

Islamic Law and War Crimes Trials: The Possibility and Challenges of a War Crimes Tribunal against the Assad Regime and ISIL

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Islamic Law and War Crimes Trials: The Possibility and Challenges of a War Crimes Tribunal Against the Assad Regime and ISIL

D. Julian Veintimilla†

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Introduction

The modern Middle East faces a number of grave political and military crises that are not only causing tremendous damage to the social order in the region, but also coming at an increasingly high human cost.¹ In particular, some of the most active conflicts that are responsible for the greatest loss of life are those raging in Iraq and Syria.² A number of actors, both individuals and political/military systems in the area, are directly responsible for engendering the mass destruction of life and property that have been rampant for years now.³ Both the Assad regime and the Islamic State of Iraq and the Levant (ISIL, also known as ISIS) are responsible for those conflicts and continue to perpetrate numerous war crimes and crimes against humanity under international law.⁴ Historically, we have seen occasions where governments and individuals that violated international law have been brought before international tribunals to face charges for their crimes.⁵ The first significant example of this occurred at the Nuremberg Trials after World War II⁶ with the prosecutions of a number of individuals who committed war crimes and crimes against humanity under the Nazi regime. Since then, a coalition of countries have established a number of other international tribunals, varying in nature, for the purpose of prosecuting violators of international law.⁷ With such clear and gross violations of international laws, norms, and customs taking place in Iraq and Syria today, it makes sense to wonder about the potential establishment of some sort of international tribunal to prosecute those currently active in the region who are guilty of war crimes and crimes against humanity. The question then arises as to what such a tribunal would look like and how it might operate.

1. See generally U.N. Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014)*, U.N. Doc. S/2015/962 (Dec. 11, 2015); *Civil War in Syria*, COUNCIL ON FOREIGN REL. (updated Apr. 8, 2016), <http://www.cfr.org/global/global-conflict-tracker/p32137#1/conflict/civil-war-in-syria>; Zachary Laub, *The Islamic State*, COUNCIL ON FOREIGN REL. (Mar. 22, 2016), <http://www.cfr.org/iraq/islamic-state/p14811>.

2. See generally *Civil War in Syria*, *supra* note 1; Laub, *supra* note 1.

3. See generally *Civil War in Syria*, *supra* note 1; Laub, *supra* note 1.

4. Joshua Keating, *Why It's So Hard to Prosecute ISIS for War Crimes*, SLATE (Apr. 8, 2015), http://www.slate.com/blogs/the_slatest/2015/04/08/isis_and_the_icc_why_it_s_will_be_tough_to_prosecute_the_islamic_state_for.html.

5. See generally United States Holocaust Memorial Museum, *War Crimes Trials*, HOLOCAUST ENCYCLOPEDIA, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005140> (last visited June 24, 2016).

6. See Christopher "Kip" Hale, *Does the Evolution of International Criminal Law End with the ICC? The "Roaming ICC": A Model International Criminal Court for a State-Centric World of International Law*, 35 DENV. J. INT'L L. & POL'Y 429, 442 (2007).

7. See *id.* at 431-32.

Because nation-states are responsible for forming international tribunals, we must look at the states that would be involved in such a process in the Middle East to form an idea as to what a Middle Eastern international tribunal would look like.⁸ Indeed, it is possible that Western countries that are active in the region, such as the United States or certain European powers, might play a strong role in the implementation of any such international tribunal. It is, however, also possible that Middle Eastern states themselves could seek to formulate and implement an international tribunal without any sort of overly-dominating interference from the West. Regardless of whether this happens in the context of the current ongoing conflicts in the Middle East or not, actors in the Middle East might well desire to create such a tribunal at some point. Thus, looking at the political and legal landscapes of these nations might be useful in understanding the kind of international tribunal that might be formed in the area.

Although the different governmental regimes in the Middle East vary greatly in their legal and political composition,⁹ one common and highly salient demographic aspect that ties them together is that almost every single country in the Middle East is a Muslim-majority state.¹⁰ Indeed, the degree that Islam and Islamic law influence these respective governments is not uniform.¹¹ However, a number of the most powerful and influential states in the region, including the Islamic Republic of Iran and the Kingdom of Saudi Arabia, utilize Islamic (i.e. Shari'a) law as the basis for their respective legal codes.¹² Because these states are such powers in the region, it would make sense that one of them might be instrumental in shaping an upstart international tribunal to prosecute war criminals. Further, those states that play an active role in the formation of such tribunals often bring their own legal perspectives and systems into consideration in deciding how to construct those tribunals.¹³ As a result, the principles of Islamic law would likely influence or govern such Middle Eastern international tribunals. Furthermore, the influence of Islamic law on the national legislation and jurisprudence of Muslim states is growing,¹⁴ making the chances that it will have a role to play in any such tribunal all the more likely.

It is important to emphasize that the goal of this Note is not to make a value judgment about Islamic law, or to argue that Islamic law should or should not be the governing law of any war crimes tribunal. Rather, this

8. See Michael J. Kelly, *Islam & International Criminal Law: A Brief (In)Compatibility Study*, 1 PACE INT'L L. REV. ONLINE COMPANION 1, 6 (2010).

9. See *id.* at 6-7.

10. See *id.* at 6.

11. *Id.* at 8-10.

12. *Id.* at 8, 14; M. Raquibuz Zaman, *Economic Justice in Islam, Ideals and Reality: The Cases of Malaysia, Pakistan, and Saudi Arabia*, in ISLAMIC IDENTITY AND THE STRUGGLE FOR JUSTICE 47, 59 (Nimat Hafez Barazangi, M. Raquibuz Zaman & Omar Afzal eds., 1996).

13. Kelly, *supra* note 8, at 6.

14. Markus P. Beham, *Islamic Law and International Criminal Law*, in 7 ISLAM AND INTERNATIONAL LAW: ENGAGING SELF-CENTRISM FROM A PLURALITY OF PERSPECTIVES 349, 349 (Marie-Luisa Frick & Andreas Th. Müller eds., 2013).

Note simply seeks to analyze the possibility for such, and to examine the role that Islamic law might play in the formation of an international tribunal in the Middle East to prosecute regional war criminals. At the outset, Section I of this Note will deal with the preliminary matter of examining the topic of Islamic law generally. Of course, Islamic law is not a monolithic jurisprudential system; different Islamic legal scholars in different countries have distinctive interpretations and applications of Islamic law,¹⁵ which accordingly might cause differences in the respective establishments of international tribunals. Thus, this Note will examine different areas of Islamic legal scholarship. Section II will discuss the feasibility of an international tribunal based on Islamic law, since there is some question as to whether international tribunals are compatible with Islamic law. Section III will look to past international tribunals to determine what the formation and composition of an international tribunal in the modern Middle East might look like. Section IV will look at the International Criminal Court, examining its potential for conducting a tribunal in the Middle East in light of the ongoing conflicts in Iraq and Syria. Further, Section IV will examine the various actors who might be responsible for war crimes and crimes against humanity, and assess their culpability under an international tribunal governed by Islamic law. Finally, Section V will address the issue of what an actual Islamic war crimes tribunal would look like. Ultimately, this Note will conclude with the determination that a Western-style international war crime tribunal in the Middle East to prosecute the crimes of the Assad regime and ISIL would be difficult to establish, though not impossible. Given the difficulties posed to the formation of any such tribunal, either a hybrid-international tribunal or the International Criminal Court would be the type of forum most likely to be effective, and that Islamic law could serve, at least in some capacity, as the substantive law of such a tribunal. Furthermore, this Note will also argue that although an Islamic war crimes tribunal might be capable of adopting different Islamic legal systems as its choice of law, international involvement should continue to ensure upholding international legal standards and effectively utilizing Islamic law to try violators of international criminal law.

