islamic” Criminal Law and Muslim State Practice vis-a-vis the Rome Statute and the International Criminal Court’ in Gray (n 5) 197.

<sup>16</sup> There were 120 votes in favour of the Statute, and 21 abstentions (including Turkey), and seven States voting against it (including Iraq, Libya, Qatar and Yemen). Bassiouni *ibid* 460 fn 69.

<sup>17</sup> *ibid* 468.

Baderin, Islamic law has the potential to enhance both ‘the universality and effectiveness of international criminal justice’.<sup>18</sup>

Following this introduction, the chapter proceeds in three sections, commencing with an overview of Islamic law focusing on the norms relevant to international criminal justice. It is beyond the scope of any one short chapter to identify and analyse all of these norms, nor is the present author qualified to undertake such a task.<sup>19</sup> Rather, secondary sources and commentaries on Islamic law are relied upon in order to illustrate general areas of (dis)agreement between the two plural bodies of law. The chapter then examines if Islamic law can be applied by the ICC, and whether it has been in the relevant situations of Mali, Sudan, Libya and Afghanistan. The question addressed is: to what extent can and should Islamic law be drawn upon in relevant cases before the ICC? Noting that the Court has not, to date, drawn upon Islamic law in its rulings in such situations, the chapter laments these as missed opportunities. It argues that this could be an important way for the ICC to legitimate itself and buttress support for its judgments in Muslim communities. The chapter concludes with some brief recommendations for the Court.

## 2. OVERVIEW OF ISLAMIC LAW

The word ‘Islam’ means peace, wellbeing, surrender or salvation.<sup>20</sup> According to Al-Dawoody, ‘the fundamental objective of Islamic law is to achieve justice and serve the public interest, always and everywhere’.<sup>21</sup> As a way of life, Islam is a code covering broad areas of inter-personal as well as collective conduct in line with its ideals of what constitutes right and wrong.<sup>22</sup> These regulations are found in the sources of Islam: the *Qur’an*, *Hadith*, *Sunnah*, *fiqh*

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<sup>18</sup> Gray (n 6) 10.

<sup>19</sup> Islamic law is a vast and complex body of law with multiple sources, authorities and interpretations. It is not the intention to set out Islamic law here in detail, nor is it necessary for the present study, which looks at the potential application and instrumentalisation of Islamic law, rather than engaging in Islamic exegesis. As such, this chapter presents only an illustrative (and incomplete) overview, based on a reading of secondary sources available in English. It is important to also recognise the limits of generalising about Islam and about Muslim majority States, which are highly diverse and dynamic.

<sup>20</sup> Mohammad Daud Ali, *Islamic Law: Introduction to Islamic Jurisprudence and the Legal System in Indonesia* (PT RajaGrafindo Persada 2016) 39.

<sup>21</sup> Ahmed Al-Dawoody, ‘Islamic Law and International Humanitarian Law: An Introduction to the Main Principles’ (2017) 99(3) *International Review of the Red Cross* 999.

<sup>22</sup> Onder Bakircioglu, ‘The Principal Sources of Islamic Law’ in Gray (n 5) 15.

and *shari'ah*.<sup>23</sup> Together, these sources contribute to what is referred to as 'the Islamic tradition', however, they do not represent 'a coherent or consistent body of teachings or precepts from which a universally agreed upon set of Islamic norms can be derived'.<sup>24</sup> Given the numerous variances and inconsistencies among the sources and their interpretation, scholars conclude that it is not possible to speak of Islam as if it were a monolith.<sup>25</sup> This is despite the fact that Islam is often represented in popular and academic discourses in the West as homogeneous.<sup>26</sup>

Reflecting the diversity of views and beliefs within Islam, there are multiple schools of thought (*madhāhib*), and Muslims may choose which to follow.<sup>27</sup> According to Badar, the main difference between these schools is their approach to *Qur'anic* interpretation and the ranking of Islam's subsidiary sources.<sup>28</sup> The debate among scholars is not whether Islamic sources should be interpreted, but rather, to what degree this should occur.<sup>29</sup> While some texts (such as those regarding faith, prayer, fasting, charity and the pilgrimage – the five pillars of Islam) are fixed and common to the whole Muslim community, others relating to human relations with one another and with objects have numerous iterations.<sup>30</sup> As noted above, rather than being a uniform body of law, Islamic law takes 'the form of a scholarly discourse with varying, equally legitimate principles, viewpoints and opinions on the basis of which legally-enforceable laws may be formulated'.<sup>31</sup> In this way, Islam sustains great intra-plurality based on the interpretative tradition of its sources.

This diversity also contributes to the dynamism of Islamic law, which has various methods by which to evolve and adapt. This is important as the

<sup>23</sup> Given their translation from Arabic, there are different ways to spell Islamic terms like *Shari'ah*, including *Sharia* and *Syariah*. This applies to all of the terms, which lack agreed or formal transcriptions. Daud Ali (n 20) 30.

<sup>24</sup> Riffat Hassan, 'Is Family Planning Permitted by Islam? The Issue of a Woman's Right to Contraception' in Gisela Webb (ed), *Windows of Faith: Muslim Women Scholar-Activists in North America* (Syracuse University Press 2000) 226. See also Ali and Heer (n 15) 199.

