The International Criminal Court and the Applicability of International Jurisdiction under Islamic Law

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I. INTRODUCTION

Customarily, globalization refers to the increasing activity of transnational actors and the resulting push for greater international legal harmonization to facilitate expanding business relations. But globalization could also refer to the expansion of criminal law of universal applicability, such as the universal law against "crimes against humanity."\(^1\) Although this expansion, having taken place throughout the twentieth century, is not particularly recent, since September 11, 2001, the ability to enforce universal criminal laws has taken on greater significance.

Previously, countries would rarely allow outside authorities to exercise jurisdiction over their own citizens or even other nations' citizens residing within their territory. More often than not, disputes were resolved either by some manner of negotiation and settlement or armed conflict. Sometimes negotiations were based on bilateral or multilateral treaties requiring parties to try or extradite criminals, and other times were based solely on comity. Regardless of the method of determining the appropriate jurisdiction, it has become increasingly important that countries agree on a forum for the effective prosecution of terrorists. The International Criminal Court ("ICC") provides an interesting alternative to the traditional manners of determining the appropriate jurisdiction for trying international criminal offenses.

When one now mentions the word "terrorist," it conjures up stereotypical images of bearded Middle Eastern men desirous of martyrdom. While this is indeed unfortunate, it raises the issue of what more can be done to curb terrorism and other crimes against humanity arising from or occurring in

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\(^1\) "Crimes against humanity" are defined in Article 6(c) of the Nuremberg Charter. Agreement between the United States of America and the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics Respecting the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal art 6(c), 59 Stat 1544, 1547 (1945).
predominantly Muslim countries. Many commentators may choose to target Muslim countries' varying degrees of application of Islamic law as a roadblock on the path towards world peace and prosperity. This Development will address whether international jurisdiction in general, and the ICC in particular, are compatible with Islamic law. Part II will deal with the compatibility of Islamic law with modern international law. Subpart A will examine the contemporary rules of international jurisdiction, while Subpart B will consider the issue under the lens of Islamic law. Finally, Part III will analyze the ICC and its relevance to Islamic law countries.

II. COMPATIBILITY OF ISLAMIC LAW WITH MODERN INTERNATIONAL LAW

Modern international law has changed dramatically in the past fifty years. In contrast, Islamic law, or the Shari’ah, is over fourteen centuries old, and has been viewed in recent times as somewhat monolithic. The question is therefore a basic issue of coexistence: can a jurisdiction wishing to apply the Shari’ah fulfill its obligations under contemporary international law? In particular, how are international jurisdiction principles to be applied?

A. CONTEMPORARY RULES OF INTERNATIONAL JURISDICTION

There are three main varieties of jurisdiction discussed in the Restatement (Third) of Foreign Relations Law (“Restatement”): prescriptive, adjudicative, and enforcement jurisdiction. Prescriptive jurisdiction is the authority of a state to apply its own laws to persons and activities. Adjudicative jurisdiction is the “authority of a state to subject particular persons or things to its judicial process.” More generally, adjudicative jurisdiction is the requisite legal power to bind the defendant with a judgment—hence it focuses on the relationship between the adjudicating body and the defendant. Enforcement jurisdiction is simply the power to enforce laws; it is the ability to use government resources to “induce or compel compliance” with state law. Traditionally, all three types of jurisdiction must be present for a state to detain and try a suspect.

Asserting international prescriptive jurisdiction under the Restatement can be achieved using any one of five alternatives: territorial, nationality, protective, passive personality, or universal jurisdiction. Territorial jurisdiction, universally

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2 “Shari’ah” is simply the Arabic word for Islamic law. The two terms are used interchangeably throughout this Development.
4 Id at 711.
5 Id.
6 Id.
7 Id at 710.
accepted under international law, involves the “exercise of jurisdiction by a state over property, persons, acts, or events occurring within its territory.”\textsuperscript{8} Though territorial jurisdiction is clearly recognized, it often comes up short in prosecuting international terrorists, most of whom flee the victim-state upon commission of the crime. Nationality jurisdiction suffers from a similar lack of bite. It is defined as jurisdiction over a state’s own nationals and is also nearly universal in its application.\textsuperscript{9} The problem with nationality jurisdiction is that most international terrorists are not nationals of the victim-states.