I. An Overview of Islamic Law

A. Key Terms and Concepts of Islamic Law

To understand the interaction between Islamic law and international human rights or criminal law, we must understand what Islamic law is, its sources, and how it functions. There are five primary sources of Islamic law.¹⁶ The first is the holy book of Islam, the Qur'an, which Muslims consider to be infallible under Islamic law.¹⁷ The second is the Sunnah, which encompasses the "traditional interpretive guides to the Qur'an functioning

15. See Kelly, *supra* note 8, at 14.

16. See *id.* at 10.

17. *Id.*

as a living example of Muhammad.”¹⁸ The third is 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.”¹⁹ The Fiqh also encapsulates the fourth and fifth sources of Islamic law: the Qiyas and the Ijma.²⁰ The Qiyas are the analogical reasoning of Islamic jurists,²¹ while the Ijma is juristic consensus.²² Some scholars argue, however, that the Fiqh “inappropriately blends revealed and unrevealed truth,” and consequently 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.”²³ In other words, the Qur’an and Sunnah comprise divinely revealed Shari’a, while the Fiqh embodies the human interpretation of Shari’a, and the two bodies together form the whole of Islamic law.²⁴

Furthermore, this is not where the complexities end when it comes to the Fiqh. As a body of jurisprudence that continues evolving with the work of scholars, the Fiqh is not subject to rigid codification.²⁵ Although this might seem to parallel common law, the Fiqh is much less readily ascertainable than common law because the Fiqh splits into a number of different schools of thought that are largely divided across geographic and sectarian lines across the Muslim world.²⁶ Furthermore, the Fiqh has received criticism for being insufficient to meet the needs of modern Muslim communities, with some commentators pointing to its adherence to strict and socially harmful fundamentalism.²⁷

Within Islamic law, there are three general classes of crimes: the hudud, qisas, and ta’zir.²⁸ The hudud are crimes against God.²⁹ According to the Qur’an, the hudud encompasses actions such as sexual intercourse outside of wedlock, alcoholism, and apostasy.³⁰ Traditionally, hudud crimes have incurred very heavy penalties, though this has changed somewhat in modern times.³¹ The qisas are crimes against individuals and include such acts as homicide and “crimes against mankind.”³² Finally, the ta’zir are crimes against the interest of the public, which include corruption, bribery, and certain kinds of falsifications.³³

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* 37 (Ian Brownlie & Vaughan Lowe eds., 2003).

23. Kelly, *supra* note 8, at 11.

24. BADERIN, *supra* note 22, at 34.

25. Kelly, *supra* note 8, at 11.

26. *Id.*

27. Ali Khan, *The Reopening of the Islamic Code: The Second Era of Ijtihad*, 1 U. ST. THOMAS L.J. 341, 341 (2003-04).

28. FARHAD MALEKIAN, *PRINCIPLES OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE SEARCH* 344-46 (Eugene Cotran, Mark Hoyle & Martin Lau eds., 2d ed. 2011).

29. *Id.* at 344.

30. *Id.* at 345.

31. *See id.*

32. *Id.*

33. *Id.* at 346.

B. Varying Application of Islamic Law Among Muslim-Majority States

Across the spectrum of Muslim-majority countries, the implementation of Islamic law varies greatly, particularly within the sphere of criminal law.³⁴ Some countries, such as Pakistan, operate under an essentially Westernized legal system, using Shari'a only in select circumstances.³⁵ However, in other countries, such as Saudi Arabia, Shari'a serves as the sole basis of their legal systems, with the Qur'an and Sunnah serving as the national constitution.³⁶ Similarly, other Gulf states and Iran have classical Shari'a systems with Islamic law forming the basis of national law.³⁷ Furthermore, not all nation-states uniformly implement Shari'a; in Nigeria, for example, different states have different criminal law systems, with some implementing Shari'a while others do not.³⁸ However, not every Muslim-majority country integrates Shari'a into its legal system; Turkey is one such country, having abolished Shari'a law with Atatürk's reforms in 1924.³⁹

Before proceeding further, it may be helpful to clarify what precisely is meant by "Muslim/Islamic state." It is not only official Islamic Republics that are in fact Islamic; many states, though not officially Islamic Republics, have governments and societies with ideologies that are deeply rooted in Islamic values and law.⁴⁰ Thus, from here forward, this note will define Muslim/Islamic/Muslim-majority states as those states who hold membership in the Organisation of the Islamic Conference (OIC), the mission of which is the "promotion of Islamic spiritual, ethical, social and economic values among the member states."⁴¹ This note will also include Syria in the category of "Muslim/Islamic state," despite its current suspension from the OIC.⁴²

II. The Interaction and Compatibility of Islamic and International Law

A. Islam and the West: Was Huntington Right?

Any analysis of criminal law on the global level requires an examination of international human rights law. International human rights law

34. Kelly, *supra* note 8, at 14.

35. *Id.*

36. Zaman, *supra* note 12, at 59.

37. JAN MICHEL OTTO, SHARIA AND NATIONAL LAW IN MUSLIM COUNTRIES TENSIONS AND OPPORTUNITIES FOR DUTCH AND EU FOREIGN POLICY 8-9 (2008).

38. See HAUWA IBRAHIM & PRINCETON N. LYMAN, REFLECTIONS ON THE NEW SHARI'A LAW IN NIGERIA, AFRICA POLICY STUDIES PROGRAM AT THE COUNCIL ON FOREIGN RELATIONS, at ii (2004).

39. See IOANNIS N. GRIGORIADIS, INSTILLING RELIGION IN GREEK AND TURKISH NATIONALISM: A "SACRED SYNTHESIS" 63 (2013); OTTO, *supra* note 37, at 9.

40. BADERIN, *supra* note 22, at 8.

41. *Id.*; see Charter of the Organisation of the Islamic Conference, Preamble, Mar. 14, 2008, 914 U.N.T.S. 111.

42. Al Arabiya with Agencies, *Organization of Islamic Cooperation suspends Syria's membership*, AL ARABIYA NEWS CHANNEL (Aug. 13, 2012), <http://english.alarabiya.net/articles/2012/08/13/232088.html>.

has largely been a product of Western nations.⁴³ Within the West, many have often been skeptical that Islamic law adequately deals with human rights, particularly given the political and human rights problems, as well as particular methods of criminal punishment, that have pervaded certain Islamic legal systems globally.⁴⁴ Samuel P. Huntington's seminal article *The Clash of Civilizations?* comes to mind, wherein the political scientist outlined his theory that in the twenty-first century, "the dominating source of conflict will be cultural."⁴⁵ Huntington argues that Western concepts "differ fundamentally from those prevalent in other civilizations," and that certain Western values and features such as individualism, liberalism, constitutionalism, human rights, equality, liberty, the rule of law, democracy, free markets, and the separation of church and state, "often have little resonance" in societies outside the West.⁴⁶ Huntington declares that religion, Islam specifically, is the controlling force of culture in Muslim-majority countries.⁴⁷ He posits an "Islamic civilization" that lies in opposition to the West, noting that struggles "between Western and Islamic civilizations" have gone on roughly since the inception of Islam itself.⁴⁸

Some scholars counter that such views are obsolete, and that there is no reason why a modern interpretation and application of Islamic law is incompatible with international human rights law.⁴⁹ Some go even further, implying that, if anything, international human rights law follows in the footsteps of Islamic law; since many of the principles of public international law articulated in the post-World War II era had already been enumerated within Islamic law fourteen-hundred years prior, and that human rights law within Islamic law is actually juridically stronger than some Western standards of human rights law.⁵⁰

B. Differences in International and Islamic Law on Issues of Compatibility

However, what is incontrovertible is that there are non-trivial differences between Islamic law and international human rights law.⁵¹ A clear example of this is the classification of hudud crimes in Islamic law.⁵² International human rights law recognizes nothing that would parallel this category of offenses, and offers no justification for why actions that would qualify as hudud crimes should merit punishment.⁵³ Indeed, even scholars who view international human rights law and Islamic law as reconcilable acknowledge that tensions arise within these two realms over the

43. BADERIN, *supra* note 22, at 10.

44. *Id.* at 10-11.

