Introduction

Islamic Criminal Justice in the 21st Century

For nearly half a century – since the establishment of the Nuremberg Tribunal, until the first few years of the functioning of the two Ad Hoc Tribunals – the language of justice in international criminal tribunals was English. Other legal traditions of the world, such as the Romano-Germanic system, the (formerly well-recognised) socialist system, the Islamic system and other legal systems of the world were neglected. The same can be said regarding the work of the International Law Commission (ILC). In the ILC fortieth meeting held on 6 June 1950, Judge Manley O. Hudson had noted that his study, Ways and Means for Making the Evidence of Customary International Law more Readily Available, was certainly incomplete, since he could not know every foreign language. He asked the members of the ILC to ‘forgive him for not having mentioned the literature of Islam.’

Joseph Schacht notes that Islamic law is a ‘phenomenon so different from all other forms of law … that its study is indispensable in order to appreciate adequately the full range of possible legal phenomena’.

Responding to these observations and suggestions, this special issue commences with Farhad Malekian’s contribution which examines the possible impact of Islamic law on the Statute of the International Criminal Court (ICC). Though the frameworks of the two systems appear, at the first glance, to be very different, Malekian contends that there are no major divergences between them other than the interests of their exponents and the political power behind their motivations. While it is clear that Islamic law has its own problems of misinterpretation and misapplication Malekian stresses that judges at the ICC should not view the Islamic law as a law preventing the positive movements of the ICC.

As for the crime of aggression, Malekian draws our attention to the fact that a particular conduct or omission by states may be subject to different provisions of three different systems, namely, Islamic law, the ICC and the United Nations.


He argues that this ‘means the collapse of legitimacy and illegitimacy of war of aggression.’

Ray Murphy and Mohamed El Zeidy examine the treatment of prisoners of war (POWs) under international humanitarian law (IHL) and the Islamic Law of War. Both systems provide a comprehensive framework for the protection of POWs though there are still some significant differences between them, particularly those related to triggering the application of the laws of war and the concept of armed conflict. Based on the fact that any understanding of Shari‘a or Islamic law is always the product of *ijtihād* (personal reasoning), El Zeidy and Murphy call upon Muslim jurists to adapt classical solutions and interpretations to avoid any critical divergence between both systems.

*Ijtihād* continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community in its aspirations to attain justice, salvation and truth. In his contribution, Ilias Bantekas takes a closer look at the beneficial role of *ijtihād* which he views as a forum for discussion on bridging classic Islamic criminal law with contemporary Muslim needs. Bantekas views the divergence of opinions regarding the classification and the penalty imposed for apostasy by some Islamic States as evidence of the disunity among Muslim criminal justice systems.

Silvia Tellenbach and Ahmed Tawfiq examine the exercise of Islamic criminal law in the Islamic Republic of Iran and the Islamic Republic of Afghanistan respectively. Tellenbach’s contribution observes to what extent Islamic law as understood in Iran accepts regulations which are internationally generally applied and identifies the points on which Islamic law and Western law do not reach a common understanding. Her study reveals that there are only a limited number of cases in which Islamic law has difficulties in accepting legal solutions which are internationally favoured today.

As noted by an eminent legal scholar, Professor Cherif Bassiouni, Shari‘a’s crimes, punishment, evidentiary rules, and criminal procedures is an area ‘which has been politicised in many Muslim countries to the point where rational discourse is no longer possible.’ The contribution by Ahmed Tawfiq draws the complexity in identifying the concept of crime in the Afghan criminal justice system and the paradox between secular, tradition and Islamic law. His input shows how

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5) In the words of an eminent scholar: ‘*Ijtihād* is the most important source of Islamic law next to the Qur‘ān and the Sunnah. The main difference between *ijtihād* and the revealed source of the Shari‘ah lies in the fact that *ijtihād* is a continuous process of development whereas divine revelation and prophetic legislation discontinued after the demise of the Prophet.’ See Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, (Cambridge: The Islamic Text Society, 2003) 468-500.

4) Ibid.