The protective principle and the passive personality principle are two forms of prescriptive jurisdiction that are particularly relevant in the context of prosecuting international terrorists. The protective principle derives from § 402(3) of the Restatement, which allows a state to claim jurisdiction with respect to “certain conduct outside its territory.”\textsuperscript{10} This conduct must be committed by persons who are not its nationals and “directed against the security of the state or a limited class of other state interests.”\textsuperscript{11} This principle allows a nation to assert jurisdiction over a person whose conduct potentially interferes with national security or the operation of governmental functions.\textsuperscript{12}

Similarly, the passive personality principle stems from § 402(g) of the Restatement. Under this concept, a state may apply its law—particularly its criminal law—to an act committed outside its territory by a person who is not its national, where the victim of that act was its national.\textsuperscript{13} The passive personality principle is not “generally accepted for ordinary torts or crimes,” but it is accepted for “terrorist and other organized attacks” on nationals.\textsuperscript{14} American courts have limited the effect of the passive personality principle, stating that the mere fact that an act outside the US impacts an American citizen does not necessarily mean that the US can exert jurisdiction over the actor.\textsuperscript{15} It is important to note that although application of either the protective or passive personality principle may result in a valid assertion of prescriptive jurisdiction, in most instances it is not enough to entitle the accusing state to demand extradition absent an applicable extradition treaty with the country in question.

\textsuperscript{8} Id at 713.
\textsuperscript{9} Id at 716.
\textsuperscript{11} Id.
\textsuperscript{12} See, for example, \textit{United States v Romero-Galue}, 757 F2d 1147, 1154 (11th Cir 1985) (applying protective principle as an independent basis of jurisdiction to “prosecute foreign nationals on foreign vessels on the high seas for possession of narcotics”).
\textsuperscript{13} Restatement (Third) of the Foreign Relations Law of the United States § 402(g) (cited in note 10).
\textsuperscript{14} Id.
\textsuperscript{15} See \textit{United States v Columba-Collela}, 604 F2d 356, 359 (5th Cir 1979) (using the objective territorial principle to determine that there was no basis for jurisdiction because the defendant had not threatened the security of the US or intended to produce effects within it).
Thus, adjudicative and enforcement jurisdiction may not be possible, notwithstanding the claim of prescriptive jurisdiction.

The last form of prescriptive jurisdiction is universal jurisdiction. An act subject to universal jurisdiction is one that "is contrary to the interests of the international community," leading to the right of any state "to apprehend and punish the offenders."16 Currently, there are only two firmly established cases of universal jurisdiction: piracy and war crimes.17 Although states often assert a right of universal jurisdiction, including over acts of terrorism, this has proven to be very controversial.18 In fact, this controversy has provided much of the impetus for establishing an international criminal court and is discussed in more detail in Part III.

Although prescriptive jurisdiction must be established to justify the application of a state’s laws, absent adjudicative and enforcement jurisdiction, prescriptive jurisdiction is insufficient to enable the prosecution of crimes. However, there are several multilateral conventions making certain crimes internationally punishable, requiring states to either extradite or punish the offenders.19 Most Muslim countries are parties to these conventions, and have thereby agreed to be bound by their requirements. With regard to terrorism in particular, some scholars even believe that the duty to extradite or prosecute is now a part of customary law in the international community. Professor Oscar Schachter states that “[t]he condemnation of international terrorism thus imposes an obligation on all States to take appropriate measures to prevent acts of international terrorism. . . . When suspected terrorists are apprehended the State must either extradite or try and punish them. This obligation, I believe, is now general customary international law.”20 Thus, even absent specific extradition treaties, there may be an obligation to either prosecute or extradite under multilateral conventions and customary international law.

Only once a duty for a state to act, or at the very least a duty not to interfere, exists can there be any alleged conflict with Islamic law. The inquiry as to the compatibility with the Shari’ah is a three-step process. The first step is to determine the extent to which the duty to extradite or prosecute is generally considered part of applicable multilateral conventions or customary international law. The second step is to determine whether Muslim countries have, for the

17 Id.
18 See, for example, Filartiga v Pena-Irala, 630 F2d 876 (2d Cir 1980); Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3), [2000] 1 AC 147 (House of Lords 1999) (UK).
19 See Convention on the Prevention and Punishment of the Crime of Genocide (1951), 78 UN Treaty Ser 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UN Treaty Ser 85.
most part, accepted these responsibilities under international law. If the Muslim countries have indeed accepted these responsibilities, the third step is to determine whether they can be reconciled with Islamic law.