45. Samuel P. Huntington, *The Clash of Civilizations?*, 72 *FOREIGN AFF.* 22, 22 (1993).

46. *Id.* at 40.

47. *See id.* at 29-35.

48. *Id.* at 31.

49. *See* MALEKIAN, *supra* note 28, at 114.

50. *Id.*

51. *See* BADERIN, *supra* note 22, at 6.

52. *Id.* at 79.

53. *Id.* at 80.

rendering of judgments and punishments for the commission of hudud offenses.⁵⁴ Scholars such as Abdullahi Ahmed An-Na'im, however, have argued for the application of a concept called "neo-*ijtihad*," which claims that "Shari'ah is merely a level of Islam best suited to the needs . . . of a previous stage of human development,"⁵⁵ and that "new principles should be developed in order to address the needs and expectations of this day and age."⁵⁶ Such submissions for reform would call for a cessation to the punishment of hudud crimes under Shari'a law, but other scholars have not accepted these appeals, with some arguing against what An-Na'im proposes.⁵⁷

Given the inconsistencies between international human rights law and Islamic law, one might wonder whether these inconsistencies inhibit certain interactions between the two systems. Indeed, there is a question as to whether such inconsistencies might pose an issue for the utilization of Islamic law within war crimes tribunals. Some research suggests that significant aspects of criminal law within Shari'a, those which create a noteworthy distinction between Western law and Islamic law, make it less likely that states that incorporate Shari'a into their criminal law systems to a great degree will participate in international criminal law procedures.⁵⁸

C. Acceptance of International Law in Muslim Societies

Aside from systemic incompatibilities, evidence also shows that many individuals within Muslim communities may reject the implementation of international legal norms as the proper basis for imposing criminal liability under any circumstances.⁵⁹ Although there is no consensus that Islamic law totally precludes the application of international human rights law,⁶⁰ there have been trends within the Islamic legal world to promote Islamic human rights law as the proper system to adjudicate such issues, with some Muslims protesting any calls by the West to have international human rights applied universally.⁶¹ It is important to note, however, that political happenings have engendered many of these trends.⁶² For example, certain Islamic rights enumerated in the Cairo Declaration, a docu-

54. *Id.*

55. Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12 B.C. INT'L & COMP. L. REV. 29, 56 (1989).

56. *Id.*

57. See Matthias Cernusca, *Islamic Criminal Procedure and the Principle of Complementarity of the International Criminal Court*, in 7 ISLAM AND INTERNATIONAL LAW: ENGAGING SELF-CENTRISM FROM A PLURALITY OF PERSPECTIVES 367, 370-71 (Marie-Luisa Frick & Andreas Th. Müller eds., 2013).

58. Kelly, *supra* note 8, at 11.

59. See *The World's Muslims: Religion, Politics, and Society: Chapter 1: Beliefs About Sharia*, PEW RESEARCH CENTER (Apr. 30, 2015), <http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-beliefs-about-sharia/>.

60. 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, 309 (1994).

61. The Cairo Declaration was a direct response to the Universal Declaration of Human Rights, and it contained a great degree of Shari'a law. *Id.* at 401.

62. See Kelly, *supra* note 8, at 18.

ment drafted as a direct response to the Universal Declaration of Human Rights and which contains a great degree of Shari'a law,⁶³ were created by local leaders as a means of engendering political support for themselves. As such, there are more factors at work than just Islam that have led to these anti-internationalist trends.⁶⁴

Regardless, the motivation for such trends is largely irrelevant. What really matters is the existence of such trends. If such trends dominate discussions within the Islamic legal community, it would seem to make it more likely that Islamic societies would reject international human rights law as the correct system for adjudicating matters of criminal law. However, the motivation for promoting these trends does become relevant in regards to the matter of whether they are either fixed or transient. It is possible that politics could change and force a transformation in these trends themselves, whereas such trends would almost certainly be much more likely to be permanent and immutable if the views embodied in these trends were endemic to Islamic culture. Thus, because such trends appear to be politically motivated, there is no guarantee that they will persist indefinitely, since politics are always subject to change. It is therefore possible that such trends could reverse, leaving open the possibility that the Islamic legal world could become more receptive to the application of international criminal law.

D. Factors That Both Challenge and Facilitate the Compatibility of International and Islamic Law

Apart from politically motivated calls by some to reject the implementation of international human rights law in Islamic societies, there are other factors in Islamic law that cause some to believe in the incompatibility of Shari'a and international criminal law.⁶⁵ Professor Michael Kelly lists a number of such factors, including the multitude of Shari'a schools of thought across the Muslim world, the difficulty in designing international tribunals to accommodate Muslim traditions, and the effect of tribalism in engendering disdain for foreign interference in local law.⁶⁶ Nonetheless, Kelly also states that "the internationalization of criminal law . . . has gained traction since the end of the Cold War."⁶⁷ On top of this, Kelly further notes that certain Muslim societies will be unable to avoid dealing with current issues in a comprehensive way, given the sheer degree of their effect and importance in the field of human rights law.⁶⁸ In sum, although factors do exist in the realm of Islamic law that might interfere with the application of international criminal law in Islamic jurisdictions, the combination of a number of relevant factors—the possibility of political changes reversing the trend of denouncing international human rights law

63. *Id.*

64. See Mayer, *supra* note 60, at 401-02.

65. Kelly, *supra* note 8, at 23.

66. *Id.*

67. *Id.* at 19.

68. See *id.* at 21.

imposition in Muslim societies, the ever-increasing globalization of international law, and the sheer need for Muslim societies to address human rights concerns in an effective way—at least potentially makes the application of international criminal law in Muslim societies possible. Furthermore, although there is some degree of collision between Islamic law and international human rights, the fact that there appears to be a “general acceptance of a number of core crimes, which are also held to constitute *jus cogens*, show[ing] that there is a sense of ‘overlapping-consensus’ . . . regarding some fundamental human rights” supports the aforementioned proposition.⁶⁹ Consequently, this leaves open the possibility of war crimes tribunals functioning in nations operating under Shari’a legal systems.

