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Islam and International Criminal Law and Justice

Tallyn Gray (editor)

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Islamic Socio-Legal Norms and International Criminal Justice in Context: Advancing an ‘Object and Purpose’ cum ‘*Maqāṣid*’ Approach

Mashood A. Baderin*

3.1. Introduction

The idea of international criminal justice is underpinned by the need for international *responsiveness* (as opposed to mere reaction) to “the most serious crimes of concern to the international community as a whole”.¹ Such crimes are committed mostly during armed conflicts without the perpetrators being brought to justice by the states in whose jurisdiction they are committed, thus prompting the need for international responsiveness. Past and ongoing conflicts in different parts of the Muslim world such as Iraq, Libya, Syria, and Yemen, in which atrocious crimes have been committed by both state and non-state actors, beg the question of what role can Islamic norms play in ensuring the effective realisation of the objectives of international criminal justice, particularly in the Muslim world? Do Islamic social norms generally have anything to contribute to the effectiveness of modern international criminal justice? Is Islamic law, as some have argued,² so radically different and unsupportive of interna-

* **Mashood A. Baderin** is a Professor of Laws at the School of Oriental and African Studies (SOAS), University of London, United Kingdom. He teaches and researches in the areas of Islamic law, international law, human rights law, and law and development in Africa, with particular interest in the interaction between human rights law and Islamic law in Muslim-majority states. He served as the UN Independent Expert on the Situation of Human Rights in the Sudan from May 2012 to November 2014.

¹ Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001 (‘ICC Statute’), Article 5 (<http://www.legal-tools.org/doc/7b9af9/>).

² See, for example, David A. Westbrook, “Islamic International Law and Public International Law: Separate Expressions of World Order”, in *Virginia Journal of International Law*, 1993, vol. 33, p. 819; Christopher A. Ford, “Siyar-ization and Its Discontents: International Law and Islam’s Constitutional Crisis”, in *Texas International Law Journal*, 1995, vol. 30, p. 499.

tional criminal justice, or can it contribute to the effective implementation of international criminal justice in the modern world?³ These questions have become more pertinent due to the increasing influence of Islamic socio-legal norms in many Muslim-majority states today and also the status of Islamic law as a recognised legal system in the modern world, with growing propositions for the recognition of its principles by international tribunals such as the International Court of Justice ('ICJ'), pursuant to Article 38(b) of the ICJ Statute,⁴ and the International Criminal Court ('ICC') pursuant to Article 22(1)(c) of the ICC Statute.⁵

Like other questions of international law, questions of international criminal justice are often addressed monolithically from Western secular legal perspectives without much consideration of contributions that other worldviews, such as Islam, can make to strengthen its universal acceptance. With reference to the Muslim world, this chapter proposes that Islamic socio-legal norms (broadly defined) have positive potential, which can and should be explored to deepen the universal effectiveness of international criminal justice in today's world. The chapter disagrees with the view that Islamic law is irreconcilable with the concept of international criminal justice, and provides a contextual analysis of how the two systems can complementarily effect the shared objective of a more humane world. Also, international criminal justice is often perceived restrictively, as a form of punitive justice that is applicable only after the commission of heinous crimes that shock the human conscience globally. Much of the traditional literature on the subject focuses mainly on punitive justice "in the form of international war crimes trials"⁶ to punish perpetrators of in-

³ Michael J. Kelly, "Islam and International Criminal Law: A Brief (In)compatibility Study", in *Pace International Law Review Online Companion*, 2010, vol. 8, pp. 2–31.

⁴ Clark Lombardi, "Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis", in *Chicago Journal of International Law*, 2007, vol. 1, pp. 85–118; Mas-hood A. Baderin, "Religion and International Law: Friends or Foes?", in *European Human Rights Law Review*, 2009, pp. 655–57. See also Statute of the International Court of Justice, 26 June 1945, Article 38(b) (<http://www.legal-tools.org/doc/fdd2d2/>).

⁵ See Mohamed Badar, "Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court", in *Leiden Journal of International Law*, 2011, vol. 24, no. 2, pp. 411–33. See also ICC Statute, Article 22(1)(c), *supra* note 1 (<http://www.legal-tools.org/doc/7b9af9/>).

⁶ Gideon Boas, "What is International Criminal Justice", in Gideon Boas, William A. Schabas and Michael P. Scharf (eds.), *International Criminal Justice: Legitimacy and Coherence*, Edward Elgar Publishing Ltd., Cheltenham, 2012, p. 1.

ternational crimes, with the hope that such punishment would serve as a legal deterrent against future crimes.⁷ In view of the debate about whether international criminal trials have really succeeded in serving as a deterrent against future atrocities,⁸ this chapter advances a holistic view of international criminal justice, not perceived restrictively as a post-conflict punitive concept, but also understood and promoted as a pre-conflict humane concept that addresses the social and moral conscience of humanity to detest the commission of such heinous crimes in the first place. It advances a holistic conceptualisation of international criminal justice covering its social, moral, political and legal elements in relation to Islamic socio-legal norms and how that can be explored for enhancing international criminal justice, particularly in the Muslim world.

In addressing the question “What is international criminal justice?”, Gideon Boas states:⁹

International criminal justice is about more than responses. How do we learn from history or sometimes fail to do so? Can we use our understanding of human psychology to respond better to mass atrocity, or to prevent or address it sooner? What of the sociological elements that are infused in our response to heinous international crimes; how do these affect our understanding of international criminal justice?

He then notes that “while as international lawyers we have raised important questions about legitimacy and coherence, we do not always open ourselves to a genuinely multidisciplinary approach to international criminal justice”.¹⁰ Relatedly, the need has also been identified for “considering international criminal justice as a critical [universalist] project”, particularly with reference to alternative perspectives that question its Euro-

⁷ Cf. Mark Findlay and Ralph Henham (eds.), *Beyond Punishment: Achieving International Criminal Justice*, Palgrave Macmillan, Basingstoke, 2010.

⁸ Chris Jenks and Guido Acquaviva, “Debate: The Role of International Criminal Justice in Fostering Compliance with International Humanitarian Law”, in *International Review of the Red Cross*, 2014, vol. 96, pp. 775–94; Jennifer Schense and Linda Carter, *Two Steps Forward One Step Back: The Deterrent Effect of International Criminal Tribunals*, International Nuremberg Principles Academy, Nuremberg, 2016.

⁹ Boas, 2012, p. 1, see *supra* note 6.

¹⁰ *Ibid.*

centrism and promote its universal legitimacy.¹¹ Thus, this chapter proposes the need for an inclusive approach to international criminal justice that involves learning from our collective human history and accommodating social, moral, political, and legal understandings of relevant norms from different civilisations, with specific reference to Islamic socio-legal norms, to enhance international responsiveness to heinous crimes that shock the conscience of the international community as a whole.

The social and moral perspectives ask the question ‘why?’ relating to the normative foundations of international criminal justice, while the political and legal perspectives ask the question ‘what?’ relating to its institutional constructions. This reflects the necessary linkage between the socio-moral and politico-legal dimensions of international criminal justice. International responsiveness to heinous crimes should thus not be restricted to secular legalistic worldviews, but should also be examined within the context of religious and cultural beliefs. People who commit international crimes often act on certain distorted beliefs and understandings, which need to be challenged by reference to alternative convincing internal evidence, to win and dissuade minds from committing those atrocities in the first place. To effectively dissuade the commission of international crimes during armed conflicts in the Muslim world, it is necessary to promote a holistic and complementary understanding of the relationship between international criminal justice and Islamic socio-legal norms. In doing so, this chapter advances a combined application of the ‘object and purpose’ principle under international law and the ‘*maqāṣid*’ principle under Islamic law to rationalise the complementary relationship between the two systems.

3.2. ‘Object and Purpose’ and ‘*Maqāṣid*’ as Comparable Normative Principles

Basically, the concepts of ‘object and purpose’ and ‘*maqāṣid*’ are comparable normative principles of international law and Islamic law respectively. The object and purpose principle is an international law concept applicable to the law of treaties for ensuring adherence to the primary objective of a treaty. The relevancy of this principle lies in the fact that treaties are a fundamental basis of international criminal justice and also the most im-

¹¹ Julien Pieret and Marie-Laurence Hébert-Dolbec, “International Criminal Justice as a Critical Project: Introduction”, in *Champ Pénal/Penal Field*, 2016, vol. XIII.

portant source of international law generally. The effect of the object and purpose principle is reflected in eight different articles of the 1969 Vienna Convention on the Law of Treaties.¹² It is obvious from the provisions cited that the object and purpose is the nucleus of a treaty, which the substantive provisions are aimed to achieve.

There is some debate about how the object and purpose is to be determined where not specifically stated by the treaty. Nevertheless, there is established judicial and academic understanding that the object and purpose can be deduced from a treaty’s historical context or its preamble. Hulme notes that “preambles are more frequently cited as sources or evidence of a treaty’s ‘object and purpose’”.¹³ The preamble normally provides insight into the context, philosophy and morals underlying a treaty’s adoption. Ironically, not much attention is paid to the object and purpose of treaties to enhance their moral strength and effectiveness. Hulme further argues: “In light of treaties’ longstanding structure [...] it is surpris-

¹² Vienna Convention on the Law of Treaties (‘VCLT’), 23 May 1969, in force 27 January 1980 (<http://www.legal-tools.org/doc/6bfcd4/>). In ascending order, Article 18 of the VCLT obligates states “to refrain from acts that would defeat the object and purpose of a treaty”; Article 19(c) prohibits states from entering any reservation that “is incompatible with the object and purpose of [a] treaty”; Article 20(2) provides that a reservation to a treaty will require the acceptance by all parties to the treaty, when it appears from the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition for each one to be bound by the treaty; Article 31(3) provides that a treaty shall be interpreted in good faith “in the light of its object and purpose”; Article 33(4) provides that the object and purpose of a treaty shall be a reference point in resolving any differences of meaning in different authentic texts of the treaty; Article 41(1)(b)(ii) provides that two or more parties to a multi-lateral treaty may only agree to modify the treaty as between themselves alone if the modification in question is, *inter alia*, not incompatible with the effective execution of the object and purpose of the treaty as a whole; Article 58(1)(b)(ii) provides that two or more parties to a multi-lateral treaty may only agree to suspend the application of provisions of the treaty temporarily as between themselves if the suspension in question “is not incompatible with the object and purpose of the treaty”; and Article 60(3)(b) provides that “violation of a provision essential to the accomplishment of the object and purpose of [a] treaty” constitutes a material breach of the treaty.