<sup>25</sup> Hassan *ibid* 226–27. See also Ali and Heer (n 15) 179.

<sup>26</sup> Arskal Salim, 'Between ICMI and NU: The Contested Representation of Muslim Civil Society in Indonesia, 1990–2001' (2011) 49(2) *Al-Jāmi'ah* 299; Ali and Heer (n 15) 199; Shadi Mokhtari, 'The Search for Human Rights Within an Islamic Framework in Iran' (2004) 94 *The Muslim World* 470.

<sup>27</sup> The Sunni schools are *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*. The Shi'a schools are the Twelvers, the *Isma'ili* and the *Zaydi*. Badar (n 6) 209.

<sup>28</sup> Mohamed Elewa Badar, 'Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Law' (2011) 24 *Leiden Journal of International Law* 419.

<sup>29</sup> Bakircioglu (n 22) 24.

<sup>30</sup> *ibid* 22, citing *Qur'an* 7:158; Daud Ali (n 20) 21–23, 56, 103.

<sup>31</sup> Ali and Heer (n 15) 178; Badar (n 28) 431.

ever-changing needs of society present new and different challenges to be met according to Islamic law. In particular, *fiqh* and *ijtihad* contribute greatly to Islam's flexibility and adaptability. *Fiqh* means jurisprudence and *ijtihad* is an interpretive technique or methodology whereby, on the basis of concerted effort and reasoning, a qualified person makes a determination according to the time and place of a matter unclear or unregulated in Islamic law.<sup>32</sup> As works of human reasoning, the outcomes of *ijtihad* and the *fiqh* produced are dynamic and subject to change from time to time and place to place.<sup>33</sup> Scholars have held that such contributions to the development of Islamic law are not only permitted but highly encouraged in Islam.<sup>34</sup> Daud Ali claimed that '[a]mong the things that God gives to human beings, the most valuable one is human reason'.<sup>35</sup>

Substantively, Islamic law covers a wide range of subjects, including family law, business and finance, crime and international law. As plural legal systems, there is in fact substantial normative overlap between Islamic and international law. Numerous scholars have noted the overall alignment of Islamic law with various branches of public international law, including criminal, humanitarian and human rights law. Baderin claims that the objectives of Islamic and international law intersect as both seek to achieve 'a more humane world, which can be evoked for promoting a complementary relationship between the two systems'.<sup>36</sup> For example, the Rome Statute crimes in Articles 6, 7, 8 and 8 *bis* of genocide, crimes against humanity, war crimes and aggression are also prohibited by Islamic law.<sup>37</sup>

Like international humanitarian law (IHL), Islamic law calls for constraint in warfare, with evidence of the Prophet having instructed a Muslim army to exercise 'restraint and humanitarianism in war'.<sup>38</sup> As such, Islamic laws of war pre-date modern IHL and influenced its development. Van Engeland claims that '[a]nyone who reads the Geneva Conventions will be struck by the similarities between these Islamic humanitarian principles and international

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<sup>32</sup> This legal determination cannot conflict with the spirit of Islamic teachings or contradict the *Shari'ah*. Daud Ali (n 20) 14, 23, 34, 71.

<sup>33</sup> *ibid* 32–34, 73, 79.

<sup>34</sup> Bakircioglu (n 22) 33.

<sup>35</sup> Daud Ali (n 20) 14, 71.

<sup>36</sup> Mashood A Baderin, 'Islamic Socio-Legal Norms and International Criminal Justice in Context: Advancing an "Object and Purpose" cum "Maqásid" Approach' in Gray (n 5) 53–54.

<sup>37</sup> *ibid* 66.

<sup>38</sup> *ibid* 57, citing *Qur'an* 2:190, which provides: 'Fight in the cause of God with those who fight against you, but do not commit transgression; for God dislikes those who transgress.'

humanitarian law'.<sup>39</sup> For example, Islamic law reflects the IHL principle of distinction between combatants and non-combatants,<sup>40</sup> containing protections for civilians, medical personnel and reporters.<sup>41</sup> Several *Hadith* explicitly prohibit the targeting of women, children and the elderly,<sup>42</sup> with the first Caliph Abu Bakr (d. 634) reportedly having instructed his army: 'Do not kill a child or a woman; or an aged person; do not cut down fruit-bearing trees or destroy buildings; do not slaughter a sheep or a camel except for food; do not burn or down palm trees; do not loot; and do not be cowardly.'<sup>43</sup> The Prophet is reported to have said: 'Prisoners are your brothers and companions. It is because of God's compassion that they are in your hands. They are at your mercy, so treat them well as if you were treating yourself, with food, clothes and housing.'<sup>44</sup>

As such, Islamic law proscribes massacres and killing prisoners of war, rape, torture and mutilation of humans or beasts, and the destruction of harvests and property.<sup>45</sup> Al-Dawoody bases this on the Islamic worldview in which everything 'belongs to God, and human beings – as His vicereagents on earth – are entrusted with the responsibility of protecting His property'.<sup>46</sup> Such attacks causing great suffering, destruction of property, or harm to the civilian population are also covered by the Rome Statute in Article 8 and elaborated upon in the Elements of Crimes.<sup>47</sup>

Furthermore, international law obligations to prosecute *jus cogens* crimes, including war crimes, also apply under Islamic law.<sup>48</sup> As such, 'with respect to such crimes there would be no conflict between Islamic and international law in prosecuting people for the commission of such acts'.<sup>49</sup> In fact, scholars

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<sup>39</sup> Anisseh van Engeland, 'Differences and Similarities between International Humanitarian Law and Islamic Humanitarian Law: Is There Ground for Reconciliation?' (2008) 10 *Journal of Islamic Law and Culture* 89.

