

# An Islamic legal scholar as judge at the ICC: In conformity with Islamic law?

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On 6 July 2020, Juliette Rémond Tiedrez wrote a fantastic article on Völkerrechtsblog titled [Time for an Islamic legal scholar at the ICC?](#) She suggested that there should be an Islamic law expert (*faqih*) sitting as judge of the International Criminal Court ('ICC') based on a few reasons. First and foremost, the Islamic legal tradition is widely used yet usually forgotten and not represented, thus raising questions towards the ICC's legitimacy as an 'international' court. She points out how the Court has been criticized as a "mechanism of neo-colonialist policy used by the west. Second, there are more Islam-related matters dealt with by the court. This is tied to the third point, where Tiedrez noted that "Muslims cannot be judged by non-Muslims according to Islamic law".

The question of legitimacy is indeed an important reason. Other than the sources cited by Rémond Tiedrez, former International Court of Justice ('ICJ') [Judge Awn Al-Khasawneh lamented](#) on how difficult it was to properly include Islamic law principles as a judge at the ICJ. However, Islamic law principles do slip in sometimes: not just in the *Hostages Case* as "legitimacy booster", but also as basis of reasoning in the [Pulp Mills Case Oral Proceedings \(CRT 2009/14\)](#). Recently, [the International Law Commission cited](#) the Cairo Declaration of Human Rights in Islam 1990 as among the world's international human-rights instruments. It must also be noted that Al-Khasawneh was optimistic that Islamic law can properly find a way to participate in international law.

While Rémond Tiedrez's proposition is very interesting, I have difficulty finding a basis for her statement that "Muslims cannot be judged by non-Muslims according to Islamic law". However, it is well established that Muslims may not judge with laws other than what is revealed by Allah and His Messenger. There is a bulk of Islamic scholarship from the first until today's generation establishing this, stemming from Quranic verses such as [Surah Al-Ma'idah, 4: 44-47, and 50](#) and various others. As extension of this, believing that other laws are better than what is revealed by Allah [is a nullifier of Islam](#). Moreover, to be considered as an apostate in Islamic law is not merely by explicit self-disassociation with Islam, but also if they have committed acts known as *nawaqidul Islam/Iman* (nullifiers of Islam/faith).

At face value, it would therefore seem 'un-Islamic' for an Islamic legal scholar to sit as an ICC judge and apply the Rome Statute instead of Islamic law principles. However, I find that there are two things that would 'Islamically' justify an Islamic legal scholar as an ICC judge.

First, from an Islamic standpoint the Islamic legal scholar would have to be truly competent. He must be an expert and well-versed in the proper Islamic legal tradition of the *turath* (classical Islamic scholarship by the *'ulama* throughout the ages) as

opposed to the practice of most Muslim-majority nations. [As Ahmad Al-Dawoody notes](#) (in context of the laws of war, but applying to most if not all cases): "...the considerable westernization of the legal systems, except family law, of most Muslim countries has largely alienated scholars of Islamic law from contributing to the policies and positions of their governments, most noticeably on two of the areas treated by their classical predecessors, that is, Islamic governance and Islamic international law."

The question of appointment is also important to consider as it relates to the correct Islamic authority. In Islamic law, *Qadis* (judges) are [appointed by the Muslim rulers](#) in their own jurisdiction. Article 36 of the Rome Statute seems to solve this even from an Islamic standpoint, as judges are appointed by the Assembly of State Parties that already [includes various Muslim-majority states](#). However, to ensure the competence of the appointed Islamic legal scholar, the involvement of the OIC and established council of Islamic scholars (such as the [International Islamic Fiqh Academy](#), the [Muslim World League](#), [Majelis Ulama Indonesia](#), and Saudi Arabia's [Permanent Committee for Scholarly Research and Ifta](#)) would be a good extra mile to take.