¹³ Max H. Hulme, “Preambles in Treaty Interpretation”, in *University of Pennsylvania Law Review*, 2016, vol. 164, p. 1300. For an earlier judicial position, see the dissenting opinion of Judge Anzilotti in the Permanent Court of International Justice (‘PCIJ’), Advisory Opinion in Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, (1932) PCIJ, Series A/B, No. 50, pp. 383–89 (<http://www.legal-tools.org/doc/1839b9/>). See also Isabelle Buffard and Karl Zemanek, “The ‘Object and Purpose’ of a Treaty: An Enigma?”, in *Australian Review of International and European Law*, 1998, vol. 3, pp. 311–43.

ing that the ubiquitous preamble has received so little attention”.¹⁴ Attention is often placed mainly on the substantive provisions of a treaty to the detriment of the preamble, which is usually considered as having no binding effect.¹⁵ Although its binding nature is debatable, the moral value of the preamble as repository of a treaty’s object and purpose is settled. Thus, the moral justification of a treaty is in its object and purpose, which should be evoked to advance universal acceptance of the international norm conveyed by the treaty.

As the object and purpose principle applies generally to international treaties, it is applicable to all treaties relating to international criminal justice such as international humanitarian law, international human rights law and international criminal law, as will be analysed later. We can aim to identify the object and purpose of each of these specific areas of international law from the respective treaty preambles and their historical contexts. This provides an objective and common moral yardstick for reconciling the norms of international criminal justice with relevant Islamic norms. As academic efforts to reconcile Islamic norms with international norms are sometimes misconceived as questionable attempts to simply subjugate Islamic norms to international norms, identifying and advancing the object and purpose of the respective international norm provides an objective moral justificatory basis of complementarity between the two systems.

Similarly, the concept of *maqāṣid* is also a normative principle of Islamic law formulated by classical Islamic jurists to promote a contextual understanding of *Shari‘ah* provisions. The full Arabic terminology for the principle is ‘*maqāṣid al-Shari‘ah*’, which has been translated variously in the English language as “objects and purposes of the *Shari‘ah*”,¹⁶ “aims and intentions of the law”,¹⁷ “existential purpose of the law”,¹⁸ “higher

¹⁴ Hulme, 2016, p. 1283, see *supra* note 13.

¹⁵ *Ibid.*, p. 1285.

¹⁶ Mashood A. Baderin, *International Human Rights and Islamic Law*, Oxford University Press, Oxford, 2003, p. 40.

¹⁷ Wael B. Hallaq, *A History of Islamic Legal Theories*, Cambridge University Press, Cambridge, 1997, p. 167

¹⁸ *Ibid.*, p. 168.

objectives of Islamic law”,¹⁹ “higher intents of Islamic law”²⁰ “goals and purposes of the *Sharī‘ah*”,²¹ “the goals and objectives of Islamic law”²² and “philosophy of Islamic law”.²³ It is similar in many ways to the object and purpose principle under international law. For Muslims, the *Sharī‘ah* (consisting of the *Qur‘ān* and the *Sunnah*) is the fundamental source from which all Islamic norms draw validity. The *Qur‘ān* contains the divine and immutable injunctions of God while the *Sunnah* depicts the practices of Prophet Muḥammad as reported in authentic *aḥādīth* (Traditions). The provisions of both sources are, however, subject to human speculative interpretations, which can be either literal or contextual. Literal interpretations can often lead to out-of-context and reductionist understandings of the *Sharī‘ah*. Thus, the classical Islamic jurists formulated the concept of *maqāṣid* to ensure that the provisions of the *Sharī‘ah* are not interpreted contrary to its intended objectives.

Based on Qur‘ānic verses such as “God desires ease for you, and desires not hardship for you”,²⁴ “God does not desire to make any impediment for you”,²⁵ “[God] has laid on you no impediment in your religion”,²⁶ “We have not sent thee [Muḥammad], save as a mercy unto all beings”,²⁷ “Now there has come to you a Messenger from among yourselves, grievous to him is your suffering”,²⁸ and authentic Traditions of the Prophet such as “Verily the religion is easy, and no one overstretchers himself in the religion except that it crushes him, so be moderate and try

¹⁹ Ahmad Al-Raysuni (translated by Nancy Roberts), *Imam Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law*, The International Institute of Islamic Thought, Washington, 2005, p. xxi.

²⁰ Gamal Eldin Attia, *Towards Realization of the Higher Intents of Islamic Law*, The International Institute of Islamic Thought, Washington, D.C., 2007.

²¹ M. Cherif Bassiouni, *The Shari‘a and Islamic Criminal Justice in Time of War and Peace*, Cambridge University Press, Cambridge, 2014, p. 68.

²² Mohammad Hashim Kamali, “*Maqāṣid Al-Sharī‘ah*: The Objectives of Islamic Law”, in *Islamic Studies*, 1999, vol. 38, no. 2, pp. 193–208.

²³ Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach*, International Institute of Islamic Thought, London, 2007.

²⁴ The *Qur‘ān* (translation by Arthur J. Arberry), 2:184.

²⁵ *Ibid.*, 5:6.

²⁶ *Ibid.*, 22:78.

²⁷ *Ibid.*, 21:107.

²⁸ *Ibid.*, 9:128.

to be near perfection and take glad tidings”,²⁹ “The best of your religion is that which is easiest, the best of your religion is that which is easiest”,³⁰ and “Make things easy and do not make things difficult, give glad tidings and do not put people off”,³¹ the classical Islamic jurists identified the general *maqāṣid* of the *Shari‘ah* as the promotion of human well-being (*al-moṣalāḥah*) and prevention of harm (*mafsadah*), often referred to collectively as *al-moṣalāḥah*. This concept of *al-moṣalāḥah* may be perceived narrowly as promoting only the well-being of the Muslim community (*ummah*) specifically or broadly as promoting the well-being of humanity generally. Obviously, perceiving it broadly as the well-being of humanity generally is more consistent with international norms. The primary Islamic jurisprudential position is that the *maqāṣid* of the *Shari‘ah* is to promote the well-being of humanity generally, which also incorporates the well-being of the Muslim *ummah*. This is evidenced by the *Qur‘ān*’s description of God as “[t]he Lord of men”,³² “[t]he Lord of all Being”³³ and of the Prophet as “a mercy unto all beings”.³⁴ However, where the well-being of the Muslim *ummah* is endangered, then the *maqāṣid* would, justifiably, revolve to protecting the well-being of the Muslim *ummah* specifically. Thus, similar to the object and purpose principle under international law, the *maqāṣid* principle is for ensuring adherence to the objectives of the *Shari‘ah*, deducible from the *Qur‘ān* and the *Sunnah* as promoting human well-being generally.

Although the notion of *maqāṣid al-Shari‘ah* had been in use informally much earlier,³⁵ the fourteenth century Andalusian Islamic jurist Abú Ishāq Al-Shátibí is considered generally to be its formal initiator owing to his contribution to its formal recognition as we know it today. In his renowned Islamic jurisprudential work, *Al-Muwāfaqāt fī Usūl al-Shari‘ah*,

²⁹ Reported by Al-Bukhāri, Book 2, *ḥadīth* 39.

³⁰ Reported by Musnad Ahmad (3/479).

³¹ Reported by Al-Bukhāri, Book 3, *ḥadīth* 69.

³² The *Qur‘ān*, 114:1, see *supra* note 24. The verse is “*rabb al-Nās*” in Arabic. While the term “*al-Nās*” is often translated as ‘men’ in English, as in Arberry’s translation here, this should not be misconstrued genderwise as meaning the plural of ‘man’ and thus excluding women, but construed as meaning ‘mankind’ or humans generally, and thus ‘*rabb al-Nās*’ should be contextually understood as meaning “[t]he Lord of all mankind”.

³³ *Ibid.*, 1:1.

³⁴ *Ibid.*, 21:107.

³⁵ Kamali, 1999, p. 2, see *supra* note 22.

Al-Shátibí noted that the original intention of God in revealing the *Shari‘ah* is to protect human well-being and thus in interpreting any verse of the *Qur‘án* or Tradition of the Prophet, care must be taken not to contradict the general objective of the *Shari‘ah* which is *maṣlahah*. He considered the *maqásid* as a necessary principle for proper jurisprudential reasoning (*ijtihád*) in Islamic law.³⁶ Today, the *maqásid* principle is acknowledged by most contemporary Islamic scholars and jurists as the necessary jurisprudential tool for reconciling Islamic law with different contemporary issues such as human rights and humanitarian law generally. For example, Kamali has observed that the *maqásid* principle is an evidently important theme of the *Shari‘ah* and that “the *Shari‘ah* generally is predicated on benefits to the individual and the community, and its laws are designed so as to protect these benefits and to facilitate the improvement and perfection of the conditions of human life on earth”.³⁷ Thus, the *maqásid* principle provides a proper contextual approach for advancing the benevolent scope of Islamic law.

Apart from the general *maqásid* of the *Shari‘ah*, there is also recognition that each specific area of Islamic law, such as Islamic family law, Islamic humanitarian law and Islamic international law, has its respective objective (*maqásid*) within the context of the general *maqásid*. Thus, the *maqásid* principle will be employed to explore the role of Islamic socio-legal norms in enhancing international criminal justice, particularly in the Muslim world, by reference to relevant provisions of the *Qur‘án* and the *Sunnah* in relation to both the general *maqásid* of the *Shari‘ah* and the specific *maqásid* of identified areas of Islamic law relevant to international criminal justice.