<sup>40</sup> Al-Dawoody (n 21) 1004.

<sup>41</sup> *ibid* 1002.

<sup>42</sup> *ibid*.

<sup>43</sup> *ibid* 1003.

<sup>44</sup> van Engeland (n 39) 82.

<sup>45</sup> Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Study* (Brill 2011) 203–05; Baderin (n 36) 58–59, citing Muhammad Hamidullah, *The Muslim Conduct of State* (7th edn, Muhammad Ashraf Kashmir Bazar 1977) 205–08; Zoli, Bassiouni and Khan (n 1) 56–57; Steven Roach, 'Arab States and the Role of Islam in the International Criminal Court' (2005) 53 *Political Studies* 144.

<sup>46</sup> Al-Dawoody (n 21) 1007.

<sup>47</sup> ICC, *Elements of Crimes* (International Criminal Court 2011).

<sup>48</sup> Zoli, Bassiouni and Khan (n 1) 58.

<sup>49</sup> D Julian Veintimilla, 'Islamic Law and War Crimes Trials: The Possibility and Challenges of a War Crimes Tribunal Against the Assad Regime and ISIL' (2016) 49 *Cornell International Law Journal* 511.

have noted that Islamic law prohibits amnesties<sup>50</sup> as well as immunity for heads of State.<sup>51</sup> Under Islamic law, a person's actions should be judged based on their intentions (*al-umūr bi-maqásidhá*), reflecting the concept of *mens rea*, or the mental element of crime.<sup>52</sup> Scholars have also claimed that Islamic law is 'exceedingly rich' as a normative resource 'for post-conflict justice and reconciliation'.<sup>53</sup> They have found that the spirit and norms of the *Shari'ah* support reparative goals of international law including establishing the truth, redressing victims, and guarantees of non-repetition.<sup>54</sup> These are also contained in international human rights law, as well as Articles 68 and 75 of the Rome Statute.

Islamic law additionally contains numerous principles and maxims that aid judges in applying its basic doctrines to contentious issues.<sup>55</sup> The general principles relevant to criminal law include justice/fairness, legal certainty and the presumption of innocence. According to Daud Ali, fairness is a key principle in Islam, with many verses commanding humans to be fair and uphold justice.<sup>56</sup> In fact, justice is the third-most mentioned word in the *Qur'an*.<sup>57</sup> The principle of legal certainty is drawn from several *Qur'anic* verses that refer to punishment not being implemented unless the rules and threat of punishment are known.<sup>58</sup> Badar argues that this principle can be seen as reflected in *nullum crimen sine lege* in Article 22 Rome Statute.<sup>59</sup> The presumption of innocence is part of Islamic law (*al-bard'ah al-asliyah*), deriving from statements such as 'the norm [of Shari'a] is that of non-liability', and the Prophet who reportedly said that 'everyone is born inherently pure'.<sup>60</sup> Islam contains many fair trial rights, with Baderin concluding that it is not incompatible with the International Covenant on Civil and Political Rights.<sup>61</sup>

While there are many complementary norms between Islamic and international law, there are, of course, also conflicts. An-Na'im concludes that the Islamic tradition is generally consistent with human rights norms, 'except for

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<sup>50</sup> Zoli, Bassiouni and Khan (n 1) 52 fn 70.

<sup>51</sup> Badar (n 28) 430–31; Badar (n 6) 229–30; Baderin (n 36) 79.

<sup>52</sup> See Rome Statute art 30. Badar (n 28) 426–28; Badar (n 6) 223–26.

<sup>53</sup> Zoli, Bassiouni and Khan (n 1) 44.

<sup>54</sup> *ibid* 58.

<sup>55</sup> Badar (n 28) 421. See further discussion of maxims in Badar (n 6) 213–17.

<sup>56</sup> Daud Ali (n 20) 81. See also Baderin (n 36) 79.

<sup>57</sup> Daud Ali (n 20) 81.

<sup>58</sup> *ibid* 82.

<sup>59</sup> Badar (n 6) 218–19.

<sup>60</sup> *ibid* 220–22; Badar (n 28) 425.