To answer the preliminary question as to whether an international duty exists, one must first look to the traditional sources of international law. Examining existing treaty law applicable to Muslim countries, it is readily apparent that a government cannot overtly or tacitly assist terrorists seeking shelter within its borders. This, however, is not dispositive regarding the issue of the compatibility of the Shari’ah with international law. Although many countries purport to apply Islamic law in some manner, it is often isolated to particular areas of the law such as family law and is not applied as an overall foundation of jurisprudence. This raises the question of whether international law is compatible with a broader application of the Shari’ah in Muslim countries.

B. INTERNATIONAL JURISDICTION UNDER ISLAMIC LAW

The Qur’an, Islam’s holy book and first primary source of law, has little to say regarding state sovereignty, international jurisdiction, or extradition. In addition, prophetic pronouncements on these issues are sparse. Effective recourse, however, may be had by examining other areas of the Shari’ah. For instance, contract law, in Islamic jurisprudence, places a high emphasis on freedom of contract. Moreover, it is a bedrock of Islamic law that everything is permissible unless specifically forbidden. Provided that neither the subject matter of the contract nor the consideration provided violates the Shari’ah, the contract must be honored. If a party, whether Muslim or not, breaches the contract, it is up to the judiciary to enforce its provisions. The UN Charter and any convention to which a country is a party all constitute contracts and thus must be treated as such by the contracting parties and by the courts.

Contrary to many views on Islamic law, a more thorough application of the Shari’ah would not be a hindrance to adherence to international law and in fact could serve as a tool in establishing widespread compliance. Many wanted or suspected international Muslim criminals consider international law, and the UN

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22 This is in reference to the Sunnah, or habitual practice of Muhammad, Islam’s prophet. See Mohammad Hashim Kamali, Principles of Islamic Jurisprudence 44 (Islamic Texts Society rev ed 1997). The Sunnah is the second primary source of the Shari’ah.
24 Id at 14.
Charter in particular, to be merely heretical innovations of the West designed to subjugate the world’s Muslim population. Indeed, as Dr. El-Ayouty pointed out in his article on international terrorism, invoking the Shari’ah as a basis for compliance with international law would be a powerful and authoritative tool in delegitimizing the supposed Islamic framework within which Muslim terrorists work. 

Invoking the Shari’ah as a basis for compliance would deny them a “competitive advantage” in recruiting new members and, perhaps even more importantly, supporters. While Dr. El-Ayouty believes that applying Islamic law would be of considerable assistance “in the areas of extradition, prosecution, and punishment of Muslim terrorists,” he states, “its most immediate effect would be to peel the label of ‘Muslim’ off the perpetrators of this new type of war which goes on under the name of Islam.”

Islam places a special emphasis on both achieving and maintaining peace. The very word “Islam” derives from the same root in Arabic as the word for peace, “salaam.” Islamic law discourages, at every opportunity, activities that work toward anarchy and violence by “criminaliz[ing] individuals, groups, and government authorities involved in anti-peace actions.” The Qur’an says, “[a]s often as they light a fire for war, Allah [God] extinguishes it. Their effort is for corruption in the land, and Allah loves not those who work corruption.”

One of the many general legal principles outlined in the Qur’an states, “do not take the life which Allah has rendered sacrosanct, except rightfully.” This verse delivers a general prohibition pertaining to the taking of life, as well as a narrow exception. The “except rightfully” provision has become the de facto mantra for many Muslim extremists, yet it has been incorrectly applied. The Qur’anic exception was meant to be applied by the Islamic state vis-à-vis its own judicial system, as “the monopoly of force and the means of law enforcement lie entirely in the hands of the State.” Accordingly, extremist nonstate actors have no footing under the Shari’ah as they have no standing to apply the “except rightfully” exception to their own actions. Hence the function of the state applying Islamic law is to administer justice, not to interfere with it. This includes the duty under Islamic law to uphold extradition and mutual legal assistance treaties with other nations.