From the above analysis of these two comparable normative principles, it is obvious that both international law and Islamic law are not instituted or meant to be applied *in abstracto*. Rather, both systems were instituted to achieve identifiable objectives, the appreciation of which is necessary for establishing an objective relationship between the two systems. Generally, these two respective principles of international law and Islamic law provides the basis for a common objective of attaining a more hu-

³⁶ Ibrahim Al-Shatibi (translated by Imran Ahsan Khan Nyazee), *The Reconciliation of the Fundamentals of Islamic Law*, Al-Muwáfaqát fi Úṣúl Al-Shari‘a, vols. 1 and 2, Garnet Publishing Ltd., 2012, p. 229.

³⁷ Kamali, 1999, p. 229, see *supra* note 22.

mane world, which can be evoked for promoting a complementary relationship between the two systems.

3.3. The Basis of International Criminal Justice in Relation to Islamic Socio-Legal Norms

Today, certain acts are considered international crimes for which perpetrators must be brought to justice, based “largely on the notion that some crimes are so heinous that they offend the interest of all humanity, and, indeed, imperil civilization itself”.³⁸ Thus, international criminal justice is essentially linked to international humanitarian law, which regulates and puts constraints on the conduct of warfare; international human rights law, which promotes the protection of human dignity; and international criminal law, which prohibits and prescribes punishments for certain core crimes under international law. These three specialised areas of international law may be described as the three pillars of the international criminal justice system, as they together provide the substantive basis for which international criminal justice applies. For example, ‘war crimes’ and ‘genocide’ are two of the substantive crimes punishable under international criminal law, with the former being a consequence of the violation of core norms of international humanitarian law and the latter being a consequence of the violation of the norms of international human rights law. Thus, an appreciation of international humanitarian law, international human rights law and international criminal law as the basis of international criminal justice is essential for an effective preventive international criminal justice system. For example, it is when the rules of international humanitarian law are violated that the need to punish war crimes arises under international criminal justice. Thus, promoting adherence to international humanitarian law is essential to preventing the occurrence of war crimes in the first place. Similarly, respect for international human rights law would prevent the occurrence of atrocities such as genocide, while respect for international criminal law would automatically ensure a preventive international criminal justice system.

While international humanitarian law, international human rights law and international criminal law are all international legal regimes, they

³⁸ Leila Nadya Sadat, “Competing and Overlapping Jurisdiction”, in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. 2, 3rd ed., Martinus Nijhoff Publishers, Leiden, 2008, p. 207.

are evidently motivated by morals and humaneness, which are important factors for promoting adherence to them. In relation to the Muslim world, linking the morals underlying international humanitarian law, international human rights law, and international criminal law to Islamic socio-legal norms can go a long way to ensure adherence to these international normative regimes. Thus, a better contextual understanding of the relationship between Islamic socio-legal norms and international criminal justice first requires an Islamic socio-legal connection with each one of international humanitarian law, international human rights law and international criminal law as the basis of international criminal justice.

3.3.1. Islamic Socio-Legal Connection with International Humanitarian Law

Bassiouni traced the history of warfare back to the biblical account of Cain’s murder of his brother Abel, which also has an Islamic account in the *Qur’ān*,³⁹ noting that what started with brother against brother subsequently “turned to family against family, tribe against tribe, and nation against nation”,⁴⁰ as is witnessed today. He observed that “between 1945 and 2008 there were an estimated 313 conflicts, which collectively resulted in the killing of an estimated one hundred million persons, excluding other human and material harm”.⁴¹ The numbers have escalated greatly since 2008. The morality of such human annihilation and harm is difficult to justify from both an Islamic or secular point of view. Wars have been traditionally fought with brutality aimed at total destruction of the enemy and resulting in the commission of heinous atrocities, devastation and great human suffering. In light of the difficulty in preventing warfare completely, the realistic option, from ancient times, was to aim at regulating the conduct of warfare to limit, on humanitarian grounds, the devastation of war. This was first achieved through customary rules and subsequently through formal treaty law in modern times.⁴² The regulation of

³⁹ The Islamic account of this incident is in the *Qur’ān*, 5:12–31, which rounds up with two important verses proscribing arbitrary killing and mischief on Earth at 5:32–33.

⁴⁰ M. Cherif Bassiouni, “Perspectives on International Criminal Justice”, in *Virginia Journal of International Law*, 2010, vol. 50, no. 2, pp. 278–79.

⁴¹ *Ibid.*, p. 280.

⁴² See, for example, Michael Howard, George Andreopoulos and Mark R. Shulman (eds.), *The Laws of War: Constraints of Warfare in the Western World*, Yale University Press, Yale,

warfare in ancient times was not limited to one civilisation, nor is it solely a Western concern in modern times. Alexander has succinctly observed:⁴³

Laws of war have always existed to limit the destruction of war. The ancients, the knights of the middle ages, the jurists of the early modern period all testify to the record of this concern. Nor is it just a Western concern. Other cultures, such as China, Japan, India and the Islamic world, have their own traditions of rules of warfare. Yet, despite this universal concern, the attempt to limit war has suffered various setbacks. It was not until the 19th century that a movement to codify the laws of war began and modern international humanitarian law was born.

The historical context of international humanitarian law⁴⁴ and the preambles of relevant international humanitarian law instruments⁴⁵ clearly indicate that the general object and purpose of international humanitarian law is to diminish the evils of war, promote humanitarianism in war and lessen the horrors, evils and unnecessary human suffering in warfare, through international political and legal co-operation. For example, the preamble of the second Hague Convention with Respect to the Laws and Customs of War on Land of 1899 states, *inter alia*, that its provisions had “been inspired by the desire to diminish the evils of war so far as military necessities permit”.⁴⁶ Similarly, the Preamble of the third Hague Convention for the Adaptation to Maritime Warfare of 1899 states that the Plenipotentiaries were “animated by the desire to diminish, as far as depends on them the evils inseparable from warfare”.⁴⁷ Also, the Preamble of the Geneva Convention (IV) of 1949 states that its purpose is for the protec-

1997; Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed., Manchester University Press, Manchester, 2008, Chapter 2.

⁴³ Amanda Alexander, “A Short History of International Humanitarian Law”, in *European Journal of International Law*, 2015, vol. 26, no. 1, pp. 111–12.

⁴⁴ See, for example, Henry Dunant, *A Memory of Solferino*, International Committee of the Red Cross, Geneva, 1939; Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction*, 4th ed., Cambridge University Press, Cambridge, 2011.

⁴⁵ See, generally, the ICC Legal Tools Database for all these instruments.

⁴⁶ Hague Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, Preamble (<http://www.legal-tools.org/doc/7879ac/>).

⁴⁷ Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, 18 October 1907, Preamble (<http://www.legal-tools.org/doc/7465fa/>).

tion of civilian persons in times of war.⁴⁸ This object and purpose of international humanitarian law is based on morals and humaneness acknowledgeable universally, including under Islamic socio-legal norms.

Evidently, the concept of international humanitarian law is consistent with Islamic socio-legal norms. Its object and purpose as identified above is in consonance with the general *maqāṣid* of the *Shari‘ah* and the specific *maqṣūd* of humanitarian law in Islamic jurisprudence.⁴⁹ Islam recognised the need for constraint in warfare as early as the time of Prophet Muḥammad in the seventh century, as evidenced by his consistent instructions to the Muslim army urging restraint and humanitarianism in war. Bassiouni has noted that these early instructions of the Prophet later formed the basis of the traditional rules of armed conflict under Islamic law of nations (*al-siyar*) later “codified in the eighth century CE by Al-Shaybānī (d. 189/804) in his famous book *Al-Siyar* [which] [...] constituted the most developed articulation of international humanitarian law until the twentieth century CE, when the foundations of modern customary and conventional international humanitarian laws were laid”.⁵⁰ Similar to modern international humanitarian law, Islamic law prohibits mutilations, unnecessary destructions, unnecessary bloodshed, unnecessary human suffering, and excesses in warfare.⁵¹ These regulations were derived from the *Shari‘ah*, the practices of the early *Caliphs*, and from treaty obligations. The general tone for constraint in warfare under Islamic law is set in the Qur’ānic text 2:190, prohibiting excesses in the conduct of war: “Fight in the cause of God those who fight you *but do not exceed limits; for God does not love those who exceed limits*”. This Qur’ānic provision clearly indicates that there are limits in warfare that should not be exceeded under Islamic law. The details of these limits are found in the recorded traditions of Prophet Muḥammad and the practices of the orthodox *Caliphs* after him. It is recorded that during his lifetime, whenever the Prophet

⁴⁸ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, in force 21 October 1950, Preamble (<http://www.legal-tools.org/doc/d5e260/>).

⁴⁹ Karima Bennouna, “*As-Salāmu Alaykum?: Humanitarian Law in Islamic Jurisprudence*”, in *Michigan Journal of International Law*, 1994, vol. 15, no 4. pp. 605–43.

⁵⁰ Bassiouni, 2014, p. 162, see *supra* note 21.

⁵¹ See, for example, Muḥammad Hamidullah, *The Muslim Conduct of State*, 7th ed., Sh. Muḥammad Ashraf Kashmir Bazar, Lahore, 1977; Syed Imad-ud-Din Asad, “Islamic Humanitarian Law”, in *Dawn*, 24 February 2006.

Muḥammad appointed a commander for warfare, he enjoined him with God-consciousness and gave orders for restraint in warfare, for example, as follows:⁵²

[N]ever commit breach of trust nor treachery nor mutilate anybody nor kill any minor or woman. This is the pact of God and the conduct of His Messenger for your guidance [...] In avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infants at the breast or those who are ill in bed. Refrain from demolishing the houses of unresisting inhabitants; destroy neither the means of subsistence, nor their fruit-trees and touch not the palm [...] and do not kill children.