Nonetheless, although the confluence of Islamic and international law in the form of a war crimes tribunal may be possible, a number of challenges still remain. Even progressive or “reformist” scholars such as Abdullahi Ahmed An-Na’im have conceded that the large-scale trend in the Muslim world has not been favorable towards human rights.⁷⁰ Furthermore, from an institutional perspective, the participation of Muslims in the international legal community has not been as high as might otherwise be helpful in Islamic/international legal integration.⁷¹ Relatively few judges from Muslim nations have formed the bodies of international tribunals,⁷² and of the eighteen judges of the International Criminal Court, only one is from a dominantly-Muslim country (Nigeria).⁷³ Thus, to realize the possibility of a war crimes tribunal organized under Islamic law, the architects of such a tribunal will need take into account all of these challenges, and construct the tribunal in such a way as to enable it to deal with them effectively.

III. War Crimes Trials by Type and Application

A. Brief History on War Crimes Tribunals and Their Different Forms

Given the tensions and difficulties that would arise in establishing a war crimes tribunal in nations that use Islamic law as the basis for their criminal law system, it would be helpful to analyze different types of war crimes tribunals that have been created in the past to see how best to create such a tribunal in Islamic societies today. War crimes tribunals primarily prosecute three specific crimes: crimes against humanity, genocide, and war crimes.⁷⁴ A fourth crime tried at Nuremburg and Tokyo, the crime of aggression, has never been tried since and remains essentially an inchoate crime.⁷⁵ The oldest model of such tribunals is the ad hoc tribunal, exam-

69. Beham, *supra* note 14, at 364.

70. *Id.* at 361.

71. *Id.* at 363.

72. *Id.* at 361.

73. *Current Judges - Biographical Notes*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/judges.aspx (last visited June 24, 2016).

74. Kelly, *supra* note 8, at 20.

75. *Id.*

ples of which can be seen in the cases of Yugoslavia and Rwanda.⁷⁶ These two tribunals were designed to function only temporarily, and around narrow subject-matter and territorial jurisdiction.⁷⁷ However, one feature that many observers have seen as a weakness of the ad hoc model is the lack of investment or interest the tribunals tend to have in the local communities where the trials take place.⁷⁸ Also, fashioning such tribunals from whole cloth has been shown to, at times, come at a prohibitively high cost.⁷⁹

Since the inception of war crimes tribunals, other models besides the ad hoc form have developed.⁸⁰ One such model is the hybrid tribunal (also known as the mixed or internationalized tribunal).⁸¹ Such tribunals tend to use a fusion of both domestic and international law.⁸² Examples of countries that have implemented such hybrid models are Sierra Leone and Cambodia,⁸³ though in the latter case political issues encumbered the efficacy of the tribunal.⁸⁴

Aside from the ad hoc and hybrid models, both of which were created to serve as temporary bodies, there now also exists a permanent body capable of hearing cases of international criminal law: the International Criminal Court (ICC).⁸⁵ The ICC serves as a forum to prosecute “the *most serious crimes* of concern to the international community”⁸⁶ when local courts are either incapable or unwilling to do so themselves.⁸⁷ Specifically, the court has jurisdiction over the same four categories of international crimes listed above that war crimes tribunals typically prosecute.⁸⁸ It also acts as a deterrent against would-be human rights violators, to prevent them from acting with total impunity under the presumption that they would face no punishment for their crimes.⁸⁹

76. *Id.* at 19; see SARAH WILLIAMS, *HYBRID AND INTERNATIONALISED CRIMINAL TRIBUNALS: SELECTED JURISDICTIONAL ISSUES 3* (Mohammed Ayat et al. eds., 2012).

77. Kelly, *supra* note 8, at 19.

78. *Id.*

79. James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 *FORDHAM INT'L L.J.* 616, 616 (2005).

80. WILLIAMS, *supra* note 76, at 4.

81. *Id.* at 4-5.

82. *Id.* at 5.

83. Kelly, *supra* note 8, at 19-20.

84. See generally Susan Postlewaite, *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.

85. Ashley Joy Stein, *Reforming the Sentencing Regime for the Most Serious Crimes of Concern: The International Criminal Court Through the Lens of the Lubanga Trial*, 39 *BROOK. J. INT'L L.* 521, 523-24 (2014).

86. *Id.* at 521.

87. Kelly, *supra* note 8, at 20.

88. Rome Statute of the International Criminal Court arts. 5-8, July 17, 1998, 2187 U.N.T.S. 3.

89. See Cheryl K. Moralez, *Establishing an International Criminal Court: Will it Work?*, 4 *DEPAUL INT'L L.J.* 135, 136 (2000).

B. The Wilāyah al-Mazālim: A Court for all the Muslim World

In terms of the specific forms of war crimes tribunals that could actually materialize in the Muslim societies of the Middle East, there are a number of possibilities. One novel proposal offered by Professor Mashood Baderin is the establishment of a “regional enforcement organ” similar to a tribunal known as the *Wilāyah al-Mazālim*, which existed in the days of the Islamic Empire and heard complaints and grievances “with inter-provincial jurisdiction throughout the Islamic Empire to redress any alleged violation of individual rights by State officials.”⁹⁰ On top of the establishment of such a court, Baderin stresses the importance of a fully binding Islamic Human Rights Covenant, which he lists as an essential factor in making such a court truly efficacious, given that the Cairo Declaration is both non-binding from a legal perspective and also lacking in many indispensable rights.⁹¹ Baderin goes on to further lay out his vision as to what such a tribunal would look like:

The proposed regional enforcement organ can . . . [have] jurisdiction to adjudicate on allegations of human rights violations against any of the OIC Member States, and also to interpret the scope of the rights guaranteed under the present OIC Cairo Declaration on Human Rights in Islam, and any subsequent binding Covenant, and also rights guaranteed under the *Shari’ah* in general. The Court would be composed of highly qualified Islamic law jurists not only learned in Islamic jurisprudence, but also conversant with international human rights law and jurisprudence. That would provide a definite and unified Islamic parameter for determining the scope of human rights within the application of Islamic law by Muslim States.⁹²

Baderin further states that the proposed *Mazālim* court should be able to accommodate different schools of Islamic legal thought and should have “compulsory jurisdiction for individual complaints against human rights violations in the OIC Member states,” so as to holistically promote human rights in the Muslim world.⁹³ However, Kelly notes that while the idea of such a court may seem attractive, the sheer level of divergence among OIC states compared to the unity that existed under the Islamic Empire renders the practicability of establishing a *Mazālim* court today nearly nonexistent.⁹⁴

C. Hybrid Tribunals: The Examples of the Special Tribunal for Lebanon and the Iraqi High Tribunal

Given the concerns over incompatibilities between Islamic law and international criminal law, some have proposed the creation of “a hybrid international/Islamic criminal court.”⁹⁵ Such a court would function like other hybrid war crimes tribunals by combining elements of both domestic

90. BADERIN, *supra* note 22, at 229.

91. *Id.*

92. *Id.* at 230.

93. *Id.*

94. Kelly, *supra* note 8, at 24.

95. *Id.* at 23.