Second, there needs to be stronger consideration of the relation between *fiqh al-siyar* (Islamic international law) and contemporary international law. Classical Islamic scholars such as Al-Shaybani and Al-Fazari have considered pacts and reciprocity as sources of Islamic international law, finding basis from them in the Qur'an and Sunnah (thus does not fall under "laws other than what was revealed by Allah"). Contemporary scholars such as Muhammad Hamidullah [articulates this in a modern context](#) to more explicitly include international treaties and customary international law. However, this still only reflects how the Islamic state responds to the 'traditional positivistic international law'.

On the other hand, the ICC is based on the Rome Statute which, in turn, is based on the contemporary international lawmaking era which, [in Catherine Brölmann's words](#), leads to the "emergence of a public dimension to the international legal order." She further describes this legal order as having "(...) rules with a statutory function, above and beyond rules governing voluntary legal relations between equal subjects". Most especially, the Rome Statute is part of *jus cogens*, the highest norms in international law to which no derogation can be made.

Some scholars [such as Abdullahi An-Na'im](#) seem to incline (or explicitly state) that Islamic law must readily conform to the purported 'universality' of international law. However, his methodology of a purported 'Islamic reform' has been rightly criticized as [contradicting fundamental Islamic teachings](#). I myself [have criticized](#) An-Na'im's method in the context of international human rights. This is already a problem without mentioning the issue of "neo-colonialist policy", which raises questions towards the existence of true universality in international law. A very long debate would follow from this. My position based on established Islamic teachings is that subordinating Islamic law beneath other laws is beyond 'unislamic': it nullifies Islam. Considering that Article 21 of the Rome Statute clearly treats any domestic legal system as secondary, we find ourselves in a clash, not only of principles but also of worldviews.

However, there is a way around this. Such conflict may be resolved Islamically by redefining what the ICC means to Muslims and putting it into its proper place. A useful corridor to start with is to examine the Islamic requirements for a deed to be accepted by Allah. [As explained by Ibn Rajab Al-Hanbali](#), this requires that the deed (a) has the correct intentions i.e. to worship Allah alone, and (b) is in conformity with Allah's law.

Requirement (a), which is a very essential element to start from, is fulfilled if the scholar does not intend Islamic law to be secondary or even equal to the Rome Statute. Rather, these non-Islamic laws are perceived as treaties, which, to the extent that they do not contradict Islamic law, are Islamically binding. Therefore, Article 21 would be understood to treat the Rome Statute as superior to domestic law so long as this does not contradict true Islamic law, which is not seen as 'domestic' (state-made) law as it is [perceived as divine](#).

This path is of course flawed for obligations under the Rome Statute that are contradictory to Islamic law. This is where requirement (b) comes in. To what extent is the Rome Statute (and international criminal law in general) compatible with Islamic law? As far as they are compatible, there should be no problem. And this is where Islamic legal scholars must step up their research.

[Mohamed Elewa Badar has](#) argued how the provisions of the Rome Statute are largely consistent with Islamic law. While his contribution is much welcomed, it cannot cover each provision extensively as a 'mere' journal article. It is essential to conduct more comprehensive research. For example, do any of the crimes under the material jurisdiction of the ICC fall under the Islamic *hudood* (fixed penalty in the Qur'an and Sunnah)? If yes, the Islamic scholar must apply the *hudood* instead of the Rome Statute, which is correct Islamically but not from the Rome Statute's perspective. If not, the Islamic scholar can treat the crimes as *ta'zir* (discretionary punishments based on principles found in the Qur'an and Sunnah) and decide based on the Rome Statute as manifestation of that 'discretion', which seems acceptable in the international criminal law context.

[I have written elsewhere](#) how a very general comparative study between Islamic law and international humanitarian law seems to easily show compatibility, but a more detailed observation would show a lot of issues needing (proper and honest) reconciliation. This is not only relevant to the particular crimes committed in armed conflict. Further, we need more detailed research in order to identify potential clashes to resolve, highlight compatibilities and even possible synthetic structures.

Having all that said, I would consider the appointment of an Islamic legal scholar as an ICC judge to be a step forward. From an Islamic standpoint such an appointment runs the risk of fundamentally violating Islamic teachings. However, I see this issue as an opportunity for further development in the Islamic world, especially its scholarship, and how it should engage with the rest of the world.

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