This practice was sustained and followed by the four orthodox *Caliphs* after the Prophet and by subsequent Muslim leaders after them. It is reported that the first *Caliph*, Abú Bakr, also instructed the Muslim army, for example, as follows:⁵³

When you meet your enemies in the fight, behave yourself as befits a good Muslim [...] If [God] gives you victory, do not abuse your advantages and beware not to stain your swords with the blood of the one who yields, neither you touch the children, the women, nor the infirm men whom you may find among your enemies. In your march through enemy territory, do not cut down the palm, or other fruit-trees, destroy not the products of the earth, ravage no fields, burn no houses [...] Let no destruction be made without necessity [...] Do not disturb the quiet of the monks and the hermits, and destroy not their abodes.

Similar orders were issued by the other three orthodox *Caliphs* Umar, Uthmán and Alí, respectively.⁵⁴ Based on classical Islamic sources, Hamidullah has identified that acts prohibited in warfare under Islamic law include unnecessary cruel and tortuous ways of killing, killing non-combatants, decapitation of prisoners of war, mutilation of humans or beasts, treachery and perfidy, devastation, destruction of harvests and unnecessary cutting of trees, excess and wickedness, adultery and fornica-

⁵² Bennoune, 1994, p. 624, see *supra* note 49.

⁵³ *Ibid.*, p. 626.

⁵⁴ *Ibid.*, p. 627; Hamidullah, 1977, pp. 299–311, see *supra* note 51.

tion even with captive women, killing enemy hostages, severing the head of fallen enemies, massacre, burning captured humans or animals to death, using poisonous arrows, and acts forbidden under treaties.⁵⁵ Thus, all such atrocities committed, purportedly in the name of Islam, by extremist groups such as ISIS in Iraq and Syria, Boko Ḥarām in Nigeria, and Al-Shabáb in Somalia and Kenya, are not only contrary to international humanitarian law but also violate the rules of warfare under Islamic law, and are therefore punishable under both systems of law.

Similar to the object and purpose of international humanitarian law, the *maqāṣid* of the constraints on warfare under Islamic law is principally to promote humanitarianism in war and lessen the horrors, evils and unnecessary human suffering in warfare. General observance of these rules and reciprocity from the enemy can only be achieved through international political and legal co-operation as recognised under the principle of ‘co-operation for goodness and righteousness’ (*ta’āwwun alā al-birr wa-al-taqwā*) enjoined on Muslims in the Qur’ānic text 5:2: “Help one another to piety and godfearing; do not help each other to sin and enmity”. Such international co-operation is pertinent through ratification of treaties, as is reflected in relevant verses of the *Qur’ān*, the Traditions of the Prophet and practices of the *Caliphs* after him. For example, the Qur’ānic text 8:58 refers to the sanctity of treaties and permissibility of reciprocity in breach of a treaty: “And if thou fearest treachery any way at the hands of a people [with whom you have entered a treaty], dissolve it [their treaty] with them equally; surely God loves not the treacherous”. The Prophet is also reported to have stated in a Tradition: “Whoever has a treaty of peace with a people should not loosen or tighten it [beyond its terms] until the treaty reaches its appointed term. Otherwise, he should declare the treaty null and void so that they are both on equal terms”.⁵⁶

Similar to international humanitarian law treaties, it is interesting to note that the *Qur’ān* does not attach specific sanctions to the violations of the specified humanitarian rules by soldiers during warfare. Often, the belief in God’s reward for complying with the injunctions and possibility of punishment in the hereafter for its violation provided religious and conscientious incentives and deterrents respectively for compliance by

⁵⁵ Hamidullah, 1977, pp. 205–08, see *supra* note 51.

⁵⁶ Reported by Abú Dāwūd, taken from Shayka Safiur-Rahmān Al Mubarakpuri *et al.* (eds.), *Tassir Ibn Kathir (abridged)*, Darussalam, London, 2003, p. 343.

Muslim soldiers in warfare. However, where the violation of the rules of warfare amounted to one of the *hudūd* offences under Islamic law, the prescribed *ḥadd* punishment will be applicable. Otherwise, the State can impose discretionary (*ta'zīr*) punishments for violations of the rules of warfare either through national law or international humanitarian law treaties ratified by the State pursuant to international co-operation in punishing such atrocities. The State is morally and legally bound to comply with such treaty obligations as enjoined in the Qur'ānic text 5:1: "O Believers, fulfil your bonds", which is considered to be the basis for fulfilling international treaty obligations under Islamic law.⁵⁷

The common objective between international humanitarian law and Islamic law, as established above, provides a strong basis for universal condemnation and punishment of the violations of the common rules of warfare by extremist groups who purport to act in the name of Islam in different parts of the Muslim world today.

3.3.2. Islamic Socio-Legal Connection with International Human Rights Law

international human rights law is another basis for international criminal justice. The Preamble of the Universal Declaration of Human Rights ('UDHR') states that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind".⁵⁸ Where international human rights law is respected, most of the concerns of international criminal justice would be automatically resolved. From its historical context and the preambular statements of the UDHR and other international human rights treaties, it is obvious that the general object and purpose of international human rights law is to compel all states to recognise, promote and protect respect for the inherent dignity of all human beings without discrimination. This is an essential foundation of freedom, justice, and world peace.

Respect for human dignity is among the common norms of humanity, and falls within the concept of '*al-ma'rūf*' (common good) in Islamic socio-legal terms, the promotion of which the *Shari'ah* enjoins under the

⁵⁷ See, for example, Labeef Ahmed Bsoul, *International Treaties (Mu'āhadāt) in Islam*, University Press of America, Lanham, 2008, p. 126.

⁵⁸ Universal Declaration of Human Rights, 10 December 1948, preambular paragraph 2 (<http://www.legal-tools.org/doc/de5d83/>).

doctrine ‘*amr bi al-ma‘rūf wa nahy ‘an al-munkar*’ (enjoining the right or honourable and forbidding the wrong or dishonourable).⁵⁹ Each international human rights treaty also has its specific object and purpose. For example, it is acknowledged that the specific object and purpose of the International Covenant on Civil and Political Rights is to create legally binding standards for the guarantee of the civil and political rights of all individuals by states,⁶⁰ which is also justifiable in Islamic law under the principle of *ta‘āwwun* (co-operation) as discussed earlier above.

From an Islamic perspective, the general object and purpose of international human rights law is in consonance with the *maqāṣid* of the *Shari‘ah*, which is promotion of human well-being as already analysed above. The basic Qur’ānic provision that expresses the general *maqāṣid* of upholding human dignity in relation to the promotion and protection of human rights is the Qur’ānic text 17:70, which states clearly that God has bestowed innate honour and dignity on every human being, which must be respected:

We have honoured the children of Adam [that is, human beings], and carried them on land and sea, and provided them with good things, and preferred them greatly over many of those We created.

This is, essentially, a reminder of the sacred nature of human dignity, which the State has a duty under Islamic law to uphold and establish insti-

⁵⁹ This phrase is “[u]sed in the Quran nine times, referring to the collective duty of the Muslim community to encourage righteous behaviour and discourage immorality, as recognized by reason and the Islamic moral and legal system. Aims to remove oppression from society and instead establish justice. Applied to moral, social, political, and economic facets of life. It is, ideally, the distinguishing trait of the Muslim nation”, see John L. Esposito (ed.), *The Oxford Dictionary of Islam*, Oxford University Press, Oxford, 2003, p. 19. For a discussion of the rules on the application of this doctrine under Islamic law and its misapplication by the defendant in the Al-Mahdi case before the ICC, see Mohamed Elewa Badar and Noelle Higgins, “Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law – The Case of *Prosecutor v Al-Mahdi*”, in *International Criminal Law Review*, 2017, vol. 17, no. 3, pp. 494–95. See also, Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought*, Cambridge University Press, Cambridge, 2000.

⁶⁰ See, for example, United Nations Human Rights Committee, CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 7 (<https://www.legal-tools.org/doc/4acd3b/>).

tutions to protect. This could be either through national law or relevant treaties ratified by the State pursuant to international co-operation. The Preamble of the Cairo Declaration on Human Rights in Islam declares the wish of Muslim-majority states “to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic *Shari‘ah*”.⁶¹ It further states that the fundamental rights and universal freedoms are an integral part of Islam and are binding divine commandments, which no one has the right to suspend, violate or ignore. There is also a vast contemporary literature aimed at establishing the concept of human rights from within Islamic classical jurisprudence and identifying a common moral ground and linkage between the general object and purpose of international human rights law and the general *maqāṣid* of the *Shari‘ah*.⁶²

Today, it is well acknowledged that international human rights law is applicable both in peacetime and wartime and gross violations of human rights in warfare could lead to committing international crimes. The former United Nations (‘UN’) Secretary-General, Kofi Annan, observed in his 2004 report on the rule of law and transitional justice in conflict and post-conflict societies that one of the UN’s main objectives in establishing criminal tribunals is to bring to justice to “those responsible for serious violations of human rights and humanitarian law, [and] putting an end to such violations and preventing their recurrence, securing justice and dignity for victims”.⁶³ The active promotion of respect for human rights can be an important means of ensuring preventive international criminal justice that discourages the commission of war crimes and genocide during armed conflicts. Atrocities, such as the Bosnia-Herzegovina and Rwanda

⁶¹ Organisation of the Islamic Conference, Cairo Declaration on Human Rights in Islam, 5 August 1990, preambular paragraph 2, available on the Refworld web site.

⁶² See, for example, Mashood A. Baderin, *International Human Rights and Islamic Law*, Oxford University Press, Oxford, 2003; Abdulaziz A. Sachedina, *Islam and the Challenge of Human Rights*, Oxford University Press, Oxford, 2009; Mohammad Hashim Kamal, *The Dignity of Man: An Islamic Perspective*, Islamic Texts Society, Cambridge, 2002; Recep Şentürk, “Adamiyyah and Ismah: The Contested Relationship between Humanity and Human Rights in Classical Islamic Law”, in *Islam Arastirmalari Dergisi*, 2002, vol. 8, pp. 39–69; Bassiouni, 2014, pp. 88–117, see *supra* note 21.