(in this case, Islamic) and international law. Hybrid models such as this have been established in the Middle East in the past. The Special Tribunal for Lebanon (STL) commenced operations in 2009 with the goal of prosecuting those who planned and ordered the 2005 assassination of former Lebanese Prime Minister Rafiq Hariri.⁹⁶ Early on, the idea of the STL operating as a wholly internationalist body was rejected in favor of a “mixed” tribunal incorporating the law of Lebanon, so as not to “remove Lebanese responsibility for seeing justice done regarding a crime that primarily and significantly affected Lebanon.”⁹⁷ In 2008, Lebanese authorities detained four suspects and handed them over to STL custody, with the first formal indictment coming down in 2011.⁹⁸ The STL’s first trial, *Prosecutor v. Ayyash et al.*, commenced on January 16, 2014.⁹⁹

Another example of a hybrid tribunal is the Iraqi High Tribunal (IHT) against Saddam Hussein.¹⁰⁰ Hussein assumed power of Iraq in 1979 and engaged in activities that violated international laws and norms.¹⁰¹ He initiated a purge against those within his political party, ordered tortures, and targeted minority groups disloyal to his government.¹⁰² Hussein also ordered the gassing of between 4,000 and 5,000 Kurds in Halabja as part of the Anfal campaign.¹⁰³ Estimates suggest that the Iraqi government orchestrated the killing of over 500,000 civilians between 1968 and 2003.¹⁰⁴ The regime was characterized by “widespread and systematic disappearances, extrajudicial executions, torture, arbitrary arrests, and detentions.”¹⁰⁵ After the American invasion of Iraq in 2003 and Hussein’s subsequent capture, the Coalition Provisional Authority (CPA), a temporary government established by the United States and the United Kingdom to fill the vacuum until a permanent government could take control of the country, began deliberating as to what type of forum should be implemented to prosecute the war crimes that the Hussein regime had been responsible for.¹⁰⁶ The United States did not support the formation of a dominantly internationalist tribunal, both because of the fear that such a tribunal would be enormously costly and time-consuming and concerns that the United States harbored regarding the ICC.¹⁰⁷ Moreover, the Iraqi authorities’ desire to retain the death penalty posed a great barrier for a

96. WILLIAMS, *supra* note 76, at 73–78.

97. *Id.* at 75.

98. *Id.* at 78–79.

99. *About the Ayyash et al. trial*, SPECIAL TRIBUNAL FOR LEBANON, <http://www.stl-tsl.org/en/the-cases/about-the-trial> (last visited June 24, 2016).

100. WILLIAMS, *supra* note 76, at 109–20.

101. *Id.* at 109–10.

102. *Id.*

103. *Id.* at 110.

104. *Id.*

105. M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT’L L.J. 327, 331 (2005).

106. WILLIAMS, *supra* note 76, at 114.

107. *Id.* at 110–14.

chiefly international model.¹⁰⁸ Thus, the model that eventually was propagated, the IHT, was a dominantly Iraqi national tribunal.¹⁰⁹

However, the IHT still operated within certain internationalist dimensions, thus rendering the tribunal a hybrid model. The IHT was required to meet international standards of justice, to appoint non-Iraqis as advisers, and to “resort to the relevant decisions of international courts” or tribunals as persuasive authority for their decisions in relation to the interpretation of the international crimes within the Court’s material jurisdiction.¹¹⁰ Ultimately, the IHT handed down the decision that resulted in the execution of Saddam Hussein in December 2006.¹¹¹ However, Hussein’s trial has been cited as highly controversial, with some critics going so far as to declare it “such a failure that the case would not be cited as authority by any subsequent international judicial body.”¹¹²

While these hybrid tribunals might seem attractive in certain ways, Kelly contends that similar differences in the application of Islamic law across nations and jurisdictions that doomed the *Mazalim* court also make a hybrid tribunal difficult to implement.¹¹³ While the formation of such a tribunal is not entirely impossible, Kelly argues that its formation will require growing cohesion between Western and Islamic legal systems, which, although possible and desirable by some, does not seem realizable in the near-term.¹¹⁴ Therefore, the IHT seems particularly intriguing. If the synergy of international law and Islamic legal systems is as difficult as Kelly says, then the IHT-model seems to be a potentially viable alternative given its dominantly national disposition with international rules playing mostly a supervisory role. The model also seems to be an effective way to navigate issues regarding cost and international cooperation that might still exist today, given that the IHT was able to operate under the constraints of these same pressures previously.¹¹⁵ However, given the controversy that surrounded the outcome of the trial of Saddam Hussein, there would certainly need to be examinations as to what failed in that case so as to avoid the repetition of such mistakes in the future. On the other side, the STL, a tribunal formed without the support of a national parliament (in addition to opposition from other powerful actors in the region such as Syria and Hezbollah),¹¹⁶ might serve as an example of how to establish an operation tribunal in tense political circumstances.

108. Tom Parker, *Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal*, 38 CORNELL INT’L L.J. 899, 907-09 (2005).

109. WILLIAMS, *supra* note 76, at 114-16.

110. *Id.* at 114-17; Original Iraqi High Tribunal Statute art. 17(b).

111. WILLIAMS, *supra* note 76, at 119-20.

112. *Id.*; see also Kelly, *supra* note 8, at 5.

113. Kelly, *supra* note 8, at 23.

114. *Id.*

115. See WILLIAMS, *supra* note 76, at 113-20.

116. Beham, *supra* note 14, at 363.

IV. The Potential for an ICC Trial in the Muslim World

A. Jurisdiction of the ICC

Given the obstacles that would inhibit the formation of either a *Mazâlim* court or a hybrid international/Islamic criminal court, it becomes necessary to analyze another possible legal mechanism that could allow for prosecutions of those responsible for the war crimes and crimes against humanity taking place in the Muslim world today. One such possibility is the ICC. The first step is determining whether the ICC would even have jurisdiction to prosecute such a case. There are a number of ways by which the ICC can obtain personal jurisdiction over an individual. If the individual is a national of a state that is party to the Rome Statute, then the ICC has personal jurisdiction over that individual.¹¹⁷ In addition, if the ICC wishes to prosecute a person in a state that is not a party to the Rome Statute, and that person is not a national of a state party to the Statute, the United Nations Security Council can formally request an ICC indictment.¹¹⁸ This is what happened in the case of Sudan's president, Omar al-Bashir, whom the ICC indicted via U.N. recommendation for war crimes, crimes against humanity, and genocide, even though Sudan is not a party to the Rome Statute.¹¹⁹

Furthermore, the Rome Statute leaves open the possibility for applying principles of Islamic criminal law in war crimes trials.¹²⁰ Indeed, the creators of the Court intended that it be able to exercise jurisdiction where domestic trials would not take place or would not adhere to certain core conditions of international law.¹²¹ Thus, it is perfectly possible, should an ICC trial ever arise in the Middle East, that Islamic law could compose part of the governing law of the tribunal. Many of the acts that have been committed by various groups, including ISIL and Syria's Assad regime, would be considered crimes under both Islamic and international law.¹²² Examples of such acts are the killing of non-combatants, the killing of hostages, the killing of refugees, the killing of minors, rape, torture, the destruction of civilian establishments, and wanton destruction of property.¹²³ Thus, with respect to such crimes there would be no conflict between Islamic and international law in prosecuting people for the commission of such acts.

117. Rome Statute of the International Criminal Court art. 12(2)(b), July 17, 1998, 2187 U.N.T.S. 3.

118. MALEKIAN, *supra* note 28, at 354 n.20.

119. Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx; MALEKIAN, *supra* note 28, at 354.

120. Rome Statute of the International Criminal Court art. 21(1)(c), July 17, 1998, 2187 U.N.T.S. 3 ("The application and interpretation of law pursuant to this article must be consistent with internationally recognized human right . . ."); Beham, *supra* note 14, at 359.