<sup>61</sup> MA Baderin, *International Human Rights and Islamic Law* (OUP 2003) ch 3.15; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).



some specific, albeit very serious, aspects of the rights of women and freedom of religion and belief'.<sup>62</sup> Additionally, adultery or drunkenness are not crimes under international law, and international human rights law would not permit punishments such as amputation.<sup>63</sup> It is important to note that while there may be some divergences, neither Islamic nor international law are static and the norms within both systems continue to evolve. Moreover, given its intra-plurality and various interpretive methodologies, Islamic law could be read by scholars as being in line with international law. As seen above, Islam's intellectual tradition actively promotes scholarship, legal reasoning and 'adaptation to geographic and temporal contexts'.<sup>64</sup> An-Na'im encourages Muslim scholars to undertake and promote interpretations of Islamic law in line with international law.<sup>65</sup>

### 3. ISLAMIC LAW AND THE ICC

Having established that Islamic law is, in the main, consistent with (or able to be interpreted consistently with) international human rights, humanitarian and criminal law, the ICC could apply it per Article 21(1)(c) Rome Statute. This provision allows the Court to apply 'general principles of law' from the 'legal systems of the world'. Islam is recognised as one of the world's legal systems, as applied formally in many States including Afghanistan, Brunei, Egypt, Indonesia, Iran, Pakistan, Saudi Arabia and Syria.<sup>66</sup> Therefore, Islamic law could be relied upon by the ICC via Article 21 Rome Statute.<sup>67</sup> However, this article does not automatically grant judges recourse to general principles

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<sup>62</sup> Abdullahi Ahmed An-Na'im, 'Why Should Muslims Abandon *Jihad*? Human Rights and the Future of International Law?' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge 2008) 87. See also Fadel (n 9) 1–20.

<sup>63</sup> *Hudūd* crimes (including apostasy, theft, illicit sexual relations, slander and drinking alcohol) are set out in the *Qur'an* and *Sunnah* along with fixed penalties such as death or amputation, see Ali and Heer (n 15) 180; Badar notes that there is contestation regarding which crimes fall within this category, see Badar (n 6) 210.

<sup>64</sup> Gray (n 6) 12.

<sup>65</sup> Abdullahi Ahmed An-Na'im, 'Conclusion' in Abdullahi Ahmed An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1992) 432.

<sup>66</sup> With the exception of Lebanon and Syria, all other Arab States hold Islam to be the State religion and a source of law. Badar (n 28) 413; Badar (n 6) 203, 205. See Pakistani Constitution art 227 (2012); Egyptian Constitution art 2 (2014); Syrian Constitution art 3 (2012); Saudi Arabian Constitution art 7 (1992); Iranian Constitution art 94 (1979); Afghan Constitution art 3 (2004).

<sup>67</sup> Badar (n 28) 432–33. See also William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2015) 525–26.

of law from other legal systems, but rather does so conditionally. In the first place, the judges must apply the Rome Statute, Elements of Crimes and the Court's Rules. Then, and where appropriate, the Court shall apply the relevant treaties, principles and rules of international law. Finally, according to Article 21(1)(c), the Court may then apply general principles of law from national legal systems, including 'the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards ...'.

According to Article 21(3) Rome Statute, any laws or general principles to be applied by the Court must also be consistent with internationally recognised human rights. On this basis – and only as subsidiary to the first two sources of law – the ICC could rely upon Islamic law, especially when dealing with cases relating to States that apply it formally in their legal systems.<sup>68</sup> Moreover, rather than formally applying Islamic law as a source of law, the Court could refer to it where relevant. The Court cites various sources and authorities in its judgments, including the works of scholars independently published or submitted as *amicus curiae*.<sup>69</sup> It is thus open to the Court to refer to or cite recognised Islamic scholars where pertinent in the cases before them. Despite this, and the fact that several situations before the ICC relate to Muslim-majority States, to date the Court has not relied upon Islamic law or scholars in practice. The situations before the ICC from Mali, Sudan, Libya and Afghanistan are analysed below.

The situation in Mali has given rise thus far to two cases of war crimes against Mr Ahmad Al Faqi Al Mahdi (*Al Mahdi*) and Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (*Al Hassan*).<sup>70</sup> Both cases relate to conflict in the State's north, around Timbuktu, involving the armed group Ansar Dine, a largely Tuareg movement linked to Al Qaeda in the Islamic Maghreb. Mr Al Mahdi pleaded guilty, was convicted of war crimes and sentenced to nine years in prison for attacking ten protected objects, namely nine mausoleums and the Sidi Yahia mosque door.<sup>71</sup> While the judgments convicting him and ordering reparations do refer to Islam, they do so by way of context and background

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<sup>68</sup> Stewart Manley, 'Referencing Patterns at the International Criminal Court' (2016) 27(1) *The European Journal of International Law* 191, 210–11.

<sup>69</sup> *ibid* 207–08.

<sup>70</sup> At the time of writing, the case against Mr Al Hassan is pending trial before the ICC, which is due to commence in 2020.

<sup>71</sup> *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016) (*Al Mahdi* (Judgment and Sentence)).

rather than by citing or relying upon Islamic law.<sup>72</sup> This is despite the fact that the case related to the destruction of property during conflict, which, as noted above, is also prohibited under Islamic law. It is also despite the fact that Mr Al Mahdi is a Muslim, was head of the *Hisbah* (an Islamic morality brigade), and that many of his victims and those in the affected community are Muslim.<sup>73</sup> The Court even acknowledged that the crime was religiously motivated.<sup>74</sup>

Furthermore, in drafting their reparations plan, the ICC's Trust Fund for Victims (TFV) sought expert input from fields including psychology, anthropology, human rights and cultural heritage.<sup>75</sup> Yet it does not seem that any experts in Islamic law were consulted – during consideration of the merits or reparations. The TFV did note the 'religious functions' of the destroyed property and proposed ceremonies, a cultural festival and cultural dialogue for religious tolerance – but without reference to Islam.<sup>76</sup> The TFV in fact rejected the proposal by a victim's group for a 'Koranic education project' for school children as part of the reparations plan.<sup>77</sup> Perhaps unsurprisingly, the first thing Mr Al Mahdi did in his public apology, after acknowledging the judges, was to quote Allah and then go on to refer to 'Islamic principles' and the *Qur'an*, and address 'all Muslims in the world'.<sup>78</sup> This demonstrates a sharp contrast between the perspective and approach of the ICC compared to that of the perpetrator himself.