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26 Id.
27 Id.
29 El-Ayouty, 5 ILSA J Intl & Comp L at 490 (cited in note 25).
31 Id at ch 17, verse 33 at 285.
32 El-Ayouty, 5 ILSA J Intl & Comp L at 489 (cited in note 25).
III. THE INTERNATIONAL CRIMINAL COURT AND “ISLAMIC” COUNTRIES

Universal jurisdiction, a form of prescriptive jurisdiction, takes the notion of the application of a nation’s laws one step further and designates certain crimes as so heinous that any nation in the world can exercise its authority to stop it—thus severing the link between the alleged activity and physical location. National courts may claim the right to exercise universal jurisdiction, though this is often controversial. However, universal jurisdiction may also be asserted by an international criminal tribunal, such as the newly-established ICC. The basic premise of the ICC is “to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes.” With such a lofty goal in mind, it is interesting to examine the initial 1998 vote on the Rome Statute, pursuant to which the ICC was created. One hundred and twenty countries initially signed the Statute, and seven countries voted against it. Out of the seven countries that opposed the formation of the ICC, four were countries with predominantly Muslim populations purporting to apply at least some measure of Islamic law. States were free to subsequently sign on to the Rome Statute, as long as they did so by December 31, 2000. After that date, a nation wishing to grant jurisdiction to the ICC could only accede to the Rome Statute.

In the time between mid-July 1998 and the end of 2000, many nations did sign on to the Rome Statute. Included among these countries were the United States, Israel, and Yemen—three of the original seven dissenting parties. Though the US is a signatory to the Rome Statute, it has not yet ratified it and is extremely unlikely to do so in the near future. Looking toward the rest of the Muslim world, eleven more countries signed the Statute in the interim period.

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35 See Anthony Lewis, At Home Abroad: A Turn in the Road, NY Times A15 (July 20, 1998).

36 Id. The four predominantly Muslim countries were Libya, Iraq, Qatar, and Yemen. The remaining three countries voting against the ICC were China, Israel, and the United States.

37 Algeria signed the Rome Statute on December 28, 2000; Bahrain signed on December 11, 2000; Egypt signed on December 26, 2000; Iran signed on December 31, 2000; Jordan signed on October 7, 1998; Nigeria signed on June 1, 2000; Oman signed on December 20, 2000; the Philippines signed on December 28, 2000; Sudan signed on September 8, 2000;
However, one may gain insight as to the motives of these countries, and other late signatories, by scrutinizing the timing of the signatures. According to the rules regarding the development of the ICC, only signatory states can play a role in the development process. Of the twelve overall Muslim-majority countries to become signatories, five did so with less than ten days remaining. It would seem that the last-minute signatures resulted, at least in part, from a desire to allow the respective governments to have an influence on the development of the ICC.\(^8\) This theory is further borne out by examining the subsequent ratifications of the Rome Statute. On the whole, 92 of the 139 signatories have ratified the Rome Statute, constituting a 66 percent overall ratification rate.\(^9\) Returning to the twelve Muslim countries, only two have ratified the Rome Statute since the end of 2000, comprising an analogous ratification rate of less than 17 percent.\(^{40}\)

Contrary to the signing of the Rome Statute, there is no deadline for a country to accede to the jurisdiction of the ICC. Although the ICC may in some instances assert universal jurisdiction over the citizens of nonsignatories to the Rome Statute,\(^{41}\) wider acceptance of ICC jurisdiction in Muslim countries through ratification of the Rome Statute would go a long way toward effecting change in these countries. Leaders of these countries, often autocratic despots, could be held accountable because of the potential for future ICC prosecutions, with no question as to the validity of the assertion of universal jurisdiction or the impartiality of the forum.\(^{42}\) At the very least, this potential for future liability


\(^9\) See Coalition for the ICC, Signature and Ratification Chart (cited in note 37).

\(^{40}\) Id. The Muslim countries comprise a portion of the overall ratification rate, making it lower than it would otherwise be. Thus the disparity between the two rates is actually larger than it would appear. Afghanistan, then under the rule of the Taliban, did not sign the original treaty but acceded to it on February 10, 2003. Afghanistan is omitted from the present analysis.