121. Cernusca, *supra* note 57, at 367.

122. See MALEKIAN, *supra* note 28, at 203-07; *Civil War in Syria*, *supra* note 1; Laub, *supra* note 1.

123. MALEKIAN, *supra* note 28, at 203-05.

However, while the crimes that the ICC has the power to prosecute have certainly occurred in the Middle East today, the issue of establishing jurisdiction is more problematic. Neither Syria nor Iraq, where essentially all of the criminal acts committed by ISIL and the Assad regime have been committed, are parties to the Rome Statute.¹²⁴ Therefore, the ICC does not have clear jurisdiction over individuals who are nationals of only those countries. However, this is not the end of the matter: the ICC may still prosecute those members of either faction who are citizens of other countries that are parties to the Rome Statute. ISIL in particular has numerous members who are nationals of countries such as France, Great Britain, Germany, the Netherlands, Belgium, Australia, Tunisia, and Jordan,¹²⁵ all of which are parties to the Rome Statute.¹²⁶ With respect to members of the Assad regime, there is virtually no likelihood of a United Nations Security Council request for their indictment. Russia's ties to the Assad regime¹²⁷ and its permanent membership on the Security Council with the ability to veto a call for an ICC indictment¹²⁸ would seem to make such an indictment of members of the Assad regime all but an impossibility.

B. Other Challenges to a Potential ICC Trial

Beyond jurisdictional issues, there are other concerns with having the ICC organize a war crimes trial in the Muslim world. Several large Muslim-majority states, such as Pakistan, Indonesia, and Iran, have not ratified the Rome Statute.¹²⁹ This is particularly important in the case of Iran, whose deep involvement with the Assad regime¹³⁰ could lead to Iran being a key player once hostilities stabilize in the region and actors potentially attempt to establish a war crimes tribunal.

Furthermore, there are also due process concerns. While a number of voices have called for a modernization of Islamic law that would make it more compatible with international law, there have also been arguments against this movement.¹³¹ Particular areas in Islamic law where the full application of due process appears to be lacking are in the rights to an independent and impartial trial, the right to appeal, and gender equality in

124. *The State Parties to the Rome Statute*, INT'L CRIM. COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

125. Reuters, *Little Chance of Investigating ISIS War Crimes, Prosecutor Says*, NEWSWEEK (Apr. 8, 2015), <http://www.newsweek.com/little-chance-investigating-isis-war-crimes-prosecutor-says-320621>.

126. *The State Parties to the Rome Statute*, *supra* note 124.

127. See generally Anna Borshchevskaya, *Russia's Many Interests in Syria*, WASH. INST. (Jan. 24, 2013), <http://www.washingtoninstitute.org/policy-analysis/view/russias-many-interests-in-syria>.

128. Newsteam Staff, *The UN Security Council (UNSC)*, COUNCIL ON FOREIGN REL. (Sept. 2, 2015), <http://www.cfr.org/international-organizations-and-alliances/un-security-council-unsc/p31649>.

129. Cernusca, *supra* note 57, at 369.

130. Esther Pan, *Syria, Iran, and the Mideast Conflict*, COUNCIL ON FOREIGN REL. (July 18, 2006), <http://www.cfr.org/iran/syria-iran-mideast-conflict/p11122>.

131. See Cernusca, *supra* note 57, at 368-71.

assessing evidence.¹³² These issues are relevant because it is unclear whether regimes governed by legal systems that would deprive parties of due process would have full admissibility to the ICC.¹³³ Thus, for the ICC to eventually be able to successfully create a war crimes trial based in Islamic law to deal with the Assad regime and/or ISIL, the Court would need to be able to gain jurisdiction over nationals of states that are party to the Rome Statute, potentially deal with regional players not party to the Rome Statute, and preferably adopt a form of Islamic law that is least likely to create due process concerns.

V. Beyond the Obstacles: What a War Crimes Tribunal Governed by Islamic Law Might Look Like

A. Could an Islamic War Crimes Tribunal Uphold Human Rights?

While the challenges to a war crimes tribunal taking place against those actors currently at work in Iraq and Syria should not be understated, the preceding pages have hopefully illuminated some of the reasons why such a tribunal is still possible. The question then arises as to what such a tribunal, particularly one operating primarily with Shari'a as its choice of law, would look like. Given the paramount importance of defending universal human rights as an objective of a war crimes tribunals, the first question to address is whether such a body would adequately uphold universal human rights standards. The goal of this section of the note will be to gain a firmer grasp of what such a body would look like should it actually come to fruition, and whether it would meet baseline international human rights standards.¹³⁴

132. *Id.* at 372-76.

133. *Id.* at 377-78.

134. It should be noted that respect and recognition of such basic universal international standards is actually a relatively recent phenomenon. An example of international investment law actually illustrates this point well. During the colonial era, it was assumed that local law would not apply to foreign investors, who instead would then carry the law of their home state with them as they traveled and invested abroad. SURYA P. SUBEDI, *INTERNATIONAL INVESTMENT LAW* 7 (2d ed. 2012). The need for international law here was minimal because investments by colonial powers into their colonies "did not need protection as the colonial legal systems were integrated with those of the imperial powers and the imperial system gave sufficient protection for the investments which went into the colonies." M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 19 (3d ed. 2010). However, once colonialism came to an end, so too did the idea that local law could not apply to foreign nationals, given the rise of the doctrines of sovereignty and sovereign equality. SUBEDI, *supra* 134, at 8. Commenters on international law began to invoke the writings like those of American statesman Elihu Root, who dealt with the issue of an international minimum standard of justice and equity in saying that "if any country's system of law does not conform to that standard . . . then no other country could be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens." Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT'L L. 517, 522 (1910). S.K.B. Asante expanded on this idea, proffering the position that "[w]here international standards fall below the international minimum standard, the latter prevails." Samuel K.B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMP. L.Q. 588, 590 (1988). As for what constitutes the minimum international standard, the General Claims Commission articulated that the test for determining whether individuals were accorded proper treatment according to this

One metric used to gauge a country's respect for upholding human rights is to see whether that country is a signatory to the International Covenant on Civil and Political Rights (ICCPR). The ICCPR is a treaty that guarantees twenty-four substantive civil and political rights, ranging from the right of self-determination, freedom from torture, and political rights.¹³⁵ The treaty signifies "the positive international law guarantee of civil and political rights under the international human rights objective of the UN."¹³⁶ The vast majority of states across the globe are parties to the ICCPR.¹³⁷ Among Muslim-majority states, the only countries that are either non-signatories or non-parties to the agreement are Brunei, Malaysia, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.¹³⁸ At least one thorough study analyzing the substantive guarantees of the ICCPR in light of Islamic law has demonstrated that the treaty is not incompatible with Islamic law.¹³⁹ Professor Baderin's analysis concludes that "the *Shari'ah* does not oppose or prohibit the guarantee of civil and political rights, liberal and democratic principles or the liberty of individuals in relation to the state."¹⁴⁰ Baderin does identify gender equality, the usage of cruel and unusual punishments, and freedom of religion to be the areas most difficult to reconcile between international and Islamic law, but finds ultimately that these issues are "not insurmountable where addressed openly and in a well-informed manner."¹⁴¹ While Baderin's claims are not without critics, numerous scholars support the proposition that Islamic law is not inherently incompatible with international human rights.¹⁴² Thus, there exists robust intellectual support for the notion that

international standard was to ask whether they had been "treated in accordance with ordinary standards of civilization." *Great Britain v. Spain* (1924), 2 R.I.A.A. 615. Thus, in understanding what is meant by a minimum international standard, we can better determine if other tribunals are capable meeting the mark.

