

Time for an Islamic legal scholar at the ICC?

On the International Criminal Court's lack of Islamic law representation

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2020-07-06T14:00:31

2020 will be a busy year for the International Criminal Court's (ICC) Assembly of State Parties (ASP) as three elections are coming up in December: The elections of six judges, one prosecutor and six members of the Committee on Budget and Finance. The ASP should take this opportunity to bring an Islamic legal scholar, a *Faqih*, to the Court.

The Court is an *international* court. It should therefore represent the whole world, not only all geographical regions but also all legal traditions. Accordingly, Article 36 of the Rome Statute states that the States Parties should consider "the representation of the principal legal systems of the world" in electing judges. Although the common law/civil law divide at the ICC has been [extensively discussed](#), one legal tradition always seems to be forgotten: the Islamic legal tradition. [According to Sara McLaughlin Mitchell and Emilia Powell](#), a legal system can be considered a "major legal system" if it is geographically widespread and its influence has been long lasting. McLaughlin Mitchell and Powell hold that the Islamic legal tradition meets those two conditions making it the third major legal system. 25 States in the world use Islamic law, either as their main legal system or in addition to another one.

However, the Islamic legal tradition has never really been included at the ICC. Until now, judges and prosecutors came from common law and civil law countries, but the ASP never elected an Islamic legal scholar. Certainly, Fatou Bensouda, the current Prosecutor from the Gambia, and Chile Eboe-Osuji, the current President from Nigeria, are from countries which use Islamic law to some extents. However, a close look at their CVs reveals that neither [Judge Eboe-Osuji](#) nor [Prosecutor Bensouda](#) have an Islamic law background; they studied law in regions (the Cross River, Lagos and Osun States) and countries (Canada, Malta and the Netherlands) which do not use Islamic law. This lack of Islamic law representation at the Court questions whether the ASP indeed considered the representation of *all* legal traditions when electing judges.

Article 21 of Rome the Statute also indirectly refers to the Islamic legal tradition stating that "national laws of legal systems of the world" should be examined in developing general principles of law. And who better to study the laws of a world's legal system than a scholar from that system? This is particularly true for Islamic law as understanding it and being able to discern principles of law in this legal tradition can be hard: Scholars need to have a good level of Arabic to understand the Courts' decisions as well as the sources of Islamic law. These include the *Qur'an*, the

Sunna (the Prophet Mohammed's statements and behavior), the *Fiqh* (consensus of opinions and analogical deduction) and the three categories of crimes (*hudud*, *qesas* and *ta'azir*). As an intern at the ICC's Chambers, I tried including the Islamic legal tradition when asked to determine whether a certain concept was a general principle of law. I asked another intern whose mother tongue was Arabic but who did not study law in Arabic for help to find case law from States using Islamic law. He did not, however, manage to find anything conclusive. Only a skilled and experienced Islamic legal scholar who speaks Arabic and knows the Islamic legal system could find such case law.

It is tricky to elect an Islamic legal scholar to the Court since ICC judges have to be State Party nationals. Out of the 25 States that use Islamic law, only seven (Afghanistan, Comoros, Gambia, Jordan, Maldives, Nigeria, and Tunisia) have ratified the Rome Statute. However, according to strict ratio – judge per number of States from a given legal tradition – it would be sound to have one Islamic law judge: 5.7% of the ICC States Parties are Islamic law states, while one judge represents 5.5% of the bench of judges. This year's judge nominees have already been announced. Out of 22, three nominees could potentially be Islamic legal scholars: [Raymond Sock](#) from the Gambia, [Haykel Ben Mahfoudh](#) from Tunisia and [Ishaq Usman Bello](#) from Nigeria. It is, however, hard to know precisely whether they are experts in Islamic law as their CVs are not entirely clear on this aspect.

In addition to the representation of the principal legal systems, Article 36 of the Rome Statute states that the ASP "shall, in the selection of judges, take into account: [...] equitable geographical representation, a fair representation of female and male judges" and should make sure that at least nine judges have established competence in criminal law (list A) and at least five have established competence in relevant areas of international law (list B). As a custom, the ASP examines what the composition of the bench will be after the judges whose terms have ended leave the Court and then count the minimum votes necessary for list A, list B and for regional and gender requirements. The [ballots](#) used for the election also use this classification. Therefore, the Assembly takes into account all of the conditions set out in article 36 but one: The "need for the representation of the principal legal systems of the world". For Islamic judges to be elected, this condition should perhaps be added when classifying candidates and counting the necessary votes. By doing so, States Parties would be compelled to acknowledge the importance of the "representation of the principal legal systems of the world" including the Islamic legal tradition. They would therefore be more inclined to consider the election of an Islamic judge. Adding such a category would also clarify whether particular candidates, such as this year's three potential Islamic legal scholars, are indeed familiar with Islamic law.

The underrepresentation of the Islamic legal tradition at the ICC could affect its legitimacy to establish a universal system. Regarding the consideration of Islamic law at the International Court of Justice (ICJ), Clark Lombardi notes that judges would refer to Islamic law to "[legitimise its decision in the eyes of the Muslim world](#)". Lombardi argues that the ICJ only referred to Islamic law in the *United States Diplomatic and Consular Staff in Tehran* case because Iran had been questioning

the legitimacy of the Court. A similar approach should be followed at the ICC. The Court has been criticized extensively for being a [“mechanism of neo-colonialist policy used by the West”](#); it needs a legitimacy boost. For the Muslim world, the election of an Islamic legal scholar as judge could create such a boost. This is certainly true for all regions which seek representation in international organizations. However, it is especially true for Muslims regarding the ICC, as Muslims cannot be judged by non-Muslims according to Islamic law.

As the Court gets more and more involved in Islam related matters, prosecuting the alleged member of Ansar Eddine and *de facto* chief of Islamic police [Al Hassan Ag Abdoul Aziz](#), having just opened an investigation into the crimes committed against the [Rohingya Muslim group](#) as well as the crimes committed in [Afghanistan](#), and seeking a ruling on the Court’s territorial jurisdiction in respect to [Palestine](#), the arrival of an Islamic legal scholar could not be better-timed.

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Cite as: Juliette Tiedrez, “Time for an Islamic legal scholar at the ICC? – On the International Criminal Court’s lack of Islamic law representation”, *Völkerrechtsblog*, 6 July 2020.