\(^{41}\) The ICC, unlike other international courts, has the ability to assert jurisdiction over individuals. The ICC has jurisdiction over crimes occurring in either of two situations: when the crime occurs in the territory of a signatory state or when the accused is the national of a state party to the Rome Statute. Rome Statute art 12(2) (cited in note 34). The former scenario allows for the possibility of the ICC asserting jurisdiction over citizens of nonsignatories to the Rome Statute and has been a major bone of contention for opponents of the ICC. See generally Jack Goldsmith, The Self-Defeating International Criminal Court, 70 U Chi L Rev 89 (2003).

\(^{42}\) This is not to say that there would be no prosecution of world leaders who may violate international law in the absence of the ICC. See Pinochet, 1 AC at 147 (UK) (cited in note 18) (abrogating Augusto Pinochet’s sovereign immunity under international law as a former head of state and resulting in his being subject to extradition for the crime of torture during his rule of Chile). This decision, arguably resting on the concept of universal jurisdiction, was controversial. See Sarah C. Rispin, Implications of Democratic Republic of the Congo v. Belgium on the Pinochet Precedent: A Setback for International Human Rights Litigation?, 3 Chi J

The ICC and the Applicability of International Jurisdiction under Islamic Law

Nassar

should serve as a deterrent from committing more egregious crimes. In addition, terrorists who once counted on safe havens in Muslim countries would face a greater risk of prosecution. ICC membership will ensure, as much as possible, the prosecution of international terrorists in an unbiased setting. This might be preferred to extradition for prosecution in national courts on the basis of universal jurisdiction. Moreover, domestic citizens who are victims of such crimes will no longer have to depend on the deficient prosecution procedures and remedies that exist in many Muslim countries.

A common concern with joining the ICC has been that it would usurp Islamic law's exclusive jurisdiction, and substitute the law of man for the law of God. Although many compromises have been suggested to include Muslim countries despite this concern, the response of most Muslim countries has been to shun the ICC. Though joining the ICC involves a measure of jurisdictional acquiescence, it does not necessarily involve abdicating the power to prosecute criminals domestically. The ICC, in its present form, provides a "safety-valve" of sorts. Member-states, once notified of impending prosecution by the ICC, may, in good faith, take up prosecution of the alleged crime themselves. This allows countries fearful of improper or incompatible ICC results to try cases domestically. Paradoxically, the ICC may be able to achieve its goals without ever trying a case—by simply spurring the domestic prosecution of crimes, when they had been previously ignored or improperly tried. Because the grant of jurisdiction is limited, the ICC is squarely within the Shari'ah's permitted realm of freedom of contract.

IV. CONCLUSION

The faithful application of Islamic law in predominantly Muslim countries can and should serve in promoting world peace. The Shari'ah may work in conjunction with international law in achieving this end, without sacrificing any of Islam's legal ideals. Despite this, the International Criminal Court provides an opportunity to predominantly Muslim countries and other countries that seek to bolster law abidance in these regions. ICC membership for these nations would aid in many respects: it would promote domestic justice by deterring prohibited

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43 See, for example, Persian Gulf: The Question of War Crimes; Hearing before the Committee on Foreign Relations, United States Senate, 102d Cong, 1st Sess 16 (1991) (testimony of Senator Jesse Helms suggesting that any international criminal court include a separate court to try Islamic law).

44 This is generally referred to as the principle of complementarity. It gives the ICC jurisdiction over a case only if state authorities do not take up the case. See Kenneth Roth, *The Court the US Doesn't Want* 45 (NY Rev Books 1998), reprinted in Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* 1195 (Oxford 2d ed 2000).
crimes domestically, provide an unbiased setting for the prosecution of alleged terrorists and criminals, reduce the risk of incurring sanctions or military action or retaliation, and provide a safety-valve against potential ICC bias by permitting domestic prosecution.

Modern times have presented unique and dynamic problems. Interestingly, one of the most overlooked avenues to solving what may be the greatest problem of our time—international terrorism—comes from the intersection of a system of law more ancient than English common law, the Shari’ah, and the newest and perhaps most controversial international institution, the ICC. As UN Secretary-General Kofi Annan noted, this problem “is a global menace which clearly calls for global action. Individual actions by Member states, whether aimed at state or nonstate actors, cannot in themselves provide a solution. We must meet this threat together.” Voluntary participation of Muslim countries in the ICC may provide an unbiased multilateral alternative to national prosecutions of terrorists, and therefore increase support for such multilateral prosecutions in the Muslim world.