⁶³ United Nations Security Council, Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, 23 August 2004, para. 38 (<http://www.legal-tools.org/doc/77bebf/>).

genocides, have shown that actions that lead to war crimes and genocide often start with extreme dehumanisation of the 'other' by distorting an opponent's image and projecting them as less human or not human at all, which then validates brutalities against them. With regard to the Muslim world, promoting international human rights law as an important pillar of international criminal justice through emphasising its general object and purpose with reference to relevant Islamic socio-legal norms and the *maqāṣid* of the *Shari'ah*, will enhance its acceptability and effectiveness.

3.3.3. Islamic Socio-Legal Connection with International Criminal Law

The normative foundation of international criminal law is to criminalise and punish violations of some core norms of international humanitarian law and international human rights law. However, regulation of crime is traditionally a domestic responsibility rather than an international one. Crimes are based on some notion of social wrong as recognised within particular societies, which thus creates divergence as to what constitutes crimes from one domestic system to the other. Criminalisation evinces social control, whereby certain acts are identified as morally and socially unacceptable within a particular society and punishment is legally ascribed for committing such acts to reflect some sense of justice in society. Thus, the concept of international criminal law reflects some element of global social control based on a universal notion of social wrongs acceptable by all. This was initially confronted with both substantive and procedural challenges. First, there was the challenge of creating an international agreement on social wrongs that would be accepted as crimes universally and, second, the challenge of international agreement about the procedure for trying and punishing such international crimes. In his 2010 article "Some Objections to the International Criminal Court", Rubin observed that the creation of the ICC "assumes that there is such a thing as international criminal law. But what is its substance? Who exercises law-making authority for the international legal community? Who has the legal authority to interpret the law once supposedly found?".⁶⁴ This, he argues, arises from the fact that criminal law is different from civil claims, with the traditional position being that crimes are "not [...]"

⁶⁴ Alfred P. Rubin, "Some Objections to the International Criminal Court", in *Peace Review*, 2000, vol. 12, no. 1, p. 45.

defined by international law as such” but rather “by the municipal laws of many states and in a few cases by international tribunals set up by victor states in an exercise of positive law making” with the tribunal’s new rules being “accepted under one rationale or another, by the states in which the accused were nationals”. One rationale was that “if all or nearly all ‘civilised’ states define particular acts as violating their municipal criminal laws, then those acts violate ‘international law’”. Another rationale was that some acts violate “general principles of law recognised by civilised states”, and thus violate general international law.⁶⁵ The rationale of international criminal law is thus very much tied to its acceptance in divergent municipal orders based on shared human values.

Certainly, there are acts that would be considered morally and socially unacceptable within the international community, either due to their negative impact on international relations or the indignation they cause to the conscience of the international community as a whole, and thus the need to socially control such acts directly or indirectly through international law. One old example is the crime of piracy. As observed by Hyde, piracy “derives its internationally illegal character from the will of the international society”.⁶⁶ Although not categorised as an international crime *stricto sensu*, piracy has long been considered the grandfather of transnational crimes, conferred with universal jurisdiction as early as the eighteenth century because of the recognisable threat it poses to the maritime interests of all states both individually and collectively. Pirates could thus be prosecuted and punished by any state that caught them, even though they committed their crime elsewhere.

Over time, the concept of international criminal law as the basis for international criminal justice has become legally solidified, first through customary international law and then through treaty law.⁶⁷ Today, genocide, war crimes, crimes against humanity and the crime of aggression are considered as the core crimes under international criminal law, obviously due to the indignation they cause to the conscience of the international community as a whole. It is unlikely that there is any state or society to-

⁶⁵ *Ibid.*

⁶⁶ Charles C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, rev. ed., Little, Brown and Company, Massachusetts, 1945, pp. 768–70.

⁶⁷ However, see Rubin’s argument in *ibid.*, pp. 45–48, which, in the context of the International Criminal Court, tended to disagree on this.

day that would consider these crimes socially or morally acceptable. Thus, similar to piracy, they derive their internationally illegal character from the will of the international society, including the Muslim world, either through customary law or treaty law.⁶⁸ The Nuremberg and Tokyo trials after the Second World War in 1945 and 1946 respectively are, usually, the starting point of modern international criminal law. Novak notes that these “were the first attempts to criminalise aggressive war and abuses against civilian populations”.⁶⁹ The Charter of the International Military Tribunal at Nuremberg⁷⁰ is the first formal legal basis for offences considered prohibited under international criminal law, listing crimes against peace, war crimes and crimes against humanity and complicity in committing them as crimes punishable under international law, and defining each one of them in relation to situations of war. The Nuremberg trials were followed in 1993 by the establishment of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), through UN Security Council Resolution 827 of 1993, to prosecute persons responsible for war crimes committed during the conflicts in the Balkans in the 1990s,⁷¹ and the International Criminal Tribunal for Rwanda ('ICTR') established through UN Security Council Resolution 955 of 1994 to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda and neighbouring states between 1 January 1994 and 31 December 1994,⁷² and ultimately the establishment of the ICC through the ICC Statute⁷³ adopted in 1998. While both the ICTY and ICTR were established under Chapter VII of the UN Charter on behalf of the international community, the ICC Statute was established by a multilateral treaty adopted through international co-operation. While

⁶⁸ See, for example, the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, in force 12 January 1951 (<http://www.legal-tools.org/doc/498c38/>).

⁶⁹ Andrew Novak, *The International Criminal Court: An Introduction*, Springer, New York, 2015, p. 8.

⁷⁰ Charter of the International Military Tribunal, 8 August 1945 (<http://www.legal-tools.org/doc/64ffdd/>).

⁷¹ United Nations Security Council Resolution 827 (1993), UN Doc. S/RES/827(1993), 25 May 1993 (<http://www.legal-tools.org/doc/dc079b/>).

⁷² United Nations Security Council Resolution 955 (1994), UN Doc. S/RES/955(1994), 8 November 1994 (<http://www.legal-tools.org/doc/f5ef47/>).

⁷³ See ICC Statute, *supra* note 1 (<http://www.legal-tools.org/doc/7b9af9/>).

Muslim-majority states may not have had much input into the Security Council resolutions establishing the ICTY and ICTR, a sizable number of them, as well as the Organisation of Islamic Cooperation ('OIC'), participated and contributed to the debates and adoption of the ICC Statute.⁷⁴ The ICTY had jurisdiction for genocide, war crimes, and crimes against humanity, while the statute of the ICTR also provided for genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and the Additional Protocol II.⁷⁵ The ICC Statute also recognises genocide, crimes against humanity, war crimes and the crime of aggression as the most serious crimes of concern to the international community as a whole, and punishable under international law.

Evidently, genocide, war crimes, crimes against humanity and the crime of aggression as defined in the statutes of these international tribunals are actions that are equally abhorred under Islamic socio-legal norms. These acts come under the general concept of '*fasád*' (corruption or atrocities), prohibited in the Qur'anic text 7:56: "Do not [cause] corruption in the land, after it has been set right". These acts are also specifically prohibited under Islamic socio-legal norms regulating warfare, as discussed above. Malekian has comparatively identified that these core international crimes are equally recognised and punishable under Islamic law.⁷⁶

Considering the historical context of international criminal law and looking at the preambles of the Charter of the International Military Tribunal at Nuremberg and the Statutes of the ICTY, ICTR, and the ICC, it is obvious that the object and purpose of international criminal law is to ensure that perpetrators of war crimes are appropriately brought to justice.⁷⁷ While bringing the perpetrators of war crimes to justice under international criminal law is mainly perceived in terms of punishing the perpetrators to serve as deterrent for future offenders, other theoretical

⁷⁴ See Coalition for the International Criminal Court, "Factsheet: The ICC and the Arab World" (<http://www.legal-tools.org/doc/c315d6/>).

⁷⁵ Statute of the International Tribunal for Rwanda, 8 November 1994, Articles 1–3 (<http://www.legal-tools.org/doc/8732d6/>).

⁷⁶ Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search*, Brill, Leiden, 2011, p. 165. See also Bassiouni, 2014, pp. 88–117, see *supra* note 21.

⁷⁷ See the preambular statements of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945 (<http://www.legal-tools.org/doc/844f64/>).

basis of punishment in international criminal law has been proffered by scholars on the subject.⁷⁸ Goldstone has noted that prosecution is not the only form of justice, nor necessarily the most appropriate form in every case, which highlights the need for a more holistic approach to international criminal justice. In that regard, it is important to note that the Preamble of the ICC Statute reflects the social, moral, political and legal origins of international criminal law as a basis of international criminal justice as will be analysed later below in relation to the object and purpose and the *maqāṣid* principles respectively.

It is apparent from the above analysis that there is certainly a common social, moral and legal objective for international humanitarian law, international human rights law and international criminal law under both international law and Islamic law respectively, as pillars of international criminal justice. This common objective is important to prevent a perception of moral and legal superiority of one civilisation over the rest, and ensure the promotion of international criminal justice through the collective moral and legal conviction of all civilisations, including Islam.

3.4. Advancing a Holistic Perspective of International Criminal Justice in Relation to the ‘Object and Purpose’ and ‘*Maqāṣid*’ Principles

The foregoing analyses establish that, while international criminal law judgments are an important aspect of international criminal justice, they are not the only basis for it. As Malekian observed:⁷⁹

[w]hen we talk of the principles of international criminal justice, we do not necessarily mean only the judgements that may be delivered by international criminal courts, but also the living structures of international criminal law as it exists in the international relations of states.

International criminal justice therefore requires a holistic perspective that combines the objects and purposes of international humanitarian law, international human rights law and international criminal law, making not

⁷⁸ See, generally, Farooq Hasan, “The Theoretical Basis of Punishment in International Criminal Law”, in *Case Western Reserve Journal of International Law*, 1983, vol. 15, no. 1, pp. 39–60.