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<sup>72</sup> *ibid* paras 9, 31, 36 and 37; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15 (17 August 2017) para 21; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Judgment on the Appeal of the Victims against the "Reparations Order") ICC-01/12-01/15-259-Red2 (8 March 2018).

<sup>73</sup> *Al Mahdi* (Judgment and Sentence) (n 71) paras 9, 31–33.

<sup>74</sup> For example, Mr Al-Mahdi delivered sermons at Friday prayers on the destruction of the property, *ibid* paras 37, 54, 81.

<sup>75</sup> ICC, The Trust Fund for Victims, 'Lesser public redacted version of "Updated Implementation Plan" submitted on 2 November 2018' ICC-01/12-01/15-291-Conf-Exp, ICC-01/12-01/15 (4 October 2019) para 30 and fn 32.

<sup>76</sup> *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of 'Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations) ICC-01/12-01/15 (12 July 2018) para 89; ICC Trust Fund for Victims, Public redacted version of 'Corrected version of Draft Implementation Plan for Reparations, With public redacted Annex I, 20 April 2018, ICC-01/12-01/15-265-Conf', 30 April 2018 ICC-01/12-01/15-265-Conf-Corr+Corr-Anx (18 May 2018) paras 243, 264–69.

<sup>77</sup> However, given that these decisions are redacted for the public, it is unclear precisely which reparation measures were granted to whom and for what reason. *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15 (4 March 2019) para 71.

<sup>78</sup> Transcript of Mr Al Mahdi's apology, available at <https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-Mahdi-Admission-of-guilt-transcript-ENG.pdf>, accessed 15 March 2020.

The situation of Sudan provides another relevant example. The ICC issued a warrant of arrest in 2009 for (now former) Sudanese President Omar Al Bashir, making him the first sitting President to be wanted by the ICC.<sup>79</sup> He is accused of crimes committed in Darfur, including genocide against the Fur, Zaghawa and Masalit groups, crimes against humanity and war crimes of pillaging and directing attacks against civilians. This situation before the Court is contentious as Sudan is not a State party to the Rome Statute, but was referred by the UN Security Council.<sup>80</sup> At the time of writing, Mr Al Bashir has not been arrested and surrendered to the ICC, despite the obligation on numerous States to cooperate with the Court and execute the arrest warrant.<sup>81</sup> For example, Jordan, a State party to the Rome Statute, failed to arrest Mr Al Bashir while he was visiting Amman in 2017 for the Summit of the Arab League. The matter of Jordan's non-cooperation came before the Court, where the issue of head of State immunity for international crimes was central.

Notably, neither Islamic law nor the Rome Statute recognises rulers or leaders as above the law. Scholars have held that heads of State and government officials are accountable under Islamic law for their conduct like everyone else.<sup>82</sup> Equally, Article 27 Rome Statute provides that the Statute applies without distinction based on official capacity. In its decision in the Jordanian matter, the Court confirmed that head of State immunity does not apply before the ICC, and that there is no customary international law recognition of head of State immunity before international courts.<sup>83</sup> The Court did not, however, refer to Islamic law, which is consistent with the position that such immunity does not apply. This is despite the fact that Jordan and Sudan have large Muslim majorities (Islam is in fact the State religion in Jordan) and formally apply Islamic law domestically.<sup>84</sup> Given the recent political events in Sudan and the fall of Mr Al Bashir, his case may shortly come before the ICC for prosecution.

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<sup>79</sup> *Situation in Darfur, Sudan* (Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-1 (4 March 2009); (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-95 (12 July 2010).

<sup>80</sup> See art 13(b) Rome Statute (n 14); UNSC Res 1593 (2005) UN Doc S/RES/1593.

<sup>81</sup> Based on the UNSC Resolution (ibid para 2), Sudan is obliged to cooperate with the Court. States Parties to the Rome Statute are similarly obliged to cooperate, see art 86 Rome Statute (n 14).

<sup>82</sup> Badar (n 6) 229–30; Badar (n 28) 430–31; Baderin (n 36) 79.

<sup>83</sup> *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir) ICC-02/05-01/09 (11 December 2017); *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09 OA2 (6 May 2019).

<sup>84</sup> See the Constitution of The Hashemite Kingdom of Jordan (1952) arts 2, 105 and 106; Interim National Constitution of the Republic of Sudan (2005) ch 1, art 5(1).