135. International Covenant on Civil and Political Rights arts. 1, 7, 25, Dec. 16, 1966, 31 I.L.M. 645, 999 U.N.T.S. 171.

136. BADERIN, *supra* note 22, at 48.

137. See International Covenant on Civil and Political Rights, *supra* note 135.

138. *Id.*

139. One such analysis is a study by Professor Mashood Baderin. The examination itself is too extensive to cover properly here, but among the areas touched by Islamic law that Baderin investigates for their compatibility with the ICCPR within an Islamic legal context are freedom from retroactive criminal law, the right to privacy, the question of apostasy under Islamic law, the prohibition of propaganda for war and incitement of hatred, the right of peaceful assembly, and the right to freedom of association, among many others. See BADERIN, *supra* note 22, at 167-68.

140. *Id.* at 167.

141. *Id.*

142. Farhad Malekian's extensive analysis states:

It is a well-known fact that the spirit of both [international criminal law and Islamic international criminal law] is to release all human beings from all concepts of limitations, restrictions and superficial differences and ignorance. Simultaneously, the system of international criminal law does not ignore Islamic law and puts a heavy weight, on its concepts, in terms of the coexistence of sovereignties.

MALEKIAN, *supra* note 28, at xxiv. Professor Khaled Abou El Fadl states that "Islam in the modern age has become associated with violence, harshness, and cruelty. . . although mercy and compassion are core values in Islamic theology," and that Islamic law as an

an Islamic tribunal could be organized in such a way as to conform to international human rights standards.

While it thus appears that a war crimes tribunal governed under Islamic law could, despite some areas of tension, be governed in such a way so as to be compatible with international law, what is just as clear is that such a tribunal could actually contravene international law. Certain schools of Islamic legal thought, such as Wahhabism, permit the reformation of Islam through violence.¹⁴³ Clearly, one would not be able to find justifications for such actions in international law. Thus, any tribunal governed under a legal system that operates under an Islamic legal system similar to Wahhabism and accepts violence as a valid means of religious reformation could allow defendants accused of such acts to go free from prosecution rather than force them to face the punishment that they could otherwise be subjected to under international law. Other regimes, such as the Shia government of Iran, have their own legal justifications for what would otherwise be considered violations of international law. Iran has justified its own international law violations through comparison with other purported violations of human rights law committed by Western nations within the territories of other countries.¹⁴⁴ Iran points to these acts and declares that if Western powers are allowed to commit crimes of international law without punishment, then smaller powers like Iran should be given a similar break for violations that they might commit, especially when they are kept contained within their own national borders.¹⁴⁵ Any possible violations of international law committed by the West aside, such declarations do little to assure that a war crimes tribunal overseen by Iranian clerics or similarly-minded Islamic legal scholars would be effective in applying international law.

intellectual tradition is capable of developing both “morally and vigorously confront[ing] renewed moral challenges,” and thus better maintaining international legal standards, if it engages in “a rich and critical intellectual discourse.” Khaled Abou El Fadl, *The Culture of Ugliness in Modern Islam and Reengaging Morality*, 2 UCLA J. ISLAMIC & NEAR E.L. 33, 40 (2002–03). Professor Ann Elizabeth Mayer would also seem to agree, pointing to the political forces at work that have made some Islamic legal systems more difficult to reconcile with international law. Thus, point here then is that any incompatibilities are not endemic to Islamic law per se, but only to certain specific regimes seeking to construe it in such a way. Specifically, Mayer points out:

[T]he constructs of Islamic rights in the civil and political sphere, that one finds in schemes like the Cairo Declaration and the Saudi Basic Law, are designed to shore up the political interests of those promoting them and have only a tenuous connection to Islamic culture. They borrow extensively from Western rights models and mine the Islamic heritage only very selectively - shutting out the enlightened, modern perspectives of Muslims who are supportive of human rights.

Mayer, *supra* 60, at 401–02.

143. *Islamic Radicalism: Its Wahhabi Roots and Current Representation*, ISLAMIC SUPREME COUNCIL OF AM., <http://www.islamicsupremecouncil.org/understanding-islam/anti-extremism/7-islamic-radicalism-its-wahhabi-roots-and-current-representation.html> (last visited June 24, 2016).

144. MALEKIAN, *supra* note 28, at 22.

145. *Id.*

Thus, while there does not seem to be a lack of a discourse on human rights within the Islamic legal community, there are a multitude of approaches to the topic, as well as differences of opinion as to what specific legal rules should apply in an Islamic court. Baderin's work focused on "the possibility of constructive harmonization of international human rights norms with Islamic law."¹⁴⁶ It is encouraging to anyone who cares about human rights and international law that such a synergistic relationship between these systems is possible. However, the fact that such coordination is possible says nothing about its likelihood of realization. In order to have a better idea of the likelihood that an Islamic war crimes tribunal would uphold high human rights standards, there are of a variety of factors that must first be examined.

B. Shaping the Tribunal: The Interplay of Regional and International Powers

As has already been mentioned, nation-states are chiefly responsible for the formation of war crimes tribunals.¹⁴⁷ In the case of Syria and Iraq, there are many states with deep interests in both the conflict and in the region generally that would want a voice in creating a possible war crimes tribunal.¹⁴⁸ These states come from a variety of legal and political backgrounds, ranging from the Wahhabi absolutist monarchy of Saudi Arabia, the Shia Islamic Republic of Iran, the constitutional monarchy of Jordan, and the secular Republic of Turkey, just to name a few.¹⁴⁹ These do not even account for the roles to be played by other non-Muslim majority nations such as the United States, the United Kingdom, France, and Russia among others.¹⁵⁰ Given the pluralism present here, it would appear that whatever legal system would come to govern such a tribunal, it would certainly not be anything that resembles the more radical systems such as that of Saudi Arabia or Iran. Whether the body were to be formed as a hybrid tribunal or under the ICC, neither format would allow for such radical law to govern the tribunal given that such legal regimes are so profoundly anti-theoretical to international laws and norms. Furthermore, any call for a

146. BADERIN, *supra* note 22, at 219.

147. Hale, *supra* note 6, at 431-32.

148. See *Syria crisis: Where key countries stand*, BBC (Oct. 30, 2015), <http://www.bbc.com/news/world-middle-east-23849587>.

149. Kelly, *supra* note 8, at 14. See generally Robert Lee & Lihi Ben Shitrit, *Religion, Society, and Politics in the Middle East*, in 13 *THE MIDDLE EAST* 209, 209 (Ellen Lust ed., 2013).

150. See generally BARAH MIKAIL, *FRANCE'S SHIFTING MIDDLE EASTERN ALLIANCES* (Nov. 2014), http://fride.org/download/pb_188_france_shifting_middle_eastern_alliances.pdf; Bassam Barabandi, Aaron Hesse & P.J. Dermer, *Russia's New Middle East Great Game*, *MIDDLE E. INST.* (Oct. 5, 2015), <http://www.mei.edu/content/article/russia%E2%80%99s-new-middle-east-great-game>; Aaron David Miller, *The Politically Incorrect Guide to U.S. Interests in the Middle East*, *FOREIGN POL'Y* (Aug. 15, 2012), <http://foreignpolicy.com/2012/08/15/the-politically-incorrect-guide-to-u-s-interests-in-the-middle-east/>; David Wearing, *Understanding British Foreign Policy in the Middle East*, *NEW LEFT PROJECT* (Mar. 19, 2011), http://www.newleftproject.org/index.php/site/article_comments/understanding_british_foreign_policy_in_the_middle_east.

totally internationalized tribunal would likely face rebuke for the same reasons that such a model was rejected at the STL, namely the concern over removing local responsibility for seeing justice done.¹⁵¹ Thus, the only viable way forward in this regard would be a compromise similar to what took place both in the STL and the IHT: domestic laws of the region combined with some supervisory aspects of internationalism so as to ensure that the tribunal accords with international law.

However, another possible complication is that the current domestic law of the Syrian government could not govern this tribunal. If this were to occur, it would be an implicit recognition of the Assad regime, something that the United States and other powers would vigorously oppose.¹⁵² There then seem to be a few potential options that follow from this point. One, either Iraqi law could serve as the basis of the tribunal's law, or two, as was the case with the IHT, a provisional government could be established (likely in Syria, assuming that the Assad regime and ISIL are toppled and the Iraqi government seeks to reestablish control of lands previously held by ISIL) similar to the CPA in post-invasion Iraq with the task of formulating the details of how the tribunal would operate. Like in the case of the CPA, this could be done under international guidance to ensure that international standards of justice are met in the trial's operation and prosecution of defendants. All of this assumes a hybrid tribunal rather than an ICC trial. Again, while the ICC would allow for some flexibility in the choice of law, it would certainly not choose any system like that of Iran or Saudi Arabia, and would be forced to choose from more moderate legal systems such as that of Iraq.

C. The Future of Islamic Law and the Importance of Building an Internationalist Framework

It thus appears clear that because international involvement in the establishment of an Islamic war crimes tribunal, while able to accommodate different bodies of Islamic law, would aim to construct a legal body that upholds international law, any actors interested in both international law and such a tribunal's organization should argue for international action in the tribunal's formation. Any tribunal created by small numbers of strictly regional actors with no broad international involvement could result in a tribunal based in a version of Islamic law, like those of Saudi Arabia or Iran, that is not in accord with international laws and norms, the exercise of which could thus lead to outcomes that violate human rights law.

An Islamic war crimes tribunal that violated International law would not only harm the international legal system itself (along with any individuals who might suffer punishments that they otherwise might not have had

151. WILLIAMS, *supra* note 76, at 75.

152. This, given the fact that President Obama has maintained his position that Assad must be removed from office as president of Syria. Colleen McCain Nelson, *Obama Says Syrian Leader Bashar al-Assad Must Go*, WALL ST. J. (Nov. 19, 2015), <http://www.wsj.com/articles/obama-says-syrian-leader-bashar-al-assad-must-go-1447925671>.

international law been adhered to properly), but would be a detriment to Islamic law itself as a system capable of viably addressing crimes of international law and human rights. It would not be the first time that such a thing has happened. Professor Khaled Abou El Fadl notes that a plethora of “morally offensive” acts have taken place in recent decades in the name of Islam, such as “the stoning and imprisonment of rape victims in Pakistan and Nigeria, the degradation of women by the Taliban, the destruction of the Buddha statues in Afghanistan, the sexual violation of domestic workers in Saudi Arabia, the excommunication of writers in Egypt, and the killing of civilians in terrorist attacks.”¹⁵³ El Fadl’s highlights the fact that some Muslims have often been forced to defend their religion from criticism, while Muslim apologists simultaneously provide what he deems are unpersuasive responses.¹⁵⁴ El Fadl’s own response is that “the contemporary Islamic world has been intellectually impoverished, and so for instance, there has been virtually no influential philosophical or critical intellectual movements emerging from the Muslim world in the modern age.”¹⁵⁵ He then goes on to say that Muslim societies are undergoing a transformation in which they have the possibility to “reclaim [their] humanistic moral tradition.”¹⁵⁶

Therefore, the establishment of an Islamic war crimes tribunal operating outside the bounds of international law would certainly not be helpful in establishing Islamic law as a part of the international order capable of efficaciously dealing with humanitarian calamities. Indeed, the likely result would be quite the opposite, with more critics declaring Islamic law unfit to dispense justice. This is a counterproductive conclusion, both because it has already been shown that at least certain bodies of Islamic law can work within the bounds of international law, and also because the Muslim world is not likely to face a shortage of predicaments regarding human rights and international law in the near future.¹⁵⁷ Thus, if the people of Islamic societies are to have any autonomy in the establishment of Islamic war crimes tribunals, it is to everyone’s benefit that they are organized in such a way as to conform to international law. Only in such a way can widely accepted global norms be upheld, and Islamic law might be confirmed as a sustainable method of dealing with transnational issues.

Concluding Remarks

The issues regarding the interaction of Islamic and international law are far from settled. Factors and trends exist that both facilitate and hinder such interplay, and it is not clear which of these developments will have the more lasting impact in the long-term. The sheer political and legal disunity

153. El Fadl, *supra* note 142, at 34-35.

154. *Id.* at 35-36.

155. *Id.* at 40.

156. *Id.* at 41.

157. See generally Jack A. Smith, *Will the Middle East Crisis Worsen in the New Year?*, FOREIGN POL’Y J. (Jan. 12, 2016), <http://www.foreignpolicyjournal.com/2016/01/12/will-the-middle-east-crisis-worsen-in-the-new-year/>.

in the Middle East precludes a truly comprehensive Islamic court such as the *Wilayah al-Mazalim*. However, given the possibility of political changes easing the current strains between Islamic and international law, the proliferation of international law worldwide, and the necessity for Muslim societies to confront human rights concerns in an effective way, it is important to acknowledge that a world might eventually exist where Islamic and international legal systems fall more into harmony. Furthermore, the lessons from the cases of both the STL and the IHT provide useful information for the possibility of establishing a hybrid tribunal. While challenges to a hybrid model are not inconsequential, the complications regarding an ICC trial seem no less imposing. Thus, while neither of these forums is precluded from conducting a war crimes trial, in either case the difficulties must be honestly acknowledged and confronted. Only then can there be a hope of trying and prosecuting those currently engaged in the heinous acts of violence that are ravaging Iraq and Syria today.

Even so, if such a tribunal ever does materialize, it is not guaranteed that it would unquestionably maintain the standards of international law. Thus, it would behoove those involved in its establishment to choose Shari'a as the body's governing law and to advocate for an Islamic legal system that does in fact uphold the standards of international law. It is vital to keep the importance of this course in mind, for to do otherwise could allow for violations of international laws and norms and thus work to undermine the ability of Islamic law to respond effectively to international crimes and crises that will certainly continue plaguing Arab and Muslim societies.

The people of Iraq and Syria have been the unfortunate victims of innumerable atrocities committed at the hands of the Assad regime on one side of the conflict and ISIL on the other. Whatever the resolution to this conflict might be, and whenever it might come, it can only be the hope of internationalist observers that those responsible for the war crimes and crimes against humanity in this part of the world one day face the full force of justice from a competent judicial authority. If a war crimes tribunal is selected as the method for doing this, the people affected by these brutalities might justifiably demand autonomy in the governance of such a tribunal, a part of this perhaps coming in the form of a call for Islamic law to dispense justice to the responsible parties. Should that day come, those responsible for organizing such a tribunal should be well aware of the challenges to such a body's implementation, the optimal way to construct the tribunal so as to best ensure a successful outcome, and the resulting implications for both international law and Islamic law.