⁷⁹ Farhad Malekian, *Jurisprudence of International Criminal Justice*, Cambridge Scholars Publishing, Newcastle upon Tyne, 2014, p. 1.

only its legal but also its social, moral and political features evident to encourage its universal acceptance, especially in the Muslim world in relation to Islamic socio-legal norms. Such a holistic perspective will link its punitive aspect with its preventive aspect to make the system more effective. The need for such complementation was well articulated by the former UN Secretary-General, Kofi Annan, in his report to the Security Council in 2004:⁸⁰

[I]n matters of justice and the rule of law, *an ounce of prevention is worth significantly more than a pound of cure*. While United Nations efforts have been tailored [...] to address the grave injustices of war, the root causes of conflict have often been left unaddressed. Yet, it is in addressing the causes of conflict, through legitimate and just ways, that the international community can help prevent a return to conflict in the future [...] *Viewed this way, prevention is the first imperative of justice*. (emphasis added)

Thus, international criminal justice must be seen as “the fruit of transcultural morality, co-operation, assistance, reciprocity, mutual and multilateral tolerances and a combination of different political necessities”.⁸¹ This requires engagement with its social, moral, political, and legal dimensions. Each of these dimensions is reflected in the Preamble of the ICC Statute. Pursuant to the object and purpose approach proposed in this chapter, relevant provisions of the preamble will be referred to in analysing each one of them in relation to Islamic socio-legal norms based on the *maqāṣid* principle to promote international criminal justice in the Muslim world.

3.4.1. Social Dimension of International Criminal Justice

The social dimension of international criminal justice relates to its societal linkages and acceptance. Kennedy observed that international lawyers “are constantly searching for better methods to ‘enforce’ their norms in international society and feel the need to defend international law when enforcement seems unlikely”.⁸² This can be addressed through a better

⁸⁰ Report of the Secretary-General, 23 August 2004, para. 4, see *supra* note 63 (<http://www.legal-tools.org/doc/77bebf>).

⁸¹ Malekian, 2014, p. 1, see *supra* note 79.

⁸² David Kennedy, “New Approaches to Comparative Law: Comparativism and International Governance”, in *Utah Law Review*, 1997, vol. 2, pp. 545–638.

appreciation of the social dimension of relevant areas of international law. As noted earlier, international criminal justice involves some element of global social control, which can be resisted in different societies due to different social and cultural variables.⁸³ Such resistance can be conciliated through promoting a proper appreciation of the social dimension of international criminal justice. International criminal justice cannot operate simply by imposition, but must be understood in the relevant social context for its acceptability in all societies, including the Muslim world.

The effectiveness of the social dimension of international criminal justice requires two mediations. The first relates to understanding societies, what they aspire to, what is their conception of justice, and whether they perceive that the international criminal justice system can fulfil their aspirations of social justice equitably. Bantekas has noted the absence of a thorough examination of the social and cultural context within which relevant international criminal justice actors operate.⁸⁴ The need to understand the social and cultural context that leads to atrocities amounting to international crimes cannot be overemphasised. For example, historical facts show that genocidal acts are often a consequence of built-up hatred of the 'other' due to ethnic supremacism and social injustices, while atrocities amounting to war crimes in armed conflicts are often a consequence of nationalist supremacism deriving from loyalty to the nation-state above respect for human equality, human dignity and universal humanitarianism. As noted by Gat: "War has a reputation for being the ultimate expression of national affinity and solidarity, of the sharp division between 'us' and 'them'",⁸⁵ and "studies show that the main cause of the post-1815 wars has been ethnic-nationalist".⁸⁶ This leads to the second mediation, which relates to promoting non-territorial common bonds of humanity reflected in values of human equality, human dignity, humaneness and social cohe-

⁸³ See generally, Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Finnish Lawyers' Publishing Company, 1989; *ibid*.

⁸⁴ Ilias Bantekas, "The Anthropological Dimension of International Crimes and International Criminal Justice", in Ilias Bantekas and Emmanouela Mylonaki (eds.), *Criminological Approaches to International Criminal Law*, Cambridge University Press, Cambridge, 2014, p. 240.

⁸⁵ Azar Gat, *Nations: The Long History and Deep Roots of Political Ethnicity and Nationalism*, Cambridge University Press, Cambridge, 2013, p. 313.

⁸⁶ *Ibid.*, p. 315.

sion within all societies, as important foundations for international criminal justice.

The promotion of non-territorial common bonds of humanity is reflected in the first preambular paragraph of the ICC Statute, which states that it is “[c]onscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time”. The consciousness that “all peoples are united by common bonds” and the concern that this “may be shattered at any time” in the first paragraph of the Preamble emphasises the importance of human equality and social justice, nationally and internationally, as an important first step to achieving a preventive international criminal justice system. This is where the link between international human rights law and international criminal justice is best reflected. The common bonds must be promoted internally through state policy and externally through international co-operation. Although international crimes are committed by individuals during armed conflict, Article 6 of the Charter of the International Military Tribunal at Nuremberg acknowledged that persons to be tried and punished by the tribunal would have been “acting in the interest of the European Axis countries”,⁸⁷ reflecting the complicit role of states either by commission or omission. States therefore have an important role to play both domestically and internationally in ensuring the advancement of social and cultural norms that promote the common bonds of humanity for the effectiveness of the social element of international criminal justice. The promotion of international human rights and good governance in all societies and equal concern for their violations thereof should be taken seriously by the international community as part of the international criminal justice system. As Boas argues:

Natural law conceptions of humanity and protection of communities are infused in the dialogue of what constitutes international criminal justice; these require a sense of an ‘international community’ acting ‘collectively’ against certain opprobrious behavior. In this way, international criminal justice is an expression of global community.

In relation to the Muslim world, it is first necessary to have a proper social understanding of Muslim societies, with reference to how Islamic

⁸⁷ Charter of the International Military Tribunal, 8 August 1945, Article 6 (<http://www.legal-tools.org/doc/64ffdd/>).

social norms are germane to promoting the “common bonds of humanity” expressed in the preamble of the ICC Statute and the perception of “international criminal justice [as] an expression of global community” highlighted by Boas. Both the “common bonds of humanity” and the idea of “global community” form part of the ends of the general *maqásid* of the *Shari‘ah* as reflected in the Qur’anic text 49:13, which is a clear global wake-up call for a much-needed functional global community:

O mankind, We have created you male and female, and appointed you races and tribes, that you may know one another [not that you may despise one another]. Surely the noblest among you in the sight of God is the most godfearing of you. God is All-knowing, All-aware.

This Qur’anic provision is the fundamental basis of Islamic social norms in respect of human co-existence, reflecting the common bonds of humanity by reference to our common human ancestry and equality of birth. Ethnicity is acknowledged as a natural phenomenon that should be positively appreciated and not negatively exploited to discriminate against or despise one another. Prior to Islam, ethnic resentment was rife in Arabia, leading to constant tribal wars. With the revelation of this verse, Prophet Muḥammad is reported to have pronounced: “Oh people! God has removed the evils and arrogance of the pre-Islamic period (*jáhiliyyah*) from you”.⁸⁸ There is consensus among both classical and contemporary Qur’anic exegetes that this verse established the prohibition of racial or ethnic resentment and discrimination in Islam as early as the seventh century. For example, the thirteenth century Qur’anic exegete, Al-Bayḏáwí, stated that the verse establishes the fact that all human beings are equal and there is no basis for superiority on grounds of ethnicity or lineage.⁸⁹ Also, Qutb stated in his commentary to this verse that God’s purpose of creating humanity into nations, races, and tribes is not to “stir up conflict and enmity [but] for the purpose of getting to know one another and living

⁸⁸ Reported by Al-Tirmidhí and Al-Bayḥáqí. For reference, see Mashood A. Baderin, “Islamic Law and International Protection of Minority Rights”, in Marie Luisa Frick *et al.* (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspective*, Martinus Nijhoff Publishers, Leiden, 2013, p. 320.

⁸⁹ Abd Alla Al-Bayḏáwí, “Anwár at-tanzíl wa-asrár at-ta’wíl”, in Heinrich O. Fleischer (ed.), *Commentarius in Coranium*, 1846, vol. 2, p. 276.

peacefully together”.⁹⁰ Similarly, Mawdúdí observed that in this verse “the whole of mankind has been addressed to reform it of the great evil that has been causing universal disruption in the world, that is, the prejudices due to race, colour, language, country and nationality”,⁹¹ and according to *Sháfi’* this verse “proceeds to set down the basis of an all-comprehensive and all-pervading principle of human equality [and] has firmly laid the axe at the false and foolish notions of superiority, born of racial arrogance or national conceit”.⁹² Prophet Muḥammad is reported to have re-emphasised this in his last major sermon, stating, *inter alia*:⁹³

O People! Be aware that your God is One. An Arab has no superiority over a non-Arab and a non-Arab has no superiority over an Arab, and no white person has any superiority over a black person, and no black person has any superiority over a white person, except on the basis of righteousness. The most honourable among you in the sight of God is the most righteous [...] Let those who are present convey this to those who are absent.

These Islamic injunctions establish strong social norms that can be used to promote the effectiveness of the social element of international criminal justice as analysed above, not only in the Muslim world but also globally. The *maqāṣid* approach requires that any contrary interpretation of the *Sharī’ah* that promotes resentment, discrimination, and enmity amongst humanity is rejected on grounds of contradicting the *maqāṣid* of the *Sharī’ah*. Modern Muslim-majority states, especially those that constitutionally recognise Islam or Islamic law as part of their social order, have an obligation to engrain this Islamic norm into their respective social orders to enhance the spirit of the common bonds of humanity as part of the general object and purpose of international criminal justice and the general *maqāṣid* of the *Sharī’ah*. There is nothing in international law that prohibits the use of these Islamic injunctions as a universal mantra for promoting the “common bonds of humanity” so important to socially encouraging a preventive international criminal justice system globally.