Like many other States in the region, Libya was impacted by the Arab Spring that commenced in 2011. During the ensuing conflict, the UN Security Council referred the situation of Libya to the ICC.<sup>85</sup> Based on the Prosecution's investigations, arrest warrants were issued, including for Mr Saif Al Islam Gaddafi and Mr Abdullah Al Senussi. While conceding that the case against Mr Al Senussi was inadmissible before the ICC,<sup>86</sup> the Court rejected the admissibility challenge regarding Mr Gaddafi.<sup>87</sup> In doing so, it ruled on the permissibility of amnesties for international crimes, holding them to be contrary to international law.<sup>88</sup> The Pre-Trial Chamber (PTC) arrived at this conclusion after surveying jurisprudence from around the world, including the American, African and European regional human rights systems.<sup>89</sup> However, despite Islamic law also supporting a prohibition of amnesties,<sup>90</sup> the Court did not refer to it. This is despite the fact that Islam is the State religion of Libya and source of law.<sup>91</sup>

Finally, the Office of the Prosecutor's newest investigation relates to crimes against humanity and war crimes committed in Afghanistan since 2003. Initially – and with much controversy – the PTC refused the Prosecutor's request to open an investigation into this situation in the 'interests of justice'.<sup>92</sup>

<sup>85</sup> UNSC Res 1970 (2011) UN Doc S/RES/1970.

<sup>86</sup> *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Decision on the Admissibility of the Case against Abdullah Al-Senussi) ICC-01/11-01/11 (11 October 2013); *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Judgment on the Appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi") ICC-OI/II-OI/IIOA6 (24 July 2014).

<sup>87</sup> *Prosecutor v Saif Al-Islam Gaddafi* (Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute) ICC-01/11-01/11 (5 April 2019).

<sup>88</sup> *ibid* para 77. See also the decision on appeal: *Prosecutor v Saif Al-Islam Gaddafi* (Judgment on the Appeal of Mr Saif Al-Islam Gaddafi against the Decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019) ICC-01/11-01/11 (9 March 2020) para 96.

<sup>89</sup> *Prosecutor v Saif Al-Islam Gaddafi* (Decision on Admissibility Challenge (n 87) paras 61–72. The Court also surveys the jurisprudence of the UN Human Rights Committee, the ad hoc tribunals and the Extraordinary Chambers in the Courts of Cambodia.

<sup>90</sup> Zoli, Bassiouni and Khan (n 1) 52 fn 70.

<sup>91</sup> The Libyan Constitution was removed after the Arab Spring and a new one is yet to be agreed. However, the role of Islam has been included in drafts. See for example, International Commission of Jurists, 'The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws' (2015) <https://www.refworld.org/pdfid/57ee86814.pdf>, accessed 27 March 2020.

<sup>92</sup> *Situation in the Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the

Upon appeal, the Court granted the Prosecutor's request and reversed the lower Chamber's order.<sup>93</sup> In neither of these decisions did the Court refer to or cite Islamic law. This is despite the fact that Afghanistan is formally an Islamic Republic that applies Islamic law domestically.<sup>94</sup> It is also despite the Court finding a reasonable basis to believe that crimes were committed by State actors as well as by Islamic groups like the Taliban.<sup>95</sup> This fact makes it particularly salient for the Court to consider and highlight Islamic norms prohibiting *inter alia* murder, killing of civilians, destruction of civilian property, and outrages upon personal dignity. Given Afghanistan's demographics, one can posit that a majority of the victims were Muslim. As such, an explicit link between Islamic law and the Rome Statute's condemnation of international crimes may be meaningful to the affected communities.

#### 4. WHY SHOULD THE ICC REFER TO ISLAMIC LAW?

This chapter argues that these decisions by the ICC represent missed opportunities. In all of these cases, the ICC judges failed to recognise the Islamic norms in support of their decisions and passed up the important opportunity to engage with the relevant principles of Islamic law. In so doing, the judges failed to speak directly to local Muslim communities affected by the decisions, including perhaps the defendants, victims and government officials. This could have been an effective way for the ICC to legitimate itself and buttress support for its judgments among Muslims. Studies have shown that international law does not necessarily have direct resonance with local communities, and that its acceptance and adoption can be improved by processes such as vernacularisation or by identifying local receptors.<sup>96</sup> These culturally sensitive approaches

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Islamic Republic of Afghanistan) ICC-02/17 (12 April 2019) (*Situation in Afghanistan* (Decision on Investigation)). For further analysis, see Chapter 17 in this volume.

<sup>93</sup> *Situation in the Islamic Republic of Afghanistan* (Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17OA4 (5 March 2020).

<sup>94</sup> Constitution of Afghanistan, 26 January 2004, arts 1–3.

<sup>95</sup> *Situation in Afghanistan* (Decision on Investigation) (n 92) para 64.

<sup>96</sup> See Sally Engel Merry, 'Legal Transplants and Cultural Translation: Making Human Rights in the Vernacular' in Mark Goodale (ed), *Human Rights: An Anthropological Reader* (Blackwell Publishing 2009); Tom Zwart, 'Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach' (2012) *Human Rights Quarterly* 546; Julie Fraser, 'Challenging State-Centricity and Legalism: Promoting the Role of Social Institutions in the Domestic Implementation of International Human Rights Law' (2019) 23(6) *The International Journal of Human Rights* 974.

rely on the legitimacy enjoyed by local norms and actors to promote international law as consistent with their community's values.

While principled in their respect for culture, the common reason advanced for the necessity of culturally sensitive approaches is their effectiveness in practice.<sup>97</sup> This is because people are more inclined to observe normative positions they believe to be endorsed by their own cultural traditions and not imposed by others.<sup>98</sup> International law suffers from the disadvantage that, by its nature, it is foreign in local settings. Added to this is the fact that in many States, particularly in the global South, people are suspicious of international law due to its connection with colonialism and the West.<sup>99</sup> As such, a bridge is needed to fill the gap between the international and the local. Cultural institutions like religion can serve as that bridge or nexus due to their overlapping normative orders.<sup>100</sup> Where religious norms address the same subject matter as international norms in a compatible manner, they can provide familiar narratives that are meaningful to the local community. In this way, religion can increase support for international law, promoting its local legitimacy and enhancing its observance. This in turn reinforces the universal nature of international law.

Scholars have begun to urge the ICC to employ such culturally sensitive approaches. Rather than operating in a top-down manner and expecting/demanding respect for international law, it 'must be understood in the relevant social context for its acceptability in all societies, including the Muslim world'.<sup>101</sup> Grounding the work of the ICC in Islamic law may make it 'more accessible to Muslim societies seeking historically meaningful legal mechanisms to deal with the aftermath of conflict'.<sup>102</sup> Khan advocates 'indigenising' international law to the Islamic legal context in order to secure 'greater buy-in from Muslim-majority states'.<sup>103</sup> Recalling religious norms can help ensure

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<sup>97</sup> Fraser (n 96) 980.

<sup>98</sup> An-Na'im (n 65) 431.

<sup>99</sup> Antony Anghic, 'International Human Rights Law and a Developing World Perspective' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 112. See also An-Na'im's critique of neo-colonialism: Abdullahi Ahmed An-Na'im, 'Editorial Note: From the Neocolonial "Transitional" to Indigenous Formations of Justice' (2013) 7 *The International Journal of Transitional Justice* 197.

<sup>100</sup> Co-existing normative ordering systems are known as 'legal pluralism' in the literature. For further analysis see Chapter 16 in this volume.

<sup>101</sup> Baderin (n 36) 69.

<sup>102</sup> Zoli, Bassiouni and Khan (n 1) 52.

<sup>103</sup> Siraj Khan, 'Arab and Islamic States' Practice: The Shari'ah Clause and its Effects on the Implementation of the Rome Statute of the International Criminal Court' in Gray (n 5) 148.

that the Court's judgments are communicated and understood in culturally appropriate ways, which not only facilitates their acceptance, but also pays due respect to cultural diversity.<sup>104</sup> Going beyond this, Al-Dawoody notes the ability of Islamic law to influence the behaviour of Muslims and to promote their compliance with IHL<sup>105</sup> – potentially preventing the commission of international crimes.

Zoli, Bassiouni and Khan compellingly argue that greater engagement with Islamic law is also necessary to 'counter contemporary extremist and instrumentalist uses of Islamic norms to justify political violence'.<sup>106</sup> As noted above, a majority of the conflicts today are in the Muslim world where non-State armed groups like Boko Haram and ISIS use Islam to justify their violence.<sup>107</sup> Therefore, it may be advantageous for the ICC to refer to Islamic law not just to bolster the legitimacy of its decisions in Muslim communities, but also to counter extremist views of Islamic law and to promote alternative interpretations in line with international law. While the ICC may play a role here, the actual exegesis, interpretation and contestation of Islamic law must be an internal process performed by qualified experts – and not undertaken by outsiders.<sup>108</sup> This is important in order to ensure the authenticity of the process and to preclude accusations of manipulation.<sup>109</sup> However, as a powerful tool, religion 'should not be left only to those who advocate violence in its name'.<sup>110</sup>

As such, another benefit to the ICC referring to Islamic law in its judgments would be the resulting cross-cultural dialogue.<sup>111</sup> Both Islamic and international criminal law are characterised by their dynamic and evolving nature, and as plural legal systems with overlapping norms, they can interact and

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<sup>104</sup> Julie Fraser, 'In Search of New Narratives: The Role of Cultural Norms and Actors in Addressing Human Rights Contestation' in Rosemarie Buikema, Antoine Buyse and Antonius Robben (eds), *Cultures, Citizenship and Human Rights* (Routledge 2019) 187.

<sup>105</sup> Al-Dawoody (n 21) 1000. Noting the significant role that religion plays in influencing behaviour, Evans claims that '[e]ven a pragmatic, secular advocate of international humanitarian law may see strategic advantages to the selective use of aspects of religious traditions to bolster compliance and commitment to the laws of war'. Carolyn Evans, 'The Double-Edged Sword: Religious Influences on International Humanitarian Law' (2005) 6 *Melbourne Journal of International Law* 3.

<sup>106</sup> Zoli, Bassiouni and Khan (n 1) 38.

<sup>107</sup> Al-Dawoody (n 21) 996.

<sup>108</sup> For example, Muslim feminists are already engaged in such processes regarding gender equality within Islam. Outsiders may play only a limited role in this process. See Fraser (n 96) 980–82.

<sup>109</sup> *ibid* 980.

<sup>110</sup> Evans (n 105) 32.

<sup>111</sup> An-Na'im advocates this type of dialogue to promote universal human rights, see An-Na'im (n 65).



influence one another. This would be facilitated by the Court engaging with Islamic norms and becoming a site of dialogue. While van Engeland argues that Islamic law is too heterogeneous and diverse to participate meaningfully in any such conversation,<sup>112</sup> this position is rejected. The cross-cultural dialogue proposed is not limited or restricted but can take place at many levels, in many forums, locations and languages. The meaning and compatibility of norms may be debated orally or in submissions before the ICC, by government officials in a ministry, by Islamic jurists in mosques, as well as by academics in books or on Twitter.

Finally, any references by the ICC to Islamic law in its jurisprudence will also help to make international law more international.<sup>113</sup> While religious teachings have been used as a basis for international law, they are often given as an historical source and then disregarded in contemporary discussions.<sup>114</sup> Khan laments the discernible pattern more broadly of excluding ‘non-Western legal traditions in the debates and drafting of international conventions and treaties’.<sup>115</sup> International law should be inclusive and reflective of its diverse constituents in order to be seen as legitimate around the world. The ICC could, where relevant, refer to norms of Islamic law or to the work of recognised Islamic scholars in its decisions, identifying how it is being used juridically and for what purpose. Precedent exists for such an approach: Evans gives the example of judgments by the International Court of Justice.<sup>116</sup> If the ICC were to refer to Islamic law in its application of international criminal law, it could ‘add moral legitimacy and cross-cultural relevance to those rules’.<sup>117</sup>

While such inclusivity is relevant generally, it is particularly important in contemporary times given the world’s increasing religiosity and the projected growth of Islam. Such an approach may help to build public support among

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<sup>112</sup> van Engeland (n 39) 93.

<sup>113</sup> Scholars have questioned the international nature of international law, see Kurt Gaubatz and Matthew MacArthur, ‘How International Is “International” Law’ (2001) 22(2) *Michigan Journal of International Law* 239; Anthea Roberts, *Is International Law International?* (OUP 2017).

<sup>114</sup> Evans (n 105) 2.

<sup>115</sup> Khan (n 103) 170. He notes, however (149), the rare exception of *Kefala* in art 20 of the Convention on the Rights of the Child, which was the first time an exclusively Islamic concept was recognised in a binding international instrument. See also Usang Assim and Julia Sloth-Nielsen, ‘Islamic Kafalah as an Alternative Care Option for Children Deprived of a Family Environment’ (2014) 14 *African Human Rights Law Journal* 322, 324–25. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>116</sup> See *United States Diplomatic and Consular Staff in Tehran (US v Iran)* [1980] ICJ Rep 2 in Evans (n 105) 18–19.

<sup>117</sup> *ibid* 12.

Muslims for the ICC, as well as to engage more Muslim-majority States to join the Rome Statute system. Currently, as noted above, few States from Asia and the Arab world are a party to the Statute. Referring to the relevant principles of Islamic law as appropriate in their decisions may help engage Muslim-majority States at an international level and also engage individual Muslims and their communities implicated in cases or affected by international crimes. This may have the effect of enhancing the legitimacy of both the ICC and international law more broadly. This question of legitimacy is particularly relevant to the situations before the ICC of Sudan and Libya, as they were referred by UN Security Council despite not being parties to the Rome Statute.

## 5. CONCLUSIONS AND RECOMMENDATIONS

This chapter has argued that the ICC should refer to Islamic law as appropriate in relevant cases before it in order to legitimate itself and buttress support for its judgments among Muslim communities. This is based on the broad overlap of norms between the two plural bodies of law, which are largely compatible or capable of compatible interpretation. It is also based on an analysis of the Rome Statute, notably Article 21, and the Court's practice of citing relevant and authoritative scholars in its jurisprudence. This chapter is critical of the Court for having missed the opportunities to refer to complementary Islamic law thus far in the situations from Mali, Sudan, Libya and Afghanistan. It argues that such an approach will help connect the often vague and foreign norms of international criminal law with local communities, building support for the ICC and boosting its perceived legitimacy. As such, the chapter concludes by making some brief recommendations to the Court.

First, while ICC judges may not have the requisite knowledge or authority regarding Islamic law, they could invite expert testimony in their cases to advise them. Similarly, they could invite Islamic scholars to make *amicus curiae* submissions. The judges could then consider this information and cite as appropriate recognised experts in Islamic law in their judgments. Islamic jurists should also be encouraged to join the ICC's List of Counsel – similar to the campaign that was run to recruit more African female lawyers. The ICC's Registry could also refer to Islamic law norms in their outreach with victims and affected communities. The judges as well as the TFV could refer to Islamic norms regarding reparation. In the design of reparation plans, Islamic leaders could be consulted and Islamic practices for reconciliation adopted, to the extent that they are not already. Finally, the ICC could promote scholarship on Islamic law and international criminal law, by hosting or participating in conferences or events on this topic.

As discussed, the ICC already has several situations before it from Muslim-majority States and may soon be confronted with many more. For

example, the Prosecutor has recently been authorised to open an investigation into Bangladesh/Myanmar, and situations from Palestine, Iraq and Nigeria are under preliminary examination. Other situations might foreseeably come before the Court, for example from Syria or Yemen. Let us work together to ensure that the ICC does not miss these further opportunities.