⁹⁰ Sayyid Qutb (translated by M. Adil Salah and Ashur A. Shais), *In the Shade of the Qur’án*, The Islamic Foundation, Leicester, 2009, vol. XVI, p. 97.

⁹¹ Sayyid Abul A’lá Mawdúdí, *The Meaning of the Qur’án*, Kazi Publications Inc., Chicago, 1999.

⁹² Mufti *Sháfi’* Usmani, *Ma’ariful Qur’án*, vol. 8, p. 143.

⁹³ Muḥammad’s Final Sermon, reported by Al-Bayháqí.

3.4.2. Moral Dimension of International Criminal Justice

The moral dimension of international criminal justice relates to its ethical linkages. Morals play a higher justificatory role in international law than in domestic law. International law acquires its general legitimacy mostly from moral justifications to make it acceptable as law in most societies. Generally, morals constitute one of the material sources of international law; history is another one, especially in respect of the international norms underlying international human rights law, international humanitarian law and international criminal law. In all these specific areas of international law, morals provide the material substance that is formally cloaked with the nature and force of law.⁹⁴ While law relates to the question 'what?', morals relate to the question 'why?', which is mostly asked in relation to international law norms. The challenge to international norms in most societies is not simply 'What is the law?', but the more complex question: 'Why should the norm be complied with?'. That complex question is not always sufficiently answered by merely saying: 'Because that is the law'. Practically, most international norms, including those of international criminal justice, are more sustainable on moral justifications than strictly legal arguments in most societies, including the Muslim world. In analysing the role of morals in international law, Boldizar and Korhonen refer, for example, to Koskeniemi's argument regarding the prohibition of nuclear weapons⁹⁵ that "the prohibition of the 'Killing of the Innocent' is not to be subjected to legal argumentation, even in the mode of justification, because this prohibition is *a priori* already stronger and clearer [morally] than any, however, ingenious, legal argument".⁹⁶ This is not to underestimate the importance of legal argumentation, but to highlight the need to also appreciate the importance of the moral argument for the promotion of the concept of international criminal justice as a universal norm. Thus, the moral dimension of international criminal justice requires looking beyond its formal source (the

⁹⁴ This is by reference to the classification of the sources of law into 'material sources' and 'formal sources', with the former being what the latter gives the force of law. See John Salmond, *Jurisprudence*, 7th ed., Sweet and Maxwell, London, 1924, p. 139.

⁹⁵ Martti Koskeniemi, "Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons", in *Leiden Journal of International Law*, 1997, vol. 10, pp. 137–62.

⁹⁶ Alexander Boldizar and Outi Korhonen, "Ethics, Morals and International Law", in *European Journal of International Law*, 1999, vol. 10, no. 2, p. 283.

law) to its material source (morals), which forms its normative foundation. Although the ideal in terms of morals is difficult to agree on in most cases, the morals underlying international criminal justice can be generally sustained within most moral systems, especially within Islamic moral norms, as is argued herein.

The atrocities prohibited under international criminal law are: genocide,⁹⁷ crimes against humanity,⁹⁸ war crimes,⁹⁹ and the crime of aggression.¹⁰⁰ There is no doubt that all these crimes and their detailed definitions are underpinned by strong moral justifications. The general object and purpose in prohibiting them is reflected in the second and third preambular paragraphs of the ICC Statute, which state: “[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity” and “[r]ecognizing that such grave crimes threaten the peace, security and well-being of the world”. These are, obviously, an appeal to human moral sentiments to justify the prohibition of those atrocious crimes.

With regard to Islam, the role of morals is well established in all its social-legal norms. Both the *Qur’án* and the Prophet’s Traditions are replete with moral admonitions as the fundamental basis of devotion, law and social interactions. The Prophet Muḥammad is specifically exalted in the Qur’anic text 68:4 as having excellent morals, which according to the Qur’anic text 33:21 Muslims are expected to emulate. The generic Qur’anic term for morals is *‘birr’*, translated as righteousness. The importance of morals as a cornerstone of all actions, including law, in Islam is reflected in the Qur’anic text 2:177, which states that righteousness is not merely turning one’s face either to the East or West in devotion to God, but rather to accompany this with different elements of excellent morals in the service of humanity. Similarly, the Qur’anic text 16:90 provides that “God bids to justice and good-doing [to all] and giving to kinsmen; and

⁹⁷ For the full definition of this crime, see ICC Statute, Article 6, *supra* note 1 (<http://www.legal-tools.org/doc/7b9af9/>).

⁹⁸ For the full definition of this crime, see ICC Statute, Article 7, *ibid.* (<http://www.legal-tools.org/doc/7b9af9/>).

⁹⁹ For the full definition of this crime, see ICC Statute, Article 8, *ibid.* (<http://www.legal-tools.org/doc/7b9af9/>).

¹⁰⁰ For the full definition of this crime, see ICC Statute, Article 5(2), *ibid.* (<http://www.legal-tools.org/doc/7b9af9/>); Assembly of States Parties Resolution, Review Conference, Resolution 6, RC/11, 11 June 2010 (<http://www.legal-tools.org/doc/de6c31/>).

He forbids indecency, dishonour and insolence”. The Prophet is also reported to have stated in a Tradition that “I have been sent [by God] to perfect good morals”.¹⁰¹ Thus, the morality of prohibiting those atrocities under international criminal justice is certainly very justifiable under Islamic socio-legal norms and in conformity with the *maqāṣid* of the *Shari‘ah*. As already identified above, a correlative aspect of the *maqāṣid* is the general prohibition of atrocities (*mafsadah*) on earth, clearly evidenced in the Qur’ānic text 7:56: “Do not [cause] corruption in the land, after it has been set right”.

In relation to the general object and purpose of international criminal justice to prevent atrocities, as indicated in the preamble of the ICC Statute, reference can also be made to the Qur’ānic text 4:75, which establishes the Islamic moral obligation of assisting the oppressed who cry out for rescue and help, and also to the Prophetic Tradition: “Let there be no harm and no reciprocation of harm”.¹⁰² All these Islamic divine injunctions can serve as reference points for promoting the moral dimension of international criminal justice in the Muslim world in relation to the general object and purpose of international criminal justice. Emphasising this moral dimension can encourage a change in attitude and gradually diminish the urge to commit the prohibited atrocities globally, especially in the Muslim world.

3.4.3. Political Dimension of International Criminal Justice

The political dimension of international criminal justice relates to authority and power relations amongst states and “the real question is how that relationship is managed and to what end”.¹⁰³ A notable hurdle for international criminal justice in that regard is the perceived selectivity and double standards within the international system.¹⁰⁴ This affects the political legitimacy of international criminal justice adversely, as impartiality is essential for its effectiveness. Concerns are often raised by developing countries, including Muslim-majority states, about the apparent political

¹⁰¹ Reported by Ibn Mājah, no. 47, *ḥadīth* 8.

¹⁰² Reported by Ibn Mājah, *ḥadīth* 32.

¹⁰³ Gideon Boas and Pascale Chifflet, *International Criminal Justice*, Edward Elgar Publishing Ltd, Cheltenham, 2017, Chapter 3.

¹⁰⁴ See, for example, Ramesh Thakur, “Law, Legitimacy and the United Nations”, in *Melbourne Journal of International Law*, 2010, vol. 11, no. 1, pp. 14–17.

inequality within the international system, as reflected in Article 27(3) of the UN Charter since 1945,¹⁰⁵ giving a veto power advantage to the five permanent members of UN Security Council on all substantive matters. This political inequality is indirectly incorporated into the ICC Statute through Articles 13(b) and 16, which grant the UN Security Council power of political interference in referring matters of international criminal justice to the ICC,¹⁰⁶ despite unsuccessful agitation for the past two decades for a reformed and better-balanced Security Council. There is apparent concern among states of the Global South about the Security Council's selective use of its referral powers under the ICC Statute based on political expediency to favour the permanent members' political interests. Most developing states, including Muslim-majority states, perceive that the powerful states can use their political advantage to manipulate the international system to make themselves immune from liability under the international criminal justice system. Thakur bluntly argues that the "initiative of international criminal justice meant to protect vulnerable people from brutal national rulers has been subverted into an instrument of powerful against vulnerable countries" for political expediency.¹⁰⁷ The former UN High Commissioner for Human Rights, Louise Arbour, also highlighted that "there would be little hope for the promotion of the rule of law internationally if the most powerful international body makes it subservient to the rule of political expediency".¹⁰⁸

International criminal justice can only be effectively sustained through equitable international political co-operation. In relating this to the object and purpose of international criminal justice, the fourth preambular paragraph of the ICC Statute affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by *enhancing international cooperation*", while the fifth preambular paragraph indicates a determination to collectively "put an end to impunity for the perpetrators of these crimes

¹⁰⁵ Charter of the United Nations, 26 June 1945, in force 24 October 1945, Article 27(3) (<http://www.legal-tools.org/doc/6b3cd5/>).

¹⁰⁶ ICC Statute, Articles 13(b) and 16, see *supra* note 1 (<http://www.legal-tools.org/doc/7b9af9/>).

¹⁰⁷ Thakur, 2010, p. 15, see *supra* note 105.

¹⁰⁸ Louise Arbour, "Justice v. Politics", in *International Herald Tribune*, 16 September 2008.

and thus to contribute to the prevention of such crimes”.¹⁰⁹ Both the enhancement of international co-operation and determination to put an end to impunity can only be achieved through an equitable international political relationship that transcends the narrow interest of any one or group of states to the detriment of the international criminal justice system. The need for international politics of equality and co-operation must be strongly promoted to enhance international criminal justice globally, particularly in the Muslim world.

From the perspective of *maqāṣid*, Islam enjoins international co-operation based on equity, justice and spirit of solidarity in dealing with international political problems. This is inspired by the Qur’ānic text 49:9–10, which enjoins collective action based on equity, justice and solidarity:

If two parties of the believers fight, put things right between them; then, if one of them is insolent against the other, fight the insolent one till it reverts to God’s commandment. If it reverts, set things right between them *equitably* and *be just*. Surely *God loves the just*. The believers indeed are *brothers*; so set things right between your two [contending] brothers and fear God; haply so you will find mercy’ (emphasis added).

Hamidullah describes this Qur’ānic provision as a fundamental objective of Islamic international law.¹¹⁰ The provision emphasises the importance of equity, justice and solidarity as essential factors of international co-operation and collective action. Many other Qur’ānic provisions corroborate this, including the Qur’ānic text 5:2: “[L]et not [your] detestation for a people, who barred you from the Holy Mosque move you to commit aggression. Help one another to piety and godfearing; do not help each other to sin and enmity”; and the Qur’ānic text 5:8: “[Let not [your] detestation for a people move you not to be equitable [towards them] – that is nearer to godfearing”, specifically enjoins Muslims not to act inequitably even against a hostile people or nation. Based on both the object and purpose of international criminal justice and the *maqāṣid* of the *Shari‘ah*, it is essential to imbibe this Islamic injunction of equity and solidarity into the political dimension of international criminal justice to remedy

¹⁰⁹ ICC Statute, Preamble, see *supra* note 1 (<http://www.legal-tools.org/doc/7b9af9/>).

¹¹⁰ Hamidullah, 1977, p. 178, see *supra* note 51.

the political double-standards, and make it more appealing particularly to the Muslim-majority states, which tend to perceive the system as having equitable deficits in its political dimension. Doing so would serve as a big boost for enhancing international criminal justice globally, but particularly in the Muslim world.

3.4.4. Legal Dimension of International Criminal Justice

The legal dimension of international criminal justice relates to the application of its principles through the courts. This climaxed in the creation of the ICC as the main and permanent international court for bringing violators of core international crimes to trial. The general object and purpose of the legal dimension of international criminal justice is reflected in the ninth and eleventh preambular paragraphs of the ICC Statute which state that, in the determination to meet the social, moral and political ends of international criminal justice “for the sake of present and future generations”, the ICC is established to exercise legal jurisdiction “over the most serious crimes of concern to the international community as a whole”, based on the resolve “to guarantee lasting respect for the enforcement of international justice”. However, the ICC may only exercise jurisdiction where national legal systems fail to do so or where a state is unwilling or has no capability to prosecute international criminal offenders.¹¹¹ States, as members of the international community, have the primary responsibility to bring violators of serious crimes of concern to the international community to justice under their respective domestic legal systems. The system envisages all states supporting the legality of international criminal justice and prosecuting offenders when necessary. This requires states to have effective domestic legal systems that ensure fair trial and due process leading to substantive justice and affording alleged offenders adequate opportunity to defend themselves.

Currently, several Muslim-majority states are parties and signatories to the ICC Statute.¹¹² This raises the question of whether Muslim-majority states whose domestic legal systems are based on or influenced by the *Shari‘ah* can provide the requisite criminal justice system for the effective

¹¹¹ See ICC Statute, tenth preambular paragraph and Article 1, *supra* note 1 (<http://www.legal-tools.org/doc/7b9af9/>).

¹¹² International Criminal Court, “The State Parties to the Rome Statute”, available on the web site of the Assembly of States Parties.

enforcement of international criminal law domestically. There is a perception, particularly in the West, that legal systems based on the *Shari'ah* cannot generally provide adequate criminal justice of international standard. While it is true that some of the criminal punishments prescribed by the *Shari'ah* are contrary to international human rights law, the *Shari'ah* generally enjoins justice, fairness and due process in criminal trials that are perfectly commensurate with international standards. Many verses in the *Qur'an* and Prophetic Traditions emphasise the maintenance of justice and equity in legal proceedings. For example, the Qur'anic text 4:135 enjoins that justice be maintained "even though it be against yourselves, or your parents and kinsmen, whether the man be rich or poor", and the Qur'anic text 16:90 instructs: "Surely God bids to justice and good-doing [...] and you have made God your surety; surely God knows the things you do". Doing justice is considered a duty to God, from which emanate the rights to equality and fairness for all without regard to status, race, gender or religion. The notion that the Crown or King can do no wrong has no place under Islamic law and thus presidents and heads of state are not immune from facing justice (with the opportunity to legally defend themselves) for alleged international crimes. However, the creation of necessary institutions and procedural rules for upholding justice as prescribed by the *Shari'ah* is the responsibility of respective Muslim-majority states. The need to prosecute offenders and violators of both domestic and international law is well recognised under Islamic law as the *Qur'an* provides specific punishment for *hudud* and *qisas* offences, while the provision in the Qur'anic text 4:16, "[a]nd when two of you commit indecency, punish them both", is understood as authority for the State to prescribe punishments for all other offences known as *ta'zir*. Thus, Muslim-majority states have a duty under Islamic law to establish judicial institutions with adequate fair trial and due processes for criminal trials that meet international standards. Both the object and purpose of the legal dimension of international criminal justice and the specific *maqṣud* of punishing crimes under the *Shari'ah* justifies the need for Muslim-majority states to bring offenders of heinous international crimes to justice under their domestic legal systems.

With reference to armed conflicts, regular combatants of Muslim-majority states that apply Islamic law are generally expected to comply with the rules of warfare as prescribed by both Islamic law and international humanitarian law, and any crimes committed in violation of interna-

tional criminal justice can be prosecuted under the domestic laws of the State; failing this, they may be subject to the jurisdiction of the ICC. However, there is one area of apparent legal conflict between aspects of classical Islamic jurisprudence and international humanitarian law in respect of atrocities being committed by rebellious groups such as ISIS, Al-Shabáb and Boko Haram in different parts of the Muslim world today. Traditionally, there is an established jurisprudential view under classical Islamic international law (*al-siyar*) that rebellious groups with established authority, some territorial control and sustained resistance (*man'ah*) against the main political authority based on some speculative interpretation (*ta'wil*) of Islamic sources, would not be punishable by the main political authority for actions they committed within the territory they controlled during the conflict. For example, Al-Shaybání expressed the view that “when such rebels repent and accept the authority of the government, they should not be punished for the damage they caused during their rebellion”. Contextually, this rule is perceived to offer incentives to rebels for complying with the laws of war, thereby reducing the sufferings of civilians and ordinary citizens. However, this rule is neither absolute nor a licence for rebellious groups to commit heinous crimes with impunity. Based on the *maqāṣid* principle, where such rebels violate the established laws of war with impunity, they would be liable for all atrocities they committed during the rebellion even if they had established authority and some territorial control, and sought to justify their atrocities by reference to some speculative interpretations of the law.¹¹³ Thus, with regard to the legal dimension of international criminal justice, it is submitted, particularly with reference to the object and purpose and *maqāṣid* principles, that members of ISIS, Al-Shabáb and Boko Haram would be liable to face justice and, where convicted, liable to be punished for all the atrocities committed by them in violation of the rules of warfare under both contemporary international humanitarian law and Islamic humanitarian law.

3.5. Conclusion

Essentially, international law cannot operate in a vacuum, but must unavoidably interact with domestic legal systems and cultures for its imple-

¹¹³ See, generally, Sadia Tabassum, “Combatants, Not Bandits: The Status of Rebels in Islamic Law”, in *International Review of the Red Cross*, 2011, vol. 93, no. 881, pp. 1–19. See also Bassiouni, 2014, p. 139, *supra* note 21.

mentation. Thus, international law is structured to be implemented primarily by states within their domestic legal systems, with international tribunals stepping in only when domestic implementation fails. This is reflected, for example, in the general requirement to exhaust all available domestic remedies before international human rights tribunals can have jurisdiction for human rights trials and also in the complementarity rule, which gives the ICC jurisdiction to try international crimes only when states fail to or have no capacity to do so. This highlights the need to promote synergy between international law generally and relevant domestic systems of the world. The greater the synergy, the greater would be the prospects of acceptance and effective implementation of international norms within domestic systems. It is in that context that this chapter has critically engaged with the concept of international criminal justice and analysed how to enhance its acceptance and effectiveness in the Muslim world, highlighting the role of Islamic socio-legal norms (broadly defined as social, moral, political and legal norms) in that regard. In doing so, the chapter not only contributes to, but changes, the traditional debate in two important aspects that will hopefully deepen the discourse on the relationship between international criminal justice and Islamic socio-legal norms beyond bare legal formalism.

The first aspect is that, in promoting international criminal justice, the traditional approach has been to focus mainly on the substantive legal provisions of relevant treaties, without much attention to the object and purpose behind the legal provisions or the moral justifications that sustain the concept of international criminal justice. While that approach may impose a compulsive legal obligation on States Parties to the relevant treaties, which they may or may not fulfil in practice, its persuasive and justificatory effect in attracting compliance is very limited universally. In challenging that approach, this chapter has advanced a more holistic approach to international criminal justice, involving its social, moral, political and legal dimensions underpinned by the reference to the object and purpose principle of international law. Similarly, the second aspect is that, in engaging Islamic socio-legal norms with the application of international criminal justice within the domestic systems of Muslim-majority states, the traditional approach has been to focus mainly on the substantive injunctions of the *Shari'ah* without much attention to the *maqāṣid* behind those injunctions. That approach also does not absorb the benevolent nature of the *Shari'ah* and conceals the common grounds it shares with the

objectives of international criminal justice. The chapter has also challenged that approach by advancing the *maqásid* principle of Islamic law.

In conclusion, the arguments herein pierce the legal veil of both international criminal justice and Islamic law by moving the discourse of their relationship beyond strict engagement with legal formalism to include consideration and appreciation of the social, moral and political norms that constitute the justification behind the legal provisions. It is submitted that this approach can be significantly persuasive and could consequently facilitate better acceptance and effective application of international criminal justice in the Muslim world.

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Islam and International Criminal Law and Justice

Tallyn Gray (editor)

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